

## **CHOOSING AND EXCLUDING TENDERERS**

**Nicholas Paines QC**  
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Monckton Chambers  
1 & 2 Raymond Buildings  
Gray's Inn  
London WC1R 5NR

Tel 020 7405 7211  
Fax 020 7405 2084  
DX LDE 257

[chambers@monckton.com](mailto:chambers@monckton.com)  
[www.monckton.com](http://www.monckton.com)

## 1. Introduction

- 1.1 The principal considerations governing the selection of a tenderer will undoubtedly be the economic advantage of the price proposed, the degree to which the objectives of the project concerned will be fulfilled and the capacity to deliver. However, it is possible that a public authority may wish to take account of wider objectives, such as to promote the economic development or other interests of the locality or a particular section of society at home or abroad; to prevent moral or financial benefits from accruing to certain countries or régimes; or to safeguard the environment.
- 1.2 Indeed, an authority may come under considerable pressure to take account of these matters, either from pressure groups or its electorate - particularly since taking such social objectives into account in procurement decisions may well be a more effective way of achieving them than direct action by the government. Such objectives and external pressures may therefore lead an authority to favour tenderers who can - and disfavour tenderers who cannot - meet such concerns either in the terms of their tender or by reason of their activities or connections elsewhere.
- 1.3 Taking such considerations into account has the potential to collide with the economic/best value demands of EU procurement policy, as well as other legal requirements in the United Kingdom. Nonetheless, efforts continue to be made to introduce a variety of environmental and social factors into public procurement decision-making; a notable example has been the scheme initiated in Northern Ireland to integrate economic, social and environmental strategies and initiatives into the government's procurement policy<sup>1</sup>. This has led to tenderers being required to incorporate an Unemployed Utilisation Plan with their tender submission, indicating each firm's proposals in respect of the recruitment and retention of those who have not been in paid employment for the 3 months preceding the contract<sup>2</sup>, and also to their being encouraged to adopt a positive environmental policy.
- 1.4 The legitimacy of preferring or excluding tenderers by reference to considerations of this kind is - at least to some extent - underpinned by the evolution of the EC Treaty, by provisions in the new Public Sector Procurement and Utilities Directives<sup>3</sup> and in the case-law of the Court of Justice. Nevertheless, the scope for choosing and excluding tenderers by reference to objectives and concerns lying beyond the specific subject-matter of the contract still remains subject to significant limitations both in the Directives and in the law within the United Kingdom.

## 2. Domestic law constraints

- 2.1 Local authorities in the United Kingdom continue to be subject to the duty imposed by section 17 of the Local Government Act 1988 to exercise their functions with respect to public supply or works contracts without reference to certain "non-commercial considerations". The excluded considerations cover matters such as the terms and conditions offered to an existing or potential contractor's workforce, the conduct of such a contractor in its other business activities or in the course of an industrial dispute, as well as its political, sectarian or industrial affiliations, support for particular organisations and the countries from which it obtains supplies or in which the contractor has business interests or activities. This applies to

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<sup>1</sup> Department of Finance and Personnel, *Public Procurement policy* (May, 2002).

<sup>2</sup> Tenderers are required to provide information on matters such as whether it offers flexible working hours, free and subsidised transportation between home and place of work and crèche and child-minding facilities, as well as whether it provides training, facilitates day-release for non-apprentice positions and assists in the development of employees.

<sup>3</sup> 2004/18/EC and 2004/17/EC.

matters occurring in the past as much as at the time of contracting; consideration of them is also prohibited in respect of any sub-contractors that might be involved.

