

HORIZONTAL POLICIES IN PUBLIC PROCUREMENT: A TAXONOMY¹

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ABSTRACT. Public procurement is widely used to promote objectives of an economic, environmental and social nature, such as the economic development of disadvantaged social groups. This article elaborates a detailed taxonomy of such “horizontal” policies. This study is valuable, first, to facilitate analysis of the practical phenomenon of horizontal policies and of the policy implications of different approaches and, second, to illuminate and develop the relevant regulatory frameworks under national and international regimes. The taxonomy is based on three key distinctions between the following: 1. policies limited to securing compliance with legal requirements and those that go beyond such requirements; 2. policies applied only to the contract awarded and those that go beyond it; and 3. nine different mechanisms by which policies are implemented in the procurement process.

INTRODUCTION

The use of public procurement as a policy tool is a longstanding and much-analysed phenomenon, which covers a range of policy areas such as support for fair labour conditions, regional development and the provision of economic opportunities for disadvantaged groups (see the review and literature in Arrowsmith, Linarelli & Wallace, 2000; McCrudden, 2007). Such policies have

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sometimes been referred to as “secondary” policies, in contrast with the so-called “primary” objective of a procurement of obtaining goods, works or services on the best terms (e.g. Arrowsmith, 1996; 2005; Priess & Pitschas, 2000), as “collateral” policies (Cibinic & Nash, 1998) or as socio-economic policies. However, the term “horizontal” policies is preferable. This term is sufficiently generic to embrace all types of policies (economic, social, political, environmental, etc.) but, in contrast with the terminology of “secondary” or “collateral” policies does not imply that such policies are necessarily illegitimate or subservient to commercial aspects (Arrowsmith & Kunzlik, 2009).

This article elaborates a detailed taxonomy of horizontal policies which is independent of the subject-matter of these policies. This is valuable for two main reasons.

First, a detailed taxonomy is useful for fully understanding the practical phenomenon of horizontal policies and the constitutional and policy implications of different approaches. Whilst it is not the aim of this short article on taxonomy to offer an exhaustive analysis of the policy issues, the article will briefly review the main issues affecting the value, legitimacy, transparency and effectiveness of policies. This highlights the diverse concerns that arise with different approaches and, hence, the value of a carefully nuanced taxonomy.

Second, the taxonomy provides a framework for understanding and developing regulatory provisions on horizontal policies. Horizontal policies are extensively regulated both under national procurement rules and – increasingly – under international trade regimes such as those of the World Trade Organization (WTO) and European Union (EU), which aim to limit policies with a disproportionate impact on trade (e.g. Arrowsmith & Kunzlik, 2009; McCrudden, 2007; Arrowsmith, 2003, Chapter 13). A detailed taxonomy can help us to understand the precise remit of the relevant legislation/treaties and court decisions, and can also facilitate sound future development by illuminating relevant distinctions and options. Again, this article focused on taxonomy is not intended to provide an exhaustive analysis of regulatory issues. However, the article will give examples of how different approaches are treated in a regulatory context, in order to illustrate the practical relevance of the distinctions in the taxonomy.

The taxonomy elaborates the author's previous analysis (Arrowsmith, 2005; Arrowsmith, Linarelli & Wallace, 2000), which has already been used for the purposes referred to above by other scholars (for example, Watermeyer [2004]; Ssenoga [2006]). Concrete examples of policies are taken mainly from jurisdictions studied by the author, notably the WTO, EU, United Kingdom, United States, and South Africa. However, the approaches and mechanisms that they illustrate are found in many other jurisdictions.

FOUNDATIONS: THREE KEY DISTINCTIONS

The proposed taxonomy is based on three key distinctions. The first is a distinction between, on the one hand, policies that are limited to securing compliance with general legal requirements – for example, a requirement for government contractors to pay their workers the minimum wage applicable by law to all firms in the jurisdiction – and, on the other hand, policies that go beyond this – for example, a requirement to pay “fair” wages that exceed the national legal minimum.

A second distinction is one between policies concerned only with performance of the contract – such as a requirement to pay “fair” wages to employees engaged in government work – and policies that are more general, such as a requirement for government contractors to pay “fair” wages to *all* their employees.

