



FAIRTRADE PROCUREMENT:
A GUIDE FOR PROCUREMENT PROFESSIONALS



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1. INTRODUCTION

Public procurement in Ireland amounts to approximately €15 billion annually. According to IBEC¹, however, most businesses (56%) are dissatisfied with the public procurement process and one of the main reasons for this is the emphasis on price instead of value-for-money.

A common perception in the purchasing sector is that the procurement system in Ireland needs to be overhauled. Department of Finance research in 2009 affirmed the need for sustainable public procurement in Ireland. At present, however, green and sustainable criteria are secondary to value for money and cost-effectiveness in most analyses and discussions around public procurement.

This guide aims to introduce procurement professionals in public bodies and educational institutions to fair and sustainable trade. It has a particular focus on Fairtrade certified cotton, but it also examines Fairtrade public procurement more widely.

The guide highlights recent developments in the case law of the Court of Justice of the European Union relating to the integration of social considerations in public procurement. It flags the new EU public procurement directive, due to enter into force in March 2014, which will confirm this trend and make it easier for contracting authorities across Europe to buy fair.

The guide has been developed by Fairtrade Ireland in partnership with the Fairtrade Foundation and People and Planet in the UK, Plate-Forme Française pour le Commerce Equitable (PFCE) in France and the Fair Trade Advocacy Office in Brussels.

Finally, the guide provides recommendations to procurement professionals for including Fair Trade in calls to tender.

¹<http://agenda.ibec.ie/cl0griwxya8>

2. FAIR TRADE PUBLIC PROCUREMENT

2.1 What is Fair Trade?

Fair Trade is a trading partnership, based on dialogue, transparency and respect that seeks greater equity in international trade. It contributes to sustainable development by offering better trading conditions to, and securing the rights of, marginalized producers and workers – especially in the South. Fair Trade Organizations, backed by consumers, are engaged actively in supporting producers, awareness raising and in campaigning for changes in the rules and practice of conventional international trade².

There are two internationally recognised Fair Trade standard-setters, Fairtrade International and the World Fair Trade Organization (WFTO) that certify Fair Trade products. Both are cosignatories of the Charter of Fair Trade principles and have put in place systems (the former for the certification of products, the latter for the certification of organisations) that are complementary to each other. The term 'fair trade' is a broader term often used to describe one or many of the above, but can also occasionally be used to refer to trade justice issues. In such cases, it can be as broad as to describe general fairness in trade, such as tariffs, subsidies, worker rights and other issues. The term Fairtrade is used to describe the certification and labelling system governed by Fairtrade International and designed to allow consumers to identify goods produced under agreed economic, environmental and social standards.

²Definition of Fair Trade in the Charter of Fair Trade principles
<http://www.fairtrade.net/faqs.html?&L=0>



The Fairtrade system provides tangible benefits to small-scale farmers and workers, consumers and the environment.

1. Small-scale Farmers and Workers: The Fairtrade system benefits approximately 1.2 million workers and farmers in 58 developing countries in Africa, Asia and Latin America³. Including their dependents, five million people are affected. Fairtrade Certification allows them to achieve economic independence and empowerment while improving their standards of living.

2. Consumers: The Fairtrade system benefits consumers by:

- Giving them the option of purchasing according to their principles and values
- Empowering them to be a player in the solution to global trade inequities
- Providing them with high quality products
- Assuring them of the ethical source of their purchases

3. Environment: Fairtrade rewards and encourages farming and production practices that are environmentally sustainable, such as: integrated farm management systems which minimize pollutants, pesticides and herbicides; organic agriculture techniques; banning the use of most dangerous pesticides and of Genetically Modified Organisms (GMOs).

The Fairtrade minimum price is the minimum price that a buyer of Fairtrade products has to pay to a Producer Organisation for their product. It is not a fixed price, but should be seen as the lowest possible starting point for price negotiations between producer and purchaser. It is set at a level which ensures that Producer Organisations receive a price which covers the cost of sustainable production for their product. This means it also acts as a safety net for farmers at times when world markets fall below a sustainable level. However, when the market price is higher than the Fairtrade minimum, the buyer must pay the market price. Producers and traders can also negotiate a higher price, for example on the basis of quality, and for some products, Fairtrade International (FLO) also sets different prices for organic crops, or for particular grades of produce.

The Fairtrade premium is a sum of money paid on top of the agreed Fairtrade price for investment in social, environmental or economic development projects, decided upon democratically by producers within the farmers' organisation or by workers on a plantation. The premium is fixed by the FLO Standards Unit in the same way as the minimum price and remains the same, even if the producer is paid more than the minimum price for the product. The premium fund is typically invested in education and healthcare, farm improvements to increase yield and quality, or processing facilities to increase income.

³<http://www.fairtrade.net/faqs.html?&L=0>

FAIR TRADE PUBLIC PROCUREMENT

2.2 Fairtrade Ireland

Fairtrade Ireland is a small Third World charity based in Dublin. It awards a consumer label, the FAIRTRADE Mark, to products which meet internationally recognised standards of Fairtrade. It is supported by ActionAid Ireland, Christian Aid, Comhlámh, Concern, Friends of the Earth, Irish Aid, Irish Congress of Trade Unions, Oxfam Ireland and Trócaire. Fairtrade Ireland is active throughout Ireland via its supporter network of dedicated volunteers, involved in the promotion of Fairtrade, the Fairtrade Towns project, and FAIRTRADE Mark products. It is the Irish member of Fairtrade International (FLO).