- 2.2 A limited relaxation of this restriction has since been made pursuant to powers in the 'best value' provisions of the Local Government Act 1999. Broadly, an authority may take into account the terms and conditions offered to a contractor's work force and the conduct of contractors or workers in industrial disputes between them to the extent the authority considers necessary or expedient in order to permit or facilitate compliance with the authority's best value duties under the 1999 Act or where the procurement involves a transfer of staff to which the Transfer of Undertakings (Protection of Employment) Regulations 1981 are applicable<sup>4</sup>. Other non-commercial considerations, such as contractors' affiliations or interests and activities in other countries, remain prohibited.
- 2.3 All public authorities in the United Kingdom are also bound by the requirement not to act *ultra vires* - a principle that has been successfully invoked to establish that it would be an improper purpose or unreasonable to use contracting and other powers to compel someone either to do what it is not legally obliged to do or to abstain from doing something that it is lawfully entitled to do. Thus it was impermissible to refuse to allow a rugby club to use a council recreation ground because of its failure to discourage its members from taking part in a tour of South Africa during the apartheid era<sup>5</sup>; to refuse to buy products from an oil company as part of a campaign to persuade local authorities to boycott trade with it so long as it continued to trade in South Africa<sup>6</sup>; and to refuse to purchase a publisher's newspapers and periodicals in order to put pressure on it in connection with an industrial dispute<sup>7</sup>. It was also held to be unlawful for a local authority and a port authority to ban a company from using an airport and a harbour for lawful exports simply because of an unlawful protest by animal rights protesters, although considerations of security could be taken into account<sup>8</sup>.
- 2.4 Furthermore, even if it is otherwise legitimate to take account of certain non-commercial considerations, there is also a need for the authority concerned to do so in a way which is clearly connected to its own rôle. For example, the local authority which refused to contract with the oil company could have refused lawfully if its concern had been limited to promoting good race relations within its borough - a duty so to do being imposed on all local authorities by section 71 of the Race Relations Act 1976 - rather than to encourage the dismantling of apartheid by pressurising the company to cease trading in South Africa. Similarly, a ban on the use of local authority land for hunting could have been lawful if it had been based on concern for the 'benefit, improvement or development' of its area as a whole - a requirement imposed by section 120(1)(b) of the Local Government Act 1972 - rather than the moral objection of councillors to the pursuit<sup>9</sup>.
- 2.5 These limitations on the ability to choose and exclude tenderers will apply whether or not the tendering process is subject to the requirements of Public Sector Procurement and Utilities Directives.

<sup>4</sup> Local Government Best Value (Exclusion of Non-commercial Considerations) Order 2001. In the case of Scotland and Wales terms and conditions of a contractor's workforce and the conduct of the contractor or its workers in an industrial dispute are no longer to be regarded as a non-commercial consideration; Local Government in Scotland Act 2003, s 7 and the Local Government Best Value (Exclusion of Non-commercial Considerations) (Wales) Order 2002. The Scottish relaxation is more restricted in that it only applies where the authority reasonably seeks to ensure that a contractor will comply with its contractual obligations or will do so in a way that does not prevent or hinder from obtaining best value or where the authority reasonably believes a transfer of staff subject to TUPE is involved.

<sup>5</sup> *Wheeler v Leicester City Council* [1985] AC 1054.

<sup>6</sup> *R v Lewisham London Borough Council, ex p Shell UK* [1988] 1 All ER 938.

<sup>7</sup> *R v London Borough of Ealing, ex p Times Newspapers Ltd* [1987] IRLR 129.

<sup>8</sup> *R v Coventry City Council, ex p Phoenix Aviation* [1995] 3 All ER 37.

<sup>9</sup> *R v Somerset County Council, ex p Fewings* [1995] 3 All ER 20.

### 3. Treaty Provisions

- 3.1 In EU law, the tension between commercial and non-commercial goals is now made explicit by the higher priority given in the Treaty to employment, social and other non-commercial goals (*cf* Article 3 of the EC Treaty as it now stands) and environmental policies (*cf* Article 6) than was the case when the EU procurement régime was first elaborated. There is, of course, nothing new in apparent conflicts between the different policy goals of the EU and, when these do occur, there is a need to endeavour to reconcile them in such a way that any action taken is consistent with them all. Although priority can still be given to one or other of them temporarily if there is good reason to so, it is clear that it is necessary to reconcile the single market and efficiency goals pursued by procurement law with the pursuit of other high level goals; the recognition of the latter does not *necessarily* mean that they can determine whether a particular tenderer can be chosen or excluded.

### 4. Procurement Law

- 4.1 The new Directives, particularly in their recitals, reflect the evolution of the EC Treaty to recognise the general importance of environmental and social factors in procurement<sup>10</sup>. Provisions of particular potential significance are:
- The explicit reference in the first recital in the preamble to each Directive to the Directive's being based on the Court's case law clarifying "the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental principles mentioned in recital 2".
  - The reference in recital 2 in the Public Sector Procurement Directive<sup>11</sup> to Article 6 of the EC Treaty and the statement that the Directive "clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contracts".
  - The statement in recital 6<sup>12</sup> that "Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public morality, public policy, public security, health, human and animal life or the preservation of plant life, in particular with a view to sustainable development, provided that these measures are in conformity with the Treaty".
  - The provision in recital 25 for aspects of cultural or social significance to be taken into account in contracts for audiovisual services in the field of broadcasting.
  - The provision in recital 28 and Article 19 for reserving contracts for sheltered workshops and sheltered employment<sup>13</sup>.

