



# **FLEGT**

## **III. Finance and Procurement**

*Forest Law Enforcement, Governance and Trade  
(FLEGT)  
EC Brussels Workshop 22-24 April 2002*

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**“Overview of the Community Public Procurement  
Directives and FLEGT”**

# FLEGT

## Forest law Enforcement, Governance and Trade

### overview of the Community Public Procurement Directives and FLEGT

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**One of the aims of the inter service group FLEGT is to examine what measures and policies could be developed by the various services of the Commission to combat illegal logging, forest crimes and the illegal trade in wood products (further 'illegal logging')**

For the better understanding of this note, one should keep in mind that illegal logging is not an equivalent to sustainable forestry. As illegal logging regards the legality of the logging and trade in wood and wood products, sustainable forestry regards the production methods and the forest management. Also the logging of the wood and the way this will be done is one of the principles of forest management. However, even in sustainably managed forests, the wood can be logged illegally.

In order to provide clarity as to the question if and how public procurement could contribute to combat illegal logging, the current note sets out the system created by the Community public procurement directives and it examines whether and where possibilities exist that might contribute to combat illegal logging.

This paper is based on the Commission's official interpretation of the public procurement directives as laid down in the Commission Interpretative Communication of 4 July 2001 on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement [COM(2001) 274 final].

### Introduction

Public procurement policy aims at contributing to the realisation of the Single Market by the creation of competition necessary for the non-discriminatory award of public contracts and the rational allocation of public money through the choice of the best offer presented (best value for money).

As regards the choice of the subject-matter of a tender, the public procurement directives are neutral in the sense that the decision whether or not to take environmental or other considerations into account, is up to the contracting authority.

*Any action against illegal logging in the context of a public tender procedure is an individual action of a contracting authority (the public purchaser), not necessarily co-ordinated on national or international level.*

*The main difficulty for contracting authorities, when acting as a purchaser of wood or wood-products, is the verification of whether the wood is legally logged or not.*

## **The system of the public procurement Directives**

The public procurement directives make a clear distinction between the different stages of a tender procedure, being:

- the definition of the technical specifications
- the selection of candidates
- the evaluation of tenders received and the award of the contract

### **First stage: Definition of the technical specifications of a contract**

The choice on “what to purchase” is up to the contracting authority. The public procurement Directives oblige contracting authorities to indicate the technical specifications in the general or contractual documents relating to each contract. Technical specifications include all characteristics required by the contracting authority in order to ensure that the product or service fulfils the use for which it is intended. They give objective and measurable details of the subject matter of the contract and therefore have to be linked to the subject matter of the contract.

The public procurement Directives contain a detailed system of obligatory references to standards and comparable instruments, with a clear hierarchy: preference is given to the European instruments and in the absence of these, reference can be made to international or national standards or comparable instruments.

The concept of “technical specification” includes the possibility of prescribing the basic or primary materials to be used, or prescribing the use of a specific production process, provided, of course, that this will not reserve the market to certain undertakings. This could include for instance that for a specific contract the window frames of an administrative building are made of wood or a requirement for recycled glass or other recycled materials, or that an environmentally-sound production process has been used, e.g. organically grown foodstuffs or “green” electricity.

As regards wood and wood-products, it may thus be required that the wood comes from forests where the principles of sustainability are applied. This, however, gives a guarantee that an environmentally sound production process has been used, but it does not guarantee that the wood has not been illegally logged.

***“Illegal logging” is a legal specification and cannot be regarded as a technical specification in the sense of the public procurement directives.***

### **Second stage: Selection of candidates**

The public procurement directives contain detailed rules relating to the selection of those candidates whom a contracting authority considers able to execute its contract. These rules relate to the quality of the person or company executing the contract.

These rules consist of three different types. The first set of rules concerns the grounds that justify a candidate's exclusion from participating in a public contract. The second set of rules concerns the candidate's financial and economic standing. And the third set of rules concerns the candidate's technical capacity.