A wide range of Fairtrade products are available in Ireland. These include the big six Fairtrade commodities globally – coffee (roast ground, espresso bean and instant), tea, cocoa, sugar, bananas and flowers. In addition, cotton (clothing, cotton wool and other), chocolate, wine, confectionary, ice cream, juice, olive oil, spices and honey are all available. Sales of Fairtrade products in Ireland rose 9% in 2012 over the previous year⁴.



⁴<http://www.fairtrade.ie/assets/files/Press%20Releases/Fairtrade%20Fortnight%20-%20Business.pdf>

2.3 Fair Trade Public Procurement

Getting buyers in the procurement sector to take Fair Trade into account when writing tenders, making purchasing decisions or awarding contracts, would have a significant positive impact on the producers in developing countries.

The procurement of Fair Trade products can be a significant lever for public authorities to accelerate the shift towards more sustainable consumption and production patterns, and more generally to contribute to the achievement of sustainable development goals. Fair Trade procurement is an effective way of contributing to contracting authorities' efforts in reaching the UN Millennium Development Goals and has been acknowledged as a key factor that contributes to policy coherence for development objectives. In addition, Fair Trade standards prohibit recourse to child labour and require compliance with the ILO core conventions.

Public authorities can influence the market demand through their purchasing decisions, by choosing products with sustainability characteristics. Such procurement practices encourage bidders to adapt their offer and source products which are produced ethically and follow environmental standards that ensure sustainability. Furthermore, public authorities can lead the way to sustainability by setting the example for citizens and other entities, whether public or private.

In Ireland, under the Programme for Government 2007-2011, there was a commitment to ensure that the sourcing of Fairtrade goods 'where possible' is part of all Government departments' purchasing policies. Although a specific commitment was not included in

the new Government's programme, in 2012, the Department of the Environment, Community and Local Government and the Department of Public Expenditure and Reform jointly published 'Green Tenders: An Action Plan on Green Public Procurement'⁵. This national action plan aims to help public authorities to implement green public procurement (GPP) by highlighting existing best-practice and outlining further actions to increase green public procurement.

"Ultimately, GPP is a policy tool for sustainable development and environmental issues are only one aspect of this. For this reason, several of the actions set out in this plan take account of emerging international trends whereby the sustainability of procurement policy is gauged in terms of social and economic as well as environmental impacts." (Green Tenders, page 4)

The National Action Plan notes that "the sourcing of Fairtrade goods, where possible, should be part of all Government departments' purchasing policy. Those public bodies that want to source Fairtrade and other similar products should ensure that the purchase of such products is in line with European Union legislation and guidelines." (Green Tenders, page 41).

With regard to uniforms and other textiles, the National Action Plan states that "Public bodies involved in the procurement of textiles, garments and uniforms need to be particularly mindful of the social dimension of sustainable procurement." (Green Tenders, page 52).

⁵<http://etenders.gov.ie/Media/Default/SiteContent/LegislationGuides/27.%20Green%20Tenders%20-%20An%20Action%20Plan%20on%20Green%20Public%20Procurement.pdf>

FAIR TRADE PUBLIC PROCUREMENT

2.4 Case Study - Irish Rail: Catering

Subject matter: National Rail Service

Fairtrade products involved: Tea, Coffee, Drinking Chocolate, Sugar

Period covered: 2012-2015

Contact details: Contracts Manager, Irish Rail; Marketing Manager, Bewley's

Main Activity of Contracting Entity: Rail services

Description: On Board Catering Services

Contract covered by the Government Procurement Agreement

Tender process evaluated using the Most Economically Advantageous Tender criteria

Award Criteria: Not provided - available at tender issue stage

Contract divided into lots

Type of Procedure: Negotiated

Background

Iarnród Éireann is a subsidiary company of Coras Iompair Éireann (C.I.E). It manages its procurement in line with C.I.E. Group Procurement, Policies and Procedures. These are based on the European Union Utilities Directive with all requirements being advertised in line with this Directive. Typically, the negotiated procedure, consisting of multiple phases including pre-qualification and contract award, is used. Contracts are typically awarded using the Most Economically Advantageous Tender (MEAT) evaluation process. Criteria for evaluating tender submissions are established based on the particulars of the requirement with total cost generally receiving the highest weighting and quality, methodology and account management type criteria accounting for the balance.

Iarnród Éireann provides an on-board catering offer on all its long distance, branded Intercity, services. This can take the form of an in-seat, buffet or trolley service. In total approximately 1.5 million hot drinks, divided almost equally between tea and coffee, are sold each year. The catering services are delivered by external providers – Rail Gourmet, operating under contract, to Iarnród Éireann.

Results

When last approaching the procurement of these services, Iarnród Éireann specified that respondents should include plans to incorporate Fairtrade items or equivalent as part of their overall catering offer. The list of proposed items included, as a minimum, tea⁶, coffee⁷ and sugar. This approach was taken in response to customer requests to be able to choose Fairtrade items when travelling on rail and as part of a broader based social and community policy. It also positively aligned with the image of rail as a sustainable mode of transport.