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<sup>10</sup> A development also acknowledged by the Commission's publication of Interpretative Communications on environmental and social considerations; COM 2001/274 (Final) and COM 2001/566 (Final).

<sup>11</sup> Recital 12 in the Utilities Directive.

<sup>12</sup> Recital 13 in the Utilities Directive.

<sup>13</sup> Recital 39 and Article 28 of the Utilities Directive.

- The provision in recital 29 and Article 23 for the use of environmental factors in drafting performance specifications for contracts, including the use of “eco-labels”<sup>14</sup>.
- The provision in recital 33 and Article 26 for non-discriminatory contract performance conditions favouring vocational training, re-integration of the unemployed and the protection of the environment<sup>15</sup>.
- The provision in recital 44 and Article 48 for the use of environmental management schemes as part of the performance of the contract<sup>16</sup>.

4.2 All of these reinforce the potential for social and environmental factors to be taken into account when choosing and excluding tenderers. Recital 46<sup>17</sup> affirms that the criterion of the most economically advantageous tender still means ‘best value for money’, but the fourth paragraph of the recital also affirms the legitimacy of social and environmental objectives in making that assessment:

“In order to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively. If these conditions are fulfilled, economic and qualitative criteria for the award of the contract, such as meeting environmental requirements, may enable the contracting authority to meet the needs of the public concerned, as expressed in the specifications of the contract. Under the same conditions, a contracting authority may use criteria aiming to meet social requirements, in response in particular to 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 belong.”

- 4.3 It should be noted, however, that all of these references to environmental and social factors link them with the subject-matter of the contract and do appear to contemplate decision-making being based on extraneous characteristics of the tenderer, such as wider activities or interests that might be considered undesirable for social, environmental or other reasons.
- 4.4 Certainly, tenderers may be rejected on grounds of financial and economic standing (including professional misconduct and certain offences), and the new Directives slightly widen the scope for exclusion on grounds of professional misconduct, in that this is seen as extending to “non-compliance with environmental legislation or legislation on unlawful agreements in contracts which has been the subject of a final judgment or decision having equivalent effect”<sup>18</sup>, but – particularly because of the need for formal findings in the case of offences and professional misconduct – this does not offer any real potential for excluding tenderers simply because their wider conduct is disapproved of. Nor does the criterion of technical ability, given the exhaustive list of criteria that may be taken into account under that heading<sup>19</sup>.

<sup>14</sup> Recital 42 and Article 38 of the Utilities Directive.

<sup>15</sup> Recital 44 in the Utilities Directive.

<sup>16</sup> Recital 53 in the Utilities Directive.

<sup>17</sup> Recital 55 in the Utilities Directive.

<sup>18</sup> Recital 54 in both cases.

<sup>19</sup> Some of a tenderer’s characteristics might conceivably go to technical capacity but, for an illustration of the difficulty of applying this and other suitability criteria, see H-J Pries, ‘Secondary Policy Criteria and their Compatibility with EC and WTO Procurement Law: The Case of the German Scientology Declaration’, PPLR 2000, 4, 171-195.

4.5 Moreover, in view of the decision in Case G-315/01 *Gesellschaft für Abfallentsorgungstechnik GmbH (GAT) v Österreichische Autobahnen und Schnellstraßen AG (OSAG)*<sup>20</sup> that it was impermissible to use a criterion going to suitability – in that case the number of other customers obtained by the tenderer for a specialised product – as a criterion for awarding the contract, it is unlikely that characteristics relating to a tenderer (as opposed to the tender itself) which *cannot* be taken into account for suitability purposes could be used for tender evaluation purposes instead. Conceivably, it might in extreme circumstances be appropriate to consider whether the depth of popular hostility to a particular tenderer might lead to a failure by the public to take up the services covered by the contract and thus tend to defeat the object of the process; such a negative attitude could possibly affect the value of the contract to the contracting authority.

