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Subject: Reply to your request for clarification of EU Public Procurement law for the provision of social services.

Dear Mr. Zelderloo,

I would like to thank you for your letter requesting clarifications on some aspects of EU rules applicable to the procurement of social services. It is of the utmost importance that the EU Public procurement Directives, which have now been transposed in most Member States, are correctly applied, particularly in areas and sectors which have a concrete impact on the life of service recipients, particularly in social services. I hope that this letter will shed some light on the interpretation of the rules applicable to these services. Please find below a reply to the questions you have asked.

1. *“Firstly, are EU Member States obliged to use public procurement to fund the provision of social services?”*

In EU Law, public procurement qualifies as one of the possible avenues for public authorities to provide a service to the public administration or the citizens. The Directives do not oblige Member States to contract out any service, including social services¹. Public authorities are entirely free to choose whether to outsource the provision of services or whether to provide them themselves or by means other than public procurement. However, whenever a public authority decides to spend public money to acquire a service, therefore using a public contract or concession or any other legal arrangement qualifying as such, then it must comply with EU public procurement rules.

2. *“Secondly, do EU Member States have much room for manoeuvre when they decide to use public procurement to fund the provision of social services? How strict is the EU Public procurement directive in this regard? What options are available?”*

¹ See Recital (5) of Directive 2014/24/EU on public procurement.

Increased flexibility and expanded possibilities to take into account social considerations in public tenders were among the main objectives of the 2014 Public procurement reform. In particular when tendering social services, public authorities may enjoy additional flexibility, notably when these services are delivered by organizations with a special social relevance or structure.

Firstly, any type of service contract may be tendered as a “reserved contract”²: national authorities may restrict participation to a procurement procedure to sheltered workshops and economic operators whose main aim is the social integration of disabled or disadvantaged persons, provided that these persons make up at least 30% of the workforce of such organizations.

Secondly, certain social services (e.g. welfare services and daycare services, including when specifically targeting the disabled)³ benefit from the “light regime” set forth in Articles 74 to 77 of Directive 2014/24/EU. This “special” legal framework, which Member States are under the obligation to transpose and implement, applies to a specific list of public services contracts for a value of at least EUR 750.000 or above. Below this threshold, national authorities are entirely free to regulate and conduct tendering procedures for these same services. Above the threshold, EU rules require contracting authorities to comply with rules on transparency by making their intention to tender out one of these services known at EU level, prior to the start of the procedure, and to equally announce its conclusion and outcome through a contract award notice. At the same time, the Directive does not establish any particular procedural rule, but simply requires Member States to put in place national legislation to regulate these procurements. These national rules cannot restrict the freedom of contracting authorities to take into account the specificities of the services in question. So, while Member States are under the obligation to regulate these procedures, they are also free to decide how to organize them, as long as they don’t prevent contracting authorities from taking into account the specificities of the service at stake.

When legislating, Member States must also allow contracting authorities to take into account “the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness” of the service at stake, the “specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation”. The possibility to integrate these considerations cannot be restricted and must be left to the judgment of the contracting authorities, so that they may select and introduce them in tenders for these services where needed and appropriate. For instance, in a contract for the provision of educational services for the disabled, a public buyer may set criteria requiring or encouraging the provider to take into account the types of disabilities of the users to which the services is addressed, their specific skills and their learning needs when making use of the service, the level of accessibility of the services and hardware to be provided etc.

Member States may even decide to go one step further and provide that the choice of the contractor is made on the basis of the best price-quality ratio, taking into account quality and sustainability aspects and thereby excluding the possibility of a price-only evaluation of the offer.

² In line with Article 20 of Directive 2014/24/EU.

³ See Annex VII of Directive 2014/24/EU for a full list.

Finally, a limited number of services contracts benefitting from the “light regime” may be tendered as “reserved contracts”, although based on conditions which are more stringent than those applicable to “regular” service contracts. Contracting authorities may restrict access to the procurement procedure to organizations fulfilling five conditions, related to the pursuit of a public service mission linked to the delivery of the services in question and an organization based on participatory considerations and to a management structure based on employee ownership or participatory principles⁴. Contracts for daycare and welfare services for the disabled are among those “light regime” services which can be reserved.

3. *“Thirdly, do EU Member States have to focus on cost criteria alone in the public procurement of social services? If not, what other criteria can be included and to which extent? What is the European Commission’s position when it comes to the use of these additional criteria?”*

The 2014 Directives do not mandate a price-only evaluation of offers and, instead, offer great flexibility in the use of quality-related criteria. Contracting authorities have the complete freedom to choose whether to use quality criteria, depending on the kind of service they want to purchase, and national authorities may even restrict the use of price-only as the sole award criterion. Article 67 of Directive 2014/24/EU enumerates a long – but not exhaustive – list of possible considerations to be embedded in quality-related award criteria, including accessibility, design for all users and other social characteristics, which may relate e.g. to the needs of the users or the personalization of the service. Whatever the type of consideration chosen, the award criteria need to be strictly related to the service which is being purchased by the contracting authority. For instance, to award a contract for rehabilitation services for the disabled, a contracting authority may well assess the different level of personalization of the service offered by the different tenders: the higher the level of differentiated approach for the users, the higher the score assigned to the offer. However, you may not award points based, e.g. on the ability or commitment of the same provider to offer also professional training services to the same users, as that consideration is not related to the procurement of rehabilitation services.

Setting award criteria is a matter of balance. The public procurement Directives do not establish in abstract this balance for the contracting authorities, but simply enable them to choose their preferred balance, so as to give them the opportunity to adapt the procurement process to their needs and objectives.

In some cases, the use of the lowest price criterion alone may be efficient, for instance when the product or service to be purchased is extremely standardized, or when the buyer is capable of perfectly indicating in advance all the characteristics of the performance in the tender documents.

Generally speaking, however, when the tender involves a certain degree of complexity and variables that cannot be standardized, it becomes more difficult for the contracting authority to be that specific, and therefore to organize a competition only around price or costs. In these cases, efficiency may well entail instead building award criteria around the public buyer’s needs, to create incentives for tenderers to compete towards an efficient and satisfactory outcome of the contract for the administration and for the end users. Only quality-related criteria can produce this effect.

⁴ See Article 77(2) of Directive 2014/24/EU.

Since the adoption of the 2014 Directives, the Commission has been working to raise awareness on the possibilities offered by the EU legal framework to pursue quality and best value for money in public procurement. Through conferences, events and policy-making we will continue to advocate for increased and effective use of quality criteria, as well as for the introduction, whenever appropriate, of social considerations, including those related to accessibility and user needs.

I hope this letter provides an exhaustive reply to your questions and I remain available to provide any further clarification you may need.

Best regards,

Marzena Rogalska
Head of Unit