

Is Article 5 of the proposed Energy Efficiency Directive contrary to the existing or future EU Public Procurement legislation?



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Is Article 5 EED contrary to the Public Procurement Directives?

No. Under the current EU public procurement legislation¹ ('PP Directives') a contracting authority already has the opportunity to include energy efficiency requirements as technical specifications, or to reward energy efficiency through award criteria. They can also choose to impose energy efficiency requirements in the performance clauses of a services contract. Therefore, the requirement to purchase the most energy efficient product, service or building is **not contrary to the PP Directives**.

The PP Directives apply only to contracts above a certain threshold value, as they impose procedural requirements that are deemed too burdensome for small value contracts. This limited scope of the PP Directives does not prohibit the EU from legislating in respect of a wider range of procurement contracts in a different piece of legislation. The Energy Efficiency Directive ('EED') should **not be conditioned by the PP directives**. This would unnecessarily reduce the scope of this provision and its overall objective.

Does the current review of the PP Directives change anything?

A stated aim of the Commission's revision of the PP Directives is to "allow procurers to make better use of public procurement in support of common societal goals such as [...] higher resource and energy efficiency [...]".² Thus the review process will **not remove** the option for public authorities to take into account energy efficiency requirements.

Based on the Commission's legislative proposal, published on 20 December 2011, no radical overhaul of the steps in the procurement procedure is likely.

Why do we need Article 5 EED then?

Under the current procurement rules, contracting authorities are not required to take energy efficiency requirements into account at any stage. Moreover, public authorities can award the contract either on the basis of the lowest price or of the 'most economically advantageous offer'. Where the former is chosen, energy efficiency will not even be considered. But even if the latter is chosen, contracting authorities do not have to include energy efficiency among the criteria to assess which offer is the most economically advantageous.

The PP Directives set out a framework for "how to buy", not "what to buy". It is for **specific legislation**, such as the EED, to impose such an obligation. In such focussed legislation,

¹ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L134, 30.4.2004, p.1) (as amended) and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L134, 30.4.2004, p.114) (as amended).

² Proposal for a Directive of the European Parliament and of the Council on public procurement, 2011/0438 (20 December 2011).

mandatory requirements for procurement can be tailored to the relevant policies and market-specific situation. Such mandatory obligations would prevail over the PP Directives, which only set out a general framework. Indeed, there is already a precedent of setting mandatory procurement requirements in sector-specific legislation. For example, in Directive 2009/33/EC of the European Parliament and the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles.

Why is *life-cycle analysis* the right approach?

The issue of cost is an important consideration, but there is a difference between **upfront cost and real cost**.

The overall cost to a contracting authority of a product, service or building is much greater than just the price at the moment of the purchase. For products, for example, the costs comprise expenses related to the energy bill, maintenance and repair over the life span of the product, and disposal. More energy efficient products will score well due to a lower energy bill.

Limiting the obligation to purchase the most energy efficient option to situations where it is “cost-effective” would mean that contracting authorities might only take into account the price of a product, service or building at the time of purchase. It is therefore better and clearer to use a **reference to the life-cycle cost** of the product, service or building so that the other costs incurred by the product, service or building in addition to the price are taken into account in deciding whether to proceed with a purchase of an energy efficient option.

Why bother specifying that energy efficiency requirements be *technical specifications*?

Under EU public procurement rules there are three ways to take energy efficiency into account but only one will bring the necessary results.

Ability to meet the **technical specifications** is a prerequisite for being considered a candidate for the contract. This is the most effective way to obtain high energy efficiency performance because only products or services meeting that specification can be considered.

At the **award stage**, and only if a contracting authority decides to award the contract on the basis of the 'most economically advantageous offer', the authority can compare offers by scoring each against its chosen criteria. Energy efficiency performance could be one among a set of criteria, however, ability to satisfy all the award criteria is not a prerequisite to winning the contract so if the highest overall score went to a product that did not have good energy performance, that product would still be chosen.

The use of **performance clauses** is not an effective way to incorporate energy efficiency requirements, particularly in relation to products which are not made-to-order and therefore the technical capacities of the product are already set before the contract starts to be performed. Due to lack of resources, verification of compliance with such clauses is often not carried out, and it is generally difficult to terminate the contract where non-compliance is discovered.

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