## 5. The Evolving Case Law

5.1 As already mentioned, the new Directives have been drafted in the light of the Court's case-law on the permissible use of social and environmental factors when awarding contracts. This case-law has been developed on the basis of the much less explicit provisions in the earlier Directives, which were found by the ECJ not to be an exhaustive statement of the criteria that could be considered relevant. Although there is undoubtedly scope for taking a similar approach to the new Directives, the detailed nature of their provisions might be an inhibition on so doing and it might therefore be expected that the Court will not go far beyond the position that it has been developing which is now clearly endorsed in the recasting of the legislation itself. However, it might be appropriate to treat social factors as going beyond those relating to employment – mentioned in the Directives and figuring in the case law below – and include considerations such as the promotion of community relations pursuant to duties such as that found in section 71 of the Race Relations Act 1976.

### *Social Factors*

5.2 A relatively early indication that it was possible to take social factors into account in preferring one tenderer over another was given in Case C-31/87 *Beentjes v Netherlands*<sup>21</sup>, which arose out of the imposition by a contracting authority of a condition of the contract that the provider employ a certain number of local long-term unemployed – a condition which might be seen as fulfilling the Treaty's objective of promoting employment policies. The Court noted that the condition did not go to the financial standing or technical capacity of the tenderer nor to the economic advantage of the contract but nevertheless held its imposition to be permissible so long as it was compatible with the fundamental principles of Community law, of which non-discrimination was the most relevant. This meant that such an employment requirement could be imposed in a tender – and thus exclude tenderers not willing to comply with it – if it was one that could be complied with just as readily by a would-be contractor or service provider from another EU Member State. The potential for such a condition to be either directly or indirectly discriminatory will always need to be assessed by reference to the specific circumstances of each tender<sup>22</sup>.

5.3 A complaint about a similar employment condition was subsequently rejected by the Court in Case C-225/98 *Commission v France*<sup>23</sup>. The Commission objected to the condition, which was not alleged to be inconsistent with the principle of non-discrimination and was accepted to have been advertised in the contract notice, on the grounds that it had been adopted as an award criterion; the Commission argued that *Beentjes* only permitted such a condition to

<sup>20</sup> [2003] ECR I- 6351.

<sup>21</sup> [1988] ECR 4635.

<sup>22</sup> In practice compliance with the condition by foreign tenderers might only be possible if the contracting authority itself provided assistance in recruitment: see Elias & Goudie (eds) – *Butterworths Local Government Law*, para B [2501].

<sup>23</sup> [2000] ECR I-7445; the case is sometimes referred to as *Wingles*, where one of the schools was to be constructed, and sometimes as *Nord-Pas-de-Calais*, the region in which it is located.

be employed as a condition of performance. It is not clear from the report what the distinction between a condition of performance and an award criterion was said to amount to, and the Court regarded it as a distinction without a difference, holding that in *Beentjes* "the condition relating to the employment of long-term unemployed persons, which was at issue in that case, had been used as the basis for rejecting a tender and therefore necessarily constituted a criterion for the award of the contract"<sup>24</sup>.

- 5.4 Although the rule in *Beentjes* - that an employment condition which complies with the Treaty may be applied although it does not go to financial, standing technical capacity or the economic advantage of the tender - was preserved intact by the *Commission v France* decision, other recent case-law suggests that only conditions which have some relationship to the quality of the tenderer's offering may be employed, necessarily limiting the potential for choosing or excluding tenderers by reference to wider social or other concerns.

#### *Environmental factors*

- 5.5 This limitation emerges from two recent cases in which environmental factors had been taken into account by a contracting authority.
- 5.6 It had earlier been established in *Concordia Bus Finland*<sup>25</sup> that environmental objectives can be taken into account in evaluating the most economically advantageous tender. There the contracting transport authority had included environmental criteria, namely the level of nitrogen oxide emissions and noise produced by the buses; these were scored according to a points system. The Court held that the criteria relevant to deciding which is the most economically advantageous tender could include environmental criteria, but stressed that such criteria would only be permissible insofar as they were linked to the subject-matter of the contract (as in that case they plainly were).
- 5.7 The Court's reasoning was that article 36(1)(a) of Directive 92/50 did not purport to set out a comprehensive and definitive list of the criteria that could be taken into account for the purpose of identifying the most economically advantageous tender. Furthermore the criteria that may be used for that purpose need not themselves be "economic" in nature since even non-economic criteria can affect the (economic) *value* of the tender in the eyes of the contracting authority. But like any other criteria for the most economically advantageous tender, the criteria must be linked to the subject-matter of the contract.
- 5.8 In the first of the recent decisions, the decision in Cases C-20/01 and C-28/01 *Commission v Federal Republic of Germany*<sup>26</sup>, one of the alleged infringements of the Directive was the local authority's decision to award a contract for the processing of waste to a local contractor without a call for tenders. The contracting authority had done this on the grounds that it required the waste to be treated thermally and there was only one contractor in the locality who had the resources to do so; the contracting authority contended that it was dispensed from the need to advertise the procurement by article 11(3) of Directive 92/50 which applies to a situation where "for technical ... reasons .. the services may be provided only by a particular service provider".
- 5.9 The Court accepted that a technical reason relating to the protection of the environment might be taken into account under this provision, but could not justify a departure from the fundamental principles of Community law, particularly the principle of non-discrimination. In this case it found that the local authority's preference for thermal waste treatment was not