Responses included proposals for the offer of the referenced items and others confectionary products. All proposals on this category were assessed as part of the award criteria, being evaluated against broader criteria

considering the overall service offering.

The new contract arrangements were implemented in the summer of 2012 with some of the Fairtrade items available from then. Others, most notably coffee, were introduced after a period of option testing, in the spring of 2013. Initial customer response to the increased offer of Fairtrade products has been positive and further opportunities to expand the range are being examined.

Rail Gourmet was awarded the tender from 2012-2015.

The Fairtrade food and beverages were supplied by Bewley's Coffee and Tea Company, which has a long track record in providing Fairtrade products. According to Carol Geary, Marketing Manager in Bewley's, "Fairtrade is good for business because it guarantees a certain level of quality and it is that consistent quality of taste that keeps consumers returning to our brand. I think in more recent years there is an increasing demand from the market place for Fairtrade certified coffee and tea, particularly in universities or institutions that are responsible for instilling a set of values in younger people or companies that are building a CSR (Corporate Social Responsibility) reputation. We continue to sell Fairtrade coffee and tea because our customers want it and, are prepared to pay the higher price for it."

She notes that "the majority of tenders from Horeca (Hotels, Restaurants, Cafés) do not call for Fairtrade specific supply arrangements. This may be due to the current economic climate and the fact that many of these types of locations are watching their bottom line and are opting for more cost effective coffee solutions. Ethical coffee supply is just taken as a given from almost every customer so there is never any specific details asked.

"The Convenience and Forecourt channel as well as the Contract Catering channel (universities, hospitals, business and industry locations) are more inclined to request details on Fairtrade supply or specific information on environmental impacts of our business. We are here to cater to our customers needs'. If a tender does not call for Fairtrade supply then we would illustrate our standard offer but, in some cases, depending on the type of customer, we might also illustrate what the commercials on a Fairtrade coffee supply might look like. Sometimes, there is a genuine opportunity for the customer to differentiate themselves from their competition on the high street by choosing to serve Fairtrade so, if we see that opportunity for the customer, then we would include it in our proposal (even if Fairtrade was not specified in the tender)".

⁶Fairtrade tea is only served in first-class carriages

⁷Mainly instant coffee, though roast ground coffee is provided in first-class carriages

3. COTTON

3.1 Cotton Production: Background and Issues

Cotton is grown in more than 100 countries on about 2.5% of global arable land. Processing of cotton has shifted from developed to developing countries over the last decade. The largest producers are China, India, the USA and Pakistan. The largest consumers (importing cotton for processing) are China, India, Pakistan and Turkey. The US has been the world's largest cotton exporter since 1834, followed by India who has become the second largest exporter in the past five years⁸. The expanding textile industry in Asia has led to it becoming the leading importing region.

The global cotton market works against the interests of some of the world's poorest farmers in West Africa and India. There are many reasons for this, not least of which are the subsidies that rich countries pay their farmers that skew the trading system in their favour. It is also an industry with a known history of child labour and forced labour, and environmentally degrading farming practices. Fairtrade Certified Cotton addresses these issues comprehensively.⁹

Conventional cotton production relies heavily on the use of agro-chemicals with serious implications for human and ecosystem health, and water and soil use is also a key challenge to sustainable production. Cotton growing uses 25% of all insecticides and 11% of the pesticides sold in the world. In addition, the use of genetically modified varieties may increase yields but poses risks for human health and biodiversity. In terms of water used in its production, African cotton is grown exclusively using rain-fed cultivation methods and this gives it a clear ecological advantage over conventional cotton.¹⁰

In the last few years the cotton market has been experiencing a significant price decline¹¹ for producers, mainly due to a diminished demand for cotton clothing and to the transition to synthetic materials.¹² Lower market prices for cotton lead to an increase in subsidies paid to producers¹³ (it is estimated that 10 out of the 11 largest cotton producing countries provide governmental protection measures to cotton producers). It is likely that cotton consumption will remain below production levels in 2012/13 and stocks will continue to increase.¹⁴

Cotton value chains are very complex. The different stages of the value chain can occur in different

countries, although in some cases there is a high degree of vertical integration in which a single company or parts of a corporate group perform several chain functions, especially in the stages between spinning and manufacturing.¹⁵

There is a wide range of Fair Trade products available in the market, but the uptake of edible products like coffee, tea and bananas by contracting authorities has been more frequent than cotton. There is nevertheless an untapped potential market for cotton products. Public authorities can ask for fairly traded cotton in their work and staff wear, as well as promotional items like t-shirts or bags. In fact, in Europe, the public sector represents nearly half of the work wear market, valued at €4 billion in 2008.

Already, some contracting authorities are asking for Fair Trade cotton in their public tenders. In France, there is a very good practice in this area, with many examples of public contracts integrating this commodity.

In a recent resolution, the European Parliament encourages the procurement of Fair Trade cotton at EU level by "call(ing) on the Commission to evaluate how public procurement legislation in the EU can bolster the take-up of Fair Trade cotton".

For more information about global cotton production and the role of Fairtrade, read Fairtrade Ireland's report 'Cotton on to Fairtrade' at www.fairtrade.ie/cotton.