Thirdly, the taxonomy distinguishes between nine different *mechanisms* for implementing horizontal policies, such as set-asides (whereby contracts are reserved solely for certain groups and award criteria (giving credit to tenderers for the environmental or social benefits of their tenders)). These mechanisms involve different advantages/disadvantages, including in balancing horizontal policies with other objectives, such as value for money and efficiency, and are also differently treated by trade regimes because of the differing extent to which they impact on trade (Arrowsmith, 2009).

These three distinctions, and the interrelationship between them, will now be examined in turn. The distinctions and certain further sub-divisions within them discussed below are summarised in Table 1.

TABLE 1
Summary of the Taxonomy

Key Distinction 1: Whether Limited to Legal Compliance	
1.	Policies limited to compliance with general legal requirements
2.	Policies that go beyond compliance with general legal requirements
Key Distinction 2: Whether Confined to Performance of the Contract Awarded	
1. Policies confined to contract performance	
i. Decisions to purchase or not to purchase	
ii. Decisions on what to purchase	
iii. Mechanisms for implementing policies in the award procedure (contract conditions, award criteria etc)	
1. Consumption measures	
2. Production/delivery measures	
3. Disposal measures	
4. Workforce measures	
2. Policies that go beyond contract performance	
Key Distinction 3: Mechanisms for Implementing Policies	
1.	The decision to purchase or not to purchase
2.	The decision on what to purchase
3.	Contract conditions laid down by the purchaser
4.	Packaging and timing of orders
5.	Set-asides
6.	Exclusion from contracts for non-compliance with government policies
7.	Preferences in inviting firms to tender
8.	Award criteria
9.	Measures for improving access to government contracts

**POLICIES LIMITED TO COMPLIANCE WITH GENERAL LEGAL REQUIREMENTS
AND THOSE THAT GO BEYOND LEGAL COMPLIANCE**

Policies Limited to Compliance with General Legal Requirements

Some Examples

As mentioned, a first distinction is between policies limited to a contractor's compliance with legal general norms and policies that go

beyond this. An example of the first type of policy is a contractual undertaking when, in carrying out the contract work; a contractor will comply with general legislation on health and safety at work. Another is a policy followed in many jurisdictions of excluding from government contracts any firms with convictions for certain criminal offences. This can be considered a horizontal policy to the extent that it is directed at deterring and punishing criminal behaviour rather than merely at ensuring reliability to perform the contract: this is the case, for example, with the mandatory exclusions for corruption and certain other offences under the EU procurement directives (Williams, 2009). Another interesting example is Northern Ireland's government policy under the Fair and Equal Treatment Order 1998 (FETO) (McCrudden, 2007, pp. 305-310). Against a historical background of religious and political divisions between the Roman Catholic and Protestant communities of Northern Ireland, this instrument prohibits discrimination on political and religious grounds and also requires both public and private sector organisations to secure fair employment opportunities regardless of religious or political belief through a requirement to monitor and review their employment practices and, in certain cases, to take remedial steps. This regime employs disqualification from public contracts as one sanction for non-compliance with the general policy.

Relationship with the Second and Third Distinctions

In terms of the second distinction between policies relating to the contract (as is discussed further below) and policies that go beyond the contract, policies limited to enforcing general legal norms can fall within either category. Thus a contractual obligation to follow health and safety legislation when working on the contract, for example, is clearly limited to the contract. On the other hand, a mandatory exclusion of all contractors convicted of corruption potentially affects any business activity of contractors. So also does Northern Ireland government's policy under FETO.

With regard to the nine policy mechanisms elaborated later below, on the other hand, whilst many are potentially applicable for ensuring compliance with general legal norms, not all are suitable for this purpose. This is particularly the case with contract award criteria. It is unlikely, for example, that a government will give extra points in tender evaluation to firms that have no convictions for corruption,

whilst admitting – albeit under a penalty in tender evaluation – firms that do. Rather, it is likely to prefer an approach that involves a contractual requirement for compliance with the law, or exclusion for past non-compliance.

Reasons for Using Procurement to Support General Legal Norms

Why do governments adopt procurement policies directed merely at compliance with pre-existing legal norms? We can identify several reasons.