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<sup>24</sup> Paragraph 52 of the judgment.

<sup>25</sup> Case C-513/99, [2002] ECR I-7213.

<sup>26</sup> [2003] ECR I-3609

underpinned by any evidence. The conclusion that only one supplier in the locality could provide the service was based on that unsound premise and in any event was not a necessary consequence of it, as it was not shown that the transport of waste over a greater distance would necessarily constitute a danger to the environment or to public health. The decision underscores the need for evidence of the relevance of an environmental factor (unless perhaps it is obvious); it is not something that can be loosely invoked.

- 5.10 That requirement of a link between a condition imposed for environmental reasons and the subject-matter of the contract, already emphasised in *Concordia Bus Finland*, was found to have been infringed in the second of the recent decisions, Case G-448/01 *EVN AG & Wienstrom GmbH v Austria*<sup>27</sup>. In that case, the Austrian regional government in Carinthia sought tenders for the supply of electricity to all the federal government offices over a two year period. The annual consumption of the offices to be supplied was estimated to be 22.5 GWh, and the contracting authority wished to ensure so far as possible that the electricity that they consumed would be produced from renewable resources. To that end, the tender documents specified that tenderers would be eliminated if their tenders did not contain proof that the tenderer in question: (i) would produce or purchase and supply to consumers generally at least 22.5 GWh of renewable electricity in each year of the two year period; or (ii) had actually done so over the previous two years.
- 5.11 The tender documents also specified contract award criteria based on a combination of (i) the price per kWh of the electricity to be supplied and (ii) the tenderer's ability to produce and supply, to customers generally, electricity from renewable sources in excess of the 22.5 GWh needed by the contracting authority. These criteria were weighted so that a 55% weighting was to be attached to the price and 45% to the tenderer's capacity to supply the further GWh of renewable electricity.
- 5.12 In the light of the ruling in *Concordia Buses*, it is unsurprising that the contracting authority was held to be entitled to take into account, as one of the award criteria, the ability of the supplier to provide the electricity to be purchased under the contract from renewable sources; the ECJ dismissed the concern expressed by the referring court that the criterion pursued an advantage that could not "be objectively assigned a direct economic value". The environmental concerns that may be taken into account are not, therefore, confined to those having a quantifiable economic value. As with the degree of noise and atmospheric pollution at issue in the *Concordia Buses* case, the production of electricity from renewable as opposed to fossil fuel or nuclear sources related to the quality, and thus the value, of the thing supplied.
- 5.13 The Court also held in *EVN* that the fact that the source of the electricity had been given a high, and therefore potentially decisive, weighting was not in itself objectionable. That conclusion followed from two considerations.
- 5.14 First, that a contracting authority is generally free to decide for itself the criteria to be applied to the award of the contract and the weighting to be given to those criteria. That freedom is, of course, subject to limitations: the purpose of the criteria used must be to identify the most economically advantageous offer; the criteria must not be formulated in so imprecise a way as to give the contracting authority unrestricted freedom of choice (which would turn the process into a lottery); the criteria must be applied in accordance with the procedural rules; and they must be consistent with the fundamental principles of Community law (in particular, the principle of non-discrimination). However, beyond that, there is nothing to prevent a contracting authority from giving a particularly high weighting to particular features of the offering, such as its environmental impact.

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<sup>27</sup> [2004] 1 CMLR 22.