⁸ http://www.ideascentre.ch/documents/Newsletter101-Lastbutnotleast-EN_000.pdf

⁹ http://www.fairtrade.ie/assets/files/cotton_content/Fairtrade%20Cotton%20Report.pdf

¹⁰ <http://www.cotton-made-in-africa.com/en/african-cotton/cotton-growing.html#c779>

¹¹ <http://agritrade.cta.int/en/Agriculture/Commodities/Cotton/Sharp-downturn-in-global-cotton-output-projected>

¹² <http://www.cottonfarming.com/home/issues/2012-08/Viewpoint.html>

¹³ International Cotton Advisory Committee, report October 2012

¹⁴ http://www.befair.be/sites/default/files/all-files/brochure/En%20version_0.pdf

¹⁵ Source: Valerie Nelson & Sally Smith "Fairtrade cotton: assessing impact in Mali, Senegal, Cameroon and India" http://www.fairtrade.net/fileadmin/user_upload/content/2009/resources/2011_Fairtrade_Cotton_Assessing_Impact_in_Mali_Senegal_Cameroon_and_India_summary.pdf



3.2 Case Study - City of Paris: Best Practice Example: Fair Trade Cotton Workwear¹⁶

Introduction

In the frame of its sustainable development policy the city of Paris had chosen to implement exemplary actions. This included ethical clothing (including Fair Trade cotton) for its almost 5,000 technical agents of the city back in 2008.

The city first checked that the technical performance of the clothing met the demands. It also meant that the supply chains were reliable and that the guarantees for Fair Trade cotton allowed for transparency checks and guaranteed that a fair price had been paid to the producers. Once these requirements were verified, the city awarded a public contract on Fair Trade cotton for a three-year duration. The contract has been renewed (in 2012) once and it has been extended to 9,000 agents. The contract for Fair Trade cotton is valued at more than one million euros.

The call for tenders successfully integrated some Fair Trade considerations that were required by the city of Paris. Concretely, the cotton production and the fair price were asked as evidence for the Fair Trade characteristics in the tendering documents. Besides these requirements, the tenderer had to fill in a form

indicating the partners all along the supply chain. The certification by an accredited independent body was one of the means of proof of compliance with Fair Trade principles. Furthermore, the city of Paris has developed internal guidance on responsible purchases that have been complemented with trainings on sustainable procurement for its staff. The communication on this ethical clothing has also allowed the staff to acknowledge and take ownership of the approach.

The city of Paris is part of the Fair Trade Towns campaign in France. The purchase of Fair Trade cotton is part of the sustainable development policy of this city.

- Contracting entity: City of Paris
- Subject-matter: Supply of clothes in Fair Trade cotton for the staff of the city of Paris in two separate lots
- Contract period: 1 year renewable three times
- Tendering model: open
- Value of tender:
 - For the first lot, the minimum threshold is €20million and the maximum is €80million
 - For the second lot, the minimum threshold is €90million and the maximum is €360million

¹⁶More case studies involving Fair Trade cotton in Public Procurement can be found in the European Observatory on Fair Trade Public Procurement <http://www.fairprocurement.info/best-practices/casestudies>



COTTON

Verification

The tendering documents include two annexes. Annex III defines the technical specifications that take into account the requirements in terms of social progress and environment and health protection:

1. not to use chemical treatments that may cause psychological problems, to the handling as well as the use - the products used by the dyeing of textile fabrics do not have to contravene the European Directives concerning the hygiene and the environmental protection;
2. limit the pollution to a maximum thanks to the non-polluting procedures, notably by progressively;
3. integrating the better techniques that are available for the environment, with the aim of reducing environmental impacts;
4. communicate about the whole production sector, with the aim of ensuring its traceability;
5. according to the ILO Declaration regarding the principles and fundamental rights to work, adopted in 1998;
6. implement all the possible means to respect the 8 core ILO Conventions;
7. accept to be controlled on the above mentioned points by an independent non-governmental organisation, mandated by the administration.

Annex IV for each of the lots; tenderers are required to provide proof of Fair Trade cotton production:

- identify the partners of the sector identified (cotton producers, cotton companies, textile and manufacturing companies) as well as the different certification reports, approval, and licence guaranteeing the Fair Trade standards and the fairness of the production (join the certificates of the certifying body)
- the company has a licence or approval of Fair Trade cotton (attach the certificates of the certifying body)
- show the percentage of the royalty paid by the company to the labelling system that will aim at improving the working conditions of producers (join the certificates of the certifying body)
- join the yearly audit certificate by an approved international body. This certificate will be communicated to the administration by its holder every year
- indicate the Fair Trade turnover laid down by the company
- the name of the organism that delivers the label to the products that meet the international Fair Trade standards
- indicate the list of projects that will be financed by the Fair Trade premium
- Declaration on social and environmental commitments
- The contracting authority can carry out the on-site checks of compliance of all social and environmental criteria mentioned, at every stage of the production process, by an independent entity or a non-governmental organization.

Award/evaluation criteria (if applicable)

1. Technical value: 40%
 - Quality of assembly of the pieces used
 - Compliance of technical documentation provided by the candidate with technical specifications required by the contracting authority
 - Respect of dimensions
 - Quality of finishing
2. Price (30%)
3. Delay of delivery (20%)
4. Environmental value (10%)

In order to assess the environmental value of the offer, the administration will examine all the justification given by the candidate such as: environmental norms, European Ecolabel or equivalent, carbon footprint, environmental certification, type of procedure used that is non-polluting.