***Illegal logging itself has, within the framework of the public procurement directives, neither a link with a candidate's financial and economic standing, nor with the technical capacity.***

***Illegal logging may, however, under specific conditions, be a ground for excluding a candidate from participating in a tender procedure. The possibilities for excluding candidates from participating in a tender procedure are listed exhaustively in the public procurement directives.***

All public procurement Directives define the grounds on which enterprises may be excluded from participating in tender procedures. These grounds read, as far as relevant, as follows:

*Any supplier/contractor/service provider may be excluded from participation in the contract who:*

*(c) has been convicted of an offence concerning his professional conduct by a judgement, which has the force of res judicata;*

*(d) has been guilty of grave professional misconduct proven by any means, which the contracting authorities can justify;*

In the case where legislation qualifies 'illegal logging' as an offence concerning professional conduct,<sup>1</sup> the public procurement directives allow a contracting authority to exclude a candidate from participation on the ground mentioned under (c) where this undertaking is convicted for committing this offence and where the judgement has the force of res judicata.

The concept of grave professional misconduct is a concept which is, as such, not yet defined in European legislation or case law and it is therefore left to the Member states to define this concept in national legislation.

### **Third stage: Award phase**

Once the candidates have been selected, contracting authorities enter the phase of the evaluation of the tenders, resulting in the award of the contract. These rules relate to the quality of the tenders received.

The public procurement Directives contain two options for the award of contracts: either the lowest price or the '*most economically advantageous tender*'. The aim of this second option is to help the contracting authorities get the best value for money.

In order to define which tender should be considered the most economically advantageous, a contracting authority has to indicate beforehand which criteria will be decisive and will be applied. These different criteria should be mentioned either in the contract notice or in the contract documents, where possible in descending order of importance.

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<sup>1</sup> Some countries have framed what are called "ecological offences" in their Criminal Code. For instance, Article 325 of the current Spanish Criminal Code (Organic Law No. 10/1995 of 23 November 1995) provides that "*anyone who, in breach of the laws or other general provisions to protect the environment, causes or whose actions directly or indirectly give rise to emissions, discharges, radiation, extraction or excavation, silting, noise, vibrations, injections or deposits in the atmosphere, soil, subsoil, or inland, marine or ground waters, including any influencing transboundary areas, or who undertakes water abstraction which may seriously upset the balance of natural systems, shall be liable to a term of imprisonment of between six months and four years, penalties payable over periods of between eight and twenty-four months and disqualification from pursuing an occupation or holding office for a period ranging from one to three years. If there is a risk of serious damage to human health, the term of imprisonment shall be in the upper half of the range*".

The common factor shared by all criteria used for the evaluation of tenders is that they must, like those expressly cited, concern the nature of the work to be carried out or the manner in which it is done. The criteria applied should give the contracting authority discretion to compare objectively the different tenders and to accept the most advantageous on the basis of objective criteria such as those listed by way of example in the directives.

The objective of this assessment is to establish which tender best fulfils the needs of the contracting authority. Therefore the function of the award criteria is to assess the intrinsic quality of the tenders.

***The question whether wood is legally logged or not, has as such, no impact on the intrinsic quality of a tender. It can therefore not be used as a criterion defining which one is the economically most advantageous tender.***

It must be noted that the question on award criteria and especially the interpretation of the concept of "economically most advantageous tender" is currently being judged by the Court of Justice of the European Communities in case C-513/99. The Advocate-General gave his opinion on 13 December 2001. The judgement is expected by the end of March or in April 2002.

## **Final remarks: contract clauses**

The public procurement directives do not contain rules relating to the execution of the contract, so the contracting authorities are bound by the Treaty rules and principles.

In this context, it should be emphasized that environmental or other legislation, either Community legislation or national legislation compatible with Community law is of course binding. In case such binding legislation exists, contracting authorities may verify and require proof of compliance with such legislation.