Safeguarding Human Rights through Public Procurement Law

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Capita Selecta meeting II
Societally Responsible Public Procurement

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1. Introduction

2. Social considerations in Public Procurement Law

3. Human Rights and Public Procurement Law
   - Examples
   - (Im)possibilities
1. INTRODUCTION

Public Procurement Law and Human Rights

Electronics Watch: fight against violation of Human Rights in the electronics supply chain
https://www.youtube.com/watch?v=bxrT4Tneks4

What is the role of public authorities in this fight against human rights violations?
Government duty to safeguard human rights?

- It is the duty of governments to safeguard Human Rights

- It is the duty of governments to safeguard Human Rights through Public Procurement
SOCIAL CONSIDERATIONS VS. HUMAN RIGHTS

1. Introduction - Public Procurement law and Human Rights

Social Considerations

Human Rights

Examples:
- Minimum payment
- Excellent working conditions
- Right to work for unemployed or disabled persons
- Freedom of speech
Social considerations in Public Procurement Law
2. SOCIAL CONSIDERATIONS AND THE INTERNAL MARKET AIM

- Open Market Economy with free competition >> Social Market Economy

- Public Procurement Law as a market instrument ‘to solve’ big (societal) issues: unemployment, unequal chances for disadvantaged/disabled persons, shrinking budgets, climate change, …

- New interests = new tensions

  - Level playing field for all interested undertakings:
    Principles of non-discrimination, equality, transparency, proportionality at stake
2. Social considerations in Public Procurement Law

i. Labour requirements and conditions (art. 18 para. 2)

- Member States **have to take** relevant measures to ensure compliance with obligations in the fields of social and labour law, e.g. from
  - international agreements (such as International Labour Organisation (ILO))
  - EU/ national social law, regulations, decrees, decisions
  - Collective agreements

ii. Reserving contracts for sheltered workshops and social businesses (art. 20)

- Integration in society of disabled and disadvantaged persons
- Equal opportunities for all

- Labels
- Accessibility criteria and design for users

iv. Suitability requirements and exclusion grounds (art. 57 and 58)

- Exclusion for conviction child labour and human trafficking
- Exclusion for non-payment social security contributions
- Optional exclusion for non-compliance social obligations (art. 18 (2))
2. Social considerations in Public Procurement Law

v. Contract award criteria (art. 67)
- Accessibility criteria and design for users
- Social (environmental, innovative) characteristics
- Protection of health of the staff involved in the production process
- Employment of long-term job-seekers
- Implementation of training measures for unemployed or young persons
  in the course of the contract awarded

vi. Contract performance conditions (art. 70)
- Equality of women and men at work
- Increased participation of women in the labour market
- Reconciliation of work and private life
- Compliance with fundamental International Organisation (ILO) Conventions
- Protection of health of the staff involved in the production process
- Employment of long-term job-seekers
- Implementation of training measures for unemployed or young persons
  in the course of the contract awarded
However…

EU-Internal Market objectives

Level Playing Field

- Non-discrimination principle
- Equality principle
- Transparency principle
- Proportionality principle
Human Rights and Public Procurement Law
3. HUMAN RIGHTS AND PUBLIC PROCUREMENT LAW

Social Considerations

Human Rights
HUMAN RIGHTS DIFFICULTIES

3. Human Rights and Public Procurement Law

- Human Rights definition
- Enforcement and evidence of violation
- Other political or economic restraints
3. Human Rights and Public Procurement Law

*The Guardian*: “Migrant workers suffer 'appalling treatment' in Qatar World Cup stadiums, says Amnesty”
3. Human Rights and Public Procurement Law

Human rights violation in conflict situations
EXAMPLES (3)

3. Human Rights and Public Procurement Law

Electronics industry

Ikea: violation fundamental right of freedom of association and exploitation of workers

Textile industry
“Slavery” at procured government projects  
Zembla broadcast May 2015:  
http://zembla.vara.nl/dossier/uitzending/in-de-bouwput
Discrimination on the (Dutch) labour market
3. Human Rights and public procurement law

- Technical specifications?
- Suitability criteria?
- Exclusion grounds?
- Contract award criteria?
- Contract performance conditions?
Exclusion of unreliable contracting party

Level Playing Field

Exclusion = less competition > internal market barrier
Exclusion grounds ex art. 57 Directive 2014/24/EU

**Para. 1-2 compulsory grounds**

**Conviction** (in final judgement) of:

- (a) participation in a criminal organisation
- (b) corruption
- (c) fraud with EU-subsidies
- (d) terrorist offences or offences linked to terrorist activities, or inciting, aiding, abetting or attempting to commit such an offence
- (e) money laundering or terrorist financing
- (f) child labour and other forms of trafficking in human beings

- Para 2: breach of obligations relating to the payment of taxes or social security contributions
EXCLUSION GROUNDS

3. Human Rights and Public Procurement Law

Exclusion grounds ex art. 57 Directive 2014/24/EU

Para. 4 compulsory / optional grounds

No conviction but, ‘by appropriate means / sufficiently plausible indications:

- (a) violation of applicable obligations referred to in Article 18(2) (social / labour law requirements)
- (b) bankruptcy or subject of insolvency
- (c) grave professional misconduct
- (d) agreements with other economic operators aimed at distorting competition
- (e) conflicts of interest
- (f) distortion of competition by prior involvement in the preparation of public procurement procedure
- (g) significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract (...) which led to early termination of that prior contract, damages or other comparable sanctions
- (h) misrepresentation in supplying the information required for the verification of grounds for exclusion or selection criteria / withheld such information/ not able to submit(...)
- (i) unduly influence on decision-making process of the contracting authority / attempt to obtain confidential information that may confer upon it undue advantages in the procurement procedure/ misleading information that may have a material influence on decisions concerning exclusion, selection or award.
OPTIONAL EXCLUSION GROUNDS

3. Human Rights and Public Procurement Law

(a) violation of applicable obligations referred to in Article 18(2)
   ➢ Social and labour law from international, EU, national law, collective agreements
   ➢ By appropriate means:
     - Decision of College voor de Rechten van de Mens?
     - Inspection report?

(c) grave professional misconduct
   ➢ Open concept
   ➢ CJEU 13 December 2012, C-465/11: Forposta
   ➢ CJEU 4 December 2016, C-171/15: Connexxion Taxi Services
It is the duty of governments to safeguard Human Rights through Public Procurement?

Many possibilities to incorporate social considerations
However, always within the fundamental objectives and principles of EU and Public Procurement Law

Public Procurement Law is not focused on safeguarding Human Rights
There are a lot of difficulties
But there are also continuous developments to create possibilities to procure responsible
QUESTIONS?

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