Note: These are extracts from a call for tender issued by the city of Paris. The authors of this case study have chosen to publish only those bits that are interesting from a Fair Trade procurement perspective.



4. THE EVOLUTION OF EU RULES AND FAIR TRADE PUBLIC PROCUREMENT

This section provides an overview of the treatment given to Fair Trade in the procurement context. Starting with the legal principles that apply to the procurement process and looking at the current legislation in the European Union, this section shows the evolution from 2004 onwards, ending with the interpretation made by the Court of Justice of the European Union (CJEU) in 2012.

4.1 EU Public Procurement Directives and Guidance

The legal framework for public procurement in the European Union is provided by Directives 2004/17/EC, on the coordination of the procurement procedures of entities operating in the water, energy, transport and postal services sectors, and 2004/18/EC, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Both apply to contracts with a value above the thresholds as defined in Directive 2004/18/EC.

In the 2004/18 Directive the opportunities for introducing social and environmental considerations in public contracts are different. The acceptability of different types of criteria depends on the stage of the process you are considering:

- At selection stage, contracting authorities can take into account the environmental management measures of the bidder (recital 44 and art.50).
- Environmental considerations can be included either in the technical specifications (art.23), award criteria (art.53) or contract performance clauses (art.26).

Social criteria are permitted in the contract performance conditions (art.26) and, in a recital on award criteria, a very narrow subset is mentioned: in one of the recitals “[...] the needs — defined in the specifications of the contract — of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong¹⁷” - but this is not reproduced in the operative article..

While the Directive addresses, to a certain extent, how contracting authorities may contribute to the protection of the environment, it is much less clear that social considerations may be introduced. Further, the Directive is not explicit about sustainability considerations, where social and environmental concerns overlap.

The CJEU decisions in *Concordia Bus*¹⁸ and *Wienström*¹⁹ are reflected in the possibility for contracting authorities to refer to the environmental externalities of products. In the latter ruling, the Court had accepted that production processes (such as green electricity) could be taken into account by contracting authorities in the award phase of the process, even though they had no impact on the physical characteristics of the product. This principle was further examined in the *North Holland*²⁰ case in relation to social considerations – see below.

4.2 Buying Social

The Commission published a *Buying Social* guide in 2011, which focuses on what is called “Socially Responsible Public Procurement”. This is described by the Commission as “procurement operations that take into account [...] employment opportunities, decent work, compliance with social and labour rights [...] taking account of sustainability criteria, including ethical trade issues [...]”²¹.

With regards to Fair Trade, the advice given by the Commission in the *Buying Social* guide is to include it in the contract performance conditions:

“If a contracting authority wants to buy ethical trade coffee or fruits, it can, for example, insert in the contract performance conditions of the procurement contract a clause requesting the supplier to pay the producers a price permitting them to cover their costs of sustainable production, such as decent salaries and labour conditions for the workers concerned, environmentally friendly production methods and improvements of the production process and working conditions”²² . Drawing on case law, the *Buying Social* sets rules for drafting award criteria and on awarding contracts.

Social award criteria may be applied provided they:

- are linked to the subject-matter of the contract;
- do not confer unrestricted freedom of choice on the Contracting Authority;
- are expressly mentioned in the contract notice and tender documents; and
- comply with the fundamental principles of EU law.

¹⁷Recital 46 of the Directive 2004/18/EC

¹⁸Ibid

¹⁹Case C-448/01 EVN AG and Another v Austria, judgement 2003

²⁰Ibid

²¹EUROPEAN COMMISSION, *Buying Social: A Guide to Taking account of Social Considerations in Public Procurement*, 2011

²²Ibid

THE EVOLUTION OF EU RULES AND FAIR TRADE PUBLIC PROCUREMENT

4.3 The 2012 North-Holland Ruling by the CJEU: Implications for Fair Trade Public Procurement under the Current Directive

The Court of Justice of the European Union (CJEU) clarified the legality of introducing Fair Trade criteria in the procurement process. The CJEU is the ultimate interpreter of EU law and therefore the conclusions of this landmark ruling should be taken into account when introducing Fair Trade criteria in the procurement process.

The European Commission decided in May 2010 to refer the Netherlands to the European Court of Justice for infringing the 2004/18/EC Directive on the basis of a tender issued by the province of North Holland for the supply and management of automatic coffee machines²³. This province clearly stated its desire to source products of organic and Fair Trade origin.

The Court examined the details of the procurement as set out by the province of North Holland of:

- the Max Havelaar²⁴ and EKO labels “or equivalent” in the technical specifications concerning the coffee and tea to be supplied;
- the “sustainable purchasing and socially responsible business” measures adopted by operators to be considered at selection stage;
- the reference to the Max Havelaar and EKO labels “or equivalent” at the award stage concerning the ingredients to be supplied.

The Court made a clear differentiation in its treatment of the organic and the fair trade characteristics of a product. While the Court found that the underlying considerations addressed by an eco-label for organic agriculture were valid as a technical specification, it considered that the criteria underlying an “ethical” fair trade label could not be²⁵. However, the Court accepted that fair trade criteria could be either award criteria or contract performance conditions²⁶. Concerning the reference to labels, the Court considered that, by referring to a label without listing its underlying criteria, the North-Holland province did not comply with the provisions of the (public procurement) Directive.