- 5.15 The second consideration was the fact that that the promotion of renewable energy sources is a high *Community* priority. Hence, the approach of the contracting authority in *EVN* was consistent with the Community's own policy and legislation.
- 5.16 Moreover, the fact that the terms of the tender could not guarantee fulfilment of the underlying objective - to ensure that the government's consumption of electricity led to the generation of renewable rather than fossil fuel or nuclear electricity - was not an objection. This was apparently because those terms were nevertheless conducive to that aim.
- 5.17 However, the terms of the tender were held to infringe Community law in two main respects.
- 5.18 The first was that the tender documents required tenders to undertake that the electricity supplied to the government offices would be electricity from renewable sources; breach of this obligation could lead to termination and penalties. But the obligation was, as the tender documents also recognised, impossible to comply with (or to verify compliance with) since the electricity would be supplied through the grid, where it would be mixed with electricity put into the grid by other producers. The Court held that the inclusion of a criterion with which it was impossible to verify compliance infringed the principles of objectivity and transparency.
- 5.19 Secondly, giving a weighting in the most economically advantageous tender evaluation to the tenderer's ability to supply renewable electricity, in excess of the government's requirements, to other consumers was impermissible, since it did not relate to the subject-matter of the contract but rather to supply to other purchasers. The Court stated in terms that
- An award criterion that relates solely to the amount of electricity produced from renewable energy sources in excess of the expected annual consumption, as laid down in the invitation to tender, cannot be regarded as linked to the subject-matter of the contract.<sup>28</sup>
- 5.20 Furthermore, the criterion conferred an advantage on the largest tenderers and was likely to discriminate against tenderers who could fulfil the contract requirements but did not have substantial extra capacity. That could have the effect of thwarting the objective of opening up the market to competition pursued by the procurement directives.
- 5.21 The Court rejected the argument that the greater the supplier's renewable capacity, the less likely it was that the government's electricity consumption would exceed the supplier's level of renewable production in times of peak demand, observing<sup>29</sup> that "the capacity of tenderers to provide the largest amount of electricity possible in excess of the amount laid down in the invitation to tender cannot legitimately be given the status of an award criterion".

## 6. Conclusion

- 6.1 While it well established that social and environmental factors can be taken into account in public procurement and can afford some basis for choosing or excluding tenderers, it remains essential to ensure that fundamental principles of Community law, especially the prohibition on discrimination, are not infringed. Moreover, the Court's unequivocal endorsement in *Commission v France* of its ruling in *Beentjes* that non-discriminatory criteria could be applied even if they did not go to financial standing, technical capacity or economic advantage has

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<sup>28</sup> Paragraph 68 of the judgment.

<sup>29</sup> Paragraph 70.

been called into question by the later decision in *EVN*. If the *Beentjes* approach does not survive, a contracting authority's ability to take into environmental, economic or other social or political considerations into account will be heavily circumscribed.

- 6.2 In that event, past failures to respect legal requirements in matters of employment, the environment and social welfare could be taken into account as relating to the suitability of a tenderer only if they had resulted in a conviction or a finding of professional misconduct. Furthermore such factors will not be an excuse for failing to comply with the procedural rules.
- 6.3 The *EVN* decision further suggests that such considerations may have to be related to the criterion of the most economically advantageous tender. If so, then they will only be legitimately taken into account if they have some relationship to the subject-matter of the contract. Moreover, it is likely to be necessary to ensure that the freedom to select contract award criteria and to weight them as the contracting authority thinks fit is not misconstrued as giving the authority an unfettered discretion. Even if a social or environmental concern need not be given a precise economic value, there must be some evidential basis for its importance (unless it is obvious); any associated tender condition must be clear in its content and as regards its significance in the evaluation process and must be capable of measurement (at least within the terms set for the procurement process) and verification. In short, a contracting authority can justifiably be concerned about the environmental consequences of a particular contract, but needs to be able to identify and justify rationally any associated tender requirements; insofar as there might be a variety of possible responses, the significance of a particular one for the award decision ought to be clear.
- 6.4 Moreover, this approach excludes reliance on social or environmental concerns that are not linked to the subject-matter of the procurement exercise; tenderers cannot be selected or excluded by reference to generalised concerns, no matter how significant, that do not have such a connection. If this approach prevails, the position under EU procurement law will not differ greatly from the functional constraint on authorities under the local government legislation in the United Kingdom.

**For more information on Nicholas Paines QC, please contact the Clerks on 020 7405 7211 or consult the 'Find a Barrister' Section at [www.monckton.com](http://www.monckton.com).**