²³Case c-386/10, Commission v Kingdom of the Netherlands, judgement of May 2010

²⁴Max Havelaar is the Dutch equivalent to the Fairtrade label

²⁵Client Earth’s briefing “Distinguishing technical specifications and award criteria on the basis of role, not content”; May 2012

²⁶Ibid

²⁷European Commission, Proposal for a Directive of the European Parliament and of the Council on public procurement, COM (2011) 896 1 <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0896:FIN:EN:PDF>

²⁸The briefing note is available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/225398/PPN_-_outcome_of_negotiations.pdf

4.4 Future Outlook on the Revision of the Public Procurement Directives

The 2004 Directives have been revised on the basis of a proposal from the European Commission (EC)²⁷ and has undergone the EU ordinary legislative procedure, involving the European Parliament (EP) and the Council of Ministers.

The EC proposal for a Directive on public procurement seeks to achieve two complementary objectives: first, increase the efficiency of public spending to ensure the best value for money and, second, allow procurers to make better use of public procurement in support of common societal goals.

A briefing note produced by the British Cabinet Office²⁸ contains a general overview of the main changes to the Directives:

- Improved rules on social and environmental aspects, making it clear that:
- social aspects can now also be taken into account in certain circumstances (in addition to environmental aspects which had previously been allowed);
- buyers can require certification/labels or other equivalent evidence of social/environmental characteristics, further facilitating procurement of contracts with social/environmental objectives;
- and refer to factors directly linked to the production process.
- Buyers will be encouraged to break contracts into lots to facilitate SME participation, but there is discretion not to do so where appropriate (the division into lots encourages the participation of SMEs and therefore facilitates the introduction of Fair Trade criteria, as the French example shows)
- The full life-cycle of costings can be taken into account when awarding contracts; this could encourage more sustainable and/or better value procurements which may save money over the long term but appear more costly on the initial purchase price
- Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by certain international environmental, social and labour law provisions (it is up to the Member States to decide how to ensure this)

The final formal stage of the EU process, when the EU adopts the package and publishes the new directives in the Official Journal of the European Union, is expected early 2014, subject to the European Parliament approving the package in plenary session.

5. PUBLIC PROCUREMENT ARCHITECTURE AND INSTRUMENTS

5.1 Public Procurement Architecture in Ireland

Public Procurement policies and actions have to comply with the relevant EU, World Trade Organisation and national legal requirements and obligations. In Ireland, they must also comply with relevant procurement guidance issued by the Department of Finance²⁹.

The National Procurement Service (NPS) came into effect in March 2009 as part of Office of Public Works. The Minister of State at the Department of Finance with responsibility for the Office of Public Works holds responsibility for this area of activity and chairs the board of the NPS. The NPS is responsible for operational procurement matters. Contract opportunities are advertised on the website www.etenders.gov.ie. Within the website, buyers and suppliers register voluntarily to upload and view tender notices.

A new Office of Government Procurement (OGP) has been established.³⁰ The OGP will procure or make arrangements for others to procure all goods and services bought by the public sector. Therefore, instead of public bodies each tendering separately for their goods and services, the OGP will put in place contracts and frameworks that all public bodies will buy from.³¹ The establishment of the OGP is intended to ensure that the public sector can get best value from tendering processes. The NPS will be transitioned into the new structure.

5.2 Statutory Instruments for Public Procurement

There are two main statutory instruments that deal with public procurement in Ireland. They are:

- a) SI 329/2006 - European Communities (Award of Public Authorities' Contracts) Regulations 2006
- b) SI 50/2007 - European Communities (Award of Contracts by Utility Undertakings) Regulations 2007

a) SI 329/2006 - European Communities (Award of Public Authorities' Contracts) Regulations 2006
Article 26 - Conditions for performance of contracts. A contracting authority may prescribe special conditions relating to the performance of a public contract that is to be awarded by the authority, provided the conditions:—

- (i) are compatible with European Community law, and
- (ii) are specified in the relevant contract notice or contract specifications.

In particular, those conditions may deal with social and environmental matters.

Article 66 – Criteria for Award of a Public Contract

(1) A contracting authority shall, in awarding a public

contract on the basis of the tender that is most economically advantageous to it, adopt criteria linked to the subject matter of the contract.

(3) For the purpose of paragraph (1), the criteria may include (but are not limited to)—

- quality,
- price,
- technical merit,
- aesthetic and functional characteristics,
- environmental characteristics,
- running costs,
- cost-effectiveness,
- after-sales service and technical assistance, and
- delivery date and delivery period or period of completion.

b) SI 50/2007 - European Communities (Award of Contracts by Utility Undertakings) Regulations 2007
Article 40 - Conditions for performance of contracts. A contracting entity may prescribe special conditions for the performance of a regulated contract that is to be awarded by the entity, so long as the conditions are compatible with European Community law and are specified in the relevant contract notice or contract specifications. Those conditions or specifications may deal with social and environmental matters as well as with other matters.

Article 57 – Criteria for awarding regulated contract

(1) A contracting entity shall, in awarding a regulated contract on the basis of the tender that is most economically advantageous to it, adopt criteria linked to the subject-matter of the contract.

(3) For the purpose of paragraph (1), the criteria may include (but are not limited to) quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance and delivery date and delivery period or period of completion.

²⁹<http://www.procurement.ie/publications/public-procurement-guidelines-competitive-process>

³⁰<http://per.gov.ie/2013/07/19/ministers-announce-the-launch-of-new-procurement-structures-for-the-state/>

³¹Update on the Establishment of the Office of Government Procurement, Paul Quinn (Chief Procurement Officer) 30/05/13

6. WHERE TO INCLUDE FAIR TRADE IN PUBLIC PROCUREMENT TENDERS

6.1 Subject Matter of the Contract

According to case law, the link to the subject matter is a fundamental condition that has to be satisfied by all award criteria. This point is emphasised by the Commission and is often presented as a barrier to the inclusion of social and environmental considerations into procurement processes.

The CJEU has interpreted this concept several times. Already in the *Wienström* judgement it had confirmed that award criteria³² could be considered to be linked to the subject matter when related to production processes rather than physical characteristics (such as “green electricity” in the case in question). It was not until the *North Holland* case that the Court had the chance to decide on whether the same reasoning applies to social aspects, and if the “link to the subject matter” test was applicable to them³³.

In that case the Court went further in its reasoning and confirmed the trend of the *Wienström* case-law regarding characteristics that do not alter the end-product by stating that “there is no requirement that an award criterion relates to an intrinsic characteristic of a product, that is to say something which forms part of the material substance thereof”³⁴.

The Court admitted that the award criteria relating to the ingredients of the product to be supplied under the contract were linked to the subject matter, but underlined the view that a requirement for a tenderer to have a general purchasing policy would not.

6.2 Inclusion and Verification of Technical Specifications

As mentioned earlier, the Court considered that the reference to the *Max Havelaar* label was not a valid technical specification because its content applies to “the conditions under which the supplier acquired them from the manufacturer”³⁵, and not to the characteristics of the product itself. On the contrary, the *EKO* label was considered a characteristic of the product concerned, i.e. organically produced coffee, and therefore fell within the concept of technical specification.

The implication of this ruling is that only environmental characteristics of Fair Trade products (such as the use of pesticides, no Genetically Modified Organisms, etc.) can be subject of technical specifications, whereas the social and economic characteristics that are inherent to the Fair Trade concept cannot.

The CJEU interpreted art.23.6 of the 2004/18/EC Directive -which so far accepted that products carrying an eco-label were deemed compliant with the specifications of the product and service required by the Contracting Authority - in a strict way: “Moreover, far from constituting an excessive regard for formalities, the obligation of the contracting authority to mention expressly the detailed environmental characteristics it

intends to impose even where it refers to the characteristics defined by an eco-label, is indispensable in order to allow potential tenderers to refer to a single official document, coming from the contracting authority itself and thus without being subject to the uncertainties of searching for information and the possible temporal variations in the criteria applicable to a particular eco-label”³⁶.

Henceforth, there is an obligation for the Contracting Authority to expressly mention the detailed environmental requirements it intends to impose even where it refers to the characteristics defined by an eco-label.

6.3 Selection criteria

The province of North Holland had required tenderers to show compliance with “criteria of sustainability of purchases and socially responsible business” and to state in what way the economic operator contributed to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production.

In the *North Holland* Ruling, the CJEU ruled that the specific requirements were not in line with the factors permitted to be considered under the provisions regarding the technical and/or professional ability of the economic operator (art.48) of the Directive and were also in contradiction with the obligation of transparency in art.2 of the Directive. This means that contracting authorities cannot ask for a bidder to have a Fair Trade sourcing policy, but can give preference only to the Fair Trade origin of a product in question in the award criteria.

³²Green paper on the modernisation of public procurement

³³Client Earth’s briefing “The link to the subject matter – a question of importance for sustainable public procurement”; January 2013

³⁴Para 91 of the judgement

³⁵Client Earth’s briefing “Distinguishing technical specifications and award criteria on the basis of role, not content”; May 2012

³⁶Para 67 of the judgement

WHERE TO INCLUDE FAIR TRADE IN PUBLIC PROCUREMENT TENDERS

6.4 The awarding phase of the contract

Under the Procurement Directives, the Contracting Authority has two options: it can either compare offers on the basis of price alone or choose to award the contract to the ‘most economically advantageous’, which means that other award criteria will be evaluated and taken into account in addition to the price. It must decide and publish in advance which of these it will use. Where a Contracting Authority chooses the latter predetermined award criteria, published in advance, to decide which tender is the best.

In the North Holland case ruling, the Court recognized undoubtedly that “award criteria may, in principle, be not only economic but also qualitative”³⁷ and that “contracting authorities are authorized to choose the award criteria base on considerations of a social nature”³⁸.

Giving further comfort to contracting authorities seeking to support fairly traded products, the Court even went on to state that an award criterion on Fair Trade³⁹ concerned⁴⁰ “characteristics falling within the scope of Article 53(1)(a) of Directive 2004/18”.

The award criteria chosen by the province of North Holland were validated by the Court insofar as they “related to products the supply of which constituted part of the subject-matter of that contract”⁴¹ and it concluded that “there is [...] nothing, in principle, to preclude such a criterion from referring to the fact that the product concerned was of Fair Trade origin”⁴².

The Court applied the same reasoning as with regards to the technical specifications i.e. contracting authorities are required to spell out the underlying criteria of a label at this stage and to accept proof of compliance with the criteria by all means.

6.5 Contract performance clauses

The Court in the North Holland case ruled that Fair Trade origin of products does not correspond to the definition of the concept of technical specification in the 2004/18 Directive⁴³, but to that of “conditions of performance of contracts”⁴⁴.

The Court considered that the requirement that tea and coffee to be supplied must come from small-scale producers in developing countries, subject to trading conditions favourable to them, falls within the contract performance conditions.⁴⁵

Consequently, if not included as award criteria, the trade relationship between the contracting authority’s supplier and the other suppliers further down in the supply chain can be taken into account at this stage.⁴⁶

6.6 Conclusions and Recommendations

As outlined in section 2.3, the Government’s national action plan on green procurement encourages the sourcing of Fairtrade and other similar goods as long as their purchase is consistent with EU legislation and guidelines.

As a result of the North Holland judgment, it is clear that Fair Trade characteristics are linked to the subject matter of the contract. As a consequence, a contracting authority can refer to considerations relating to the three pillars of sustainable development in several stages of the procurement process. This will allow contracting authorities to cover the economic, the social and the environmental pillars of Fair Trade.

As to where is the best place to insert reference to fair and sustainable trade in a tender document, the North Holland ruling implies that only the environmental characteristics of Fair Trade can be included under the technical specifications, and not its social or economic characteristics.

The North Holland Ruling clearly permits the inclusion of Fair Trade criteria in the awarding phase as well as in the contract performance clauses of the contract. Insofar as they relate to the supply of products that are part of the subject matter of the contract, the ruling found that there was nothing to preclude the award criteria from referring to the fact that the product concerned was of Fair Trade origin.

The new EU public procurement directive has been agreed by the European Parliament and is expected to enter into force in March 2014. EU Member States will then have two years to transpose it into national law. This will enable public authorities to make a deliberate choice for Fair Trade products, besides taking into account other sustainability considerations. The new law confirms the direction set by the Court of Justice of the European Union in the “North Holland” case ruling. The possibility to consider social aspects alongside environmental ones is a step forward from the existing rules. In addition to clarifying that public contracts can award additional points to products “of fair trade origin”, the new Directive explicitly allows reference to robust certification schemes as a proof of compliance with the sustainability requirements set out in call for tenders.

³⁷Para 85 of the judgement

³⁸ibid

³⁹Paras 73 and 89 of the judgement

⁴⁰Para 89 of the judgement

⁴¹Para 90 of the judgement

⁴²Para 91 of the judgement

⁴³Para 74 of the judgement

⁴⁴Para 75 of the judgement

⁴⁵Para 76 of the judgement

⁴⁶The Link to the subject-matter of the contract in green and social procurement” Marc Martens and Stanislas de Margerie, EPPL

RECOMMENDATIONS

1. Ensure that Fair Trade is linked to the subject matter of the contract e.g. “supply of ethical work wear/coffee/beverages”

2. Under award criteria, make preference for Fair Trade certified products explicit, for instance (suggested wording):

The successful tenderer will supply products that conform to the criteria outlined in the European Parliament resolution on fair trade and development (A6-0207/2006) and national legislation SI 329/2006.⁴⁷ The successful tenderer will provide proof of independent third party validation of the criteria. For example, products certified by Fairtrade International or the World Fair Trade Organisation are considered to conform to the criteria. The successful tenderer may also prove that they conform to the criteria by any other appropriate means.

Specifically, the products will conform to the following criteria:

- a) a fair producer price, guaranteeing a fair wage, covering the costs of sustainable production and living. This price needs to be at least as high as the Fair Trade minimum price and premium where they have been defined by the international Fair Trade associations
- b) part payments to be made in advance if so requested by the producer
- c) long-term, stable relations with producers and producers' involvement in Fair Trade standard-setting
- d) transparency and traceability throughout the supply chain to guarantee appropriate consumer information

- e) conditions of production respecting the eight International Labour Organization (ILO) Core Conventions
- f) respect for the environment, protection of human rights and in particular women's and children's rights and respect for traditional production methods which promote economic and social development
- g) capacity building and empowerment for producers, particularly small-scale and marginalised producers and workers in developing countries, their organisations as well as the respective communities, in order to ensure the sustainability of Fair Trade
- h) awareness-raising activities about Fair Trade production and trading relationships, the mission and aims of Fair Trade and about the prevailing injustice of international trade rules
- i) support for production and market access for the producer organisations
- j) monitoring and verification of compliance with these criteria, in which southern organisations must play a greater role, leading to reduced costs and increased local participation in the certification process
- k) regular impact assessments of the Fair Trade activities.

⁴⁷http://www.buyfair.org/fileadmin/template/projects/buyfair/files/E_EP_Resolution_on_Fair_Trade.pdf

3. The characteristics of Fair Trade listed above can also be included in the contract performance conditions. In this way, the trade relationship between the contracting authority's supplier and other suppliers further down in the supply chain can be taken into account.

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Fairtrade Ireland awards the Fairtrade certification mark to products which meet internationally recognised Fairtrade standards. Fairtrade Ireland is the Irish member of Fairtrade International and is supported by ActionAid Ireland, Christian Aid, Comhlámh, Concern, Friends of the Earth, Irish Aid, Irish Congress of Trade Unions, Oxfam Ireland and Trócaire.

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