A first reason for adopting such policies is simply to avoid associating the government with unlawful behaviour, both to set an example and to avoid public criticism. A second set of reasons for policies that support legal compliance is to provide an additional enforcement tool for securing compliance with the general law and/or punish violations, and for reducing the risk of violations of the general law during contract performance. The possibility of terminating the contract, for instance, may induce compliance with the law during the contract work more effectively than a remote threat of criminal prosecution. Contractual sanctions may be especially useful if work will be carried out in another jurisdiction (for example, in the case of goods manufactured abroad) and the government awarding the contract has concerns over inadequate enforcement of the law in that jurisdiction (for example, on labour standards in factories). Measures to ensure legal compliance for both these reasons are often taken in relation to matters within the procuring entity's own area of activity. For example, a Ministry for the Environment may be particularly concerned not to deal with contractors that violate environmental legislation.

Third, measures directed at legal compliance may be concerned with ensuring a level playing field. For example, firms that do not comply with their legal obligations by paying taxes or complying with labour law and so forth enjoy an unfair competitive advantage and may drive legitimate operators out of the market. Measures to address this issue have been important in recent public procurement reforms in South Africa, for example (Letchmiah, 1999). This is also one rationale for EU provisions allowing states to exclude contractors who have failed to pay taxes or social security contributions (as stated in the Opinion of Advocate General Poiares Maduro in *La*

Cascina: Joined Cases C-226/04-C-228/04, *La Cascina v Ministero della Difesa* [2006] E.C.R. I-1347, para.24 of the Opinion).

Finally, procurement measures concerned with a contractor's compliance with legal standards can help to ensure that government funds are not used to support enterprises that use government contracts as a means to raise revenue for terrorist or other criminal activities. This has been an objective of exclusion policies adopted by New York, for example (Anechiarico & Jacobs, 1995).

Procedural Issues: Transparency and Fairness

In most countries a feature of the external norms supported by procurement measures is that there are mechanisms for judging compliance that are formal and transparent, and follow fair procedures. For example, compliance may be judged by criminal courts or regulatory agencies. Procurement measures implemented for legal non-compliance may rely on these external mechanisms, in that the application of procurement measures – such as exclusions – is subject to criminal convictions or other formal determinations of non-compliance. This is the case, for example, with the mandatory exclusion provisions for corruption in the EU procurement directives, which apply only where there is a conviction (Williams, 2009).

Reliance on external adjudication may to some extent meet objections over the fairness of procedures and possible abuse of discretion that may apply if the procuring entity itself is left to decide whether a contractor has violated the law. It may also limit any need for the procuring entity, without the necessary expertise or resources, to investigate a contractor's position. However, administrative difficulties may still arise, since it may not be easy to obtain evidence of convictions, especially when dealing in the increasingly global marketplace with firms that may have convictions abroad. Policies based on criminal convictions may also be exceedingly difficult to apply if they also involve excluding related persons (such as parent companies or directors) and there is no formal, external mechanism to identify these companies. This can hamper both efficient procurement and the effectiveness of the horizontal policies themselves (Anechiarico & Jacobs, 1995). To overcome these obstacles formal information mechanisms may be needed. Thus in Northern Ireland, for example, the Equality Commission has responsibility for bringing to procuring entities' attention violations of

FETO that result in exclusions for the violator and related firms (FETO Article 62(3)).

Procurement policies concerned with violation of general norms are also sometimes applied without a non-compliance determination under the general legislation. For example, the World Bank rules applicable to Bank-financed contracts now provide for excluding contractors that have engaged in corruption even without a criminal conviction (World Bank, 2004, Section 1.15). This raises the question of whether it is appropriate to determine non-compliance and impose sanctions without the safeguards of a “normal” process such as a criminal trial. To a large extent, the issues are the same here as with any procurement determination involving consequences for contractors – for example, lack of technical qualifications to perform the contract – namely, how to balance contractor interests with an efficient procurement process. For policies based on non-compliance with external norms, however, an additional dimension is that the determination of non-compliance may carry a stigma because the conduct is also condemned by the ‘external’ normative system (such as criminal law). However, this occurs in many other situations, such as when civil legal liability (such as a requirement to pay compensation) is imposed for conduct that is also criminal, and seems unobjectionable merely because of this additional dimension. The determination of a violation does not involve the same consequences as a conviction (or other regulatory procedure) and there is thus no *prima facie* reason to apply the procedural rules of criminal law.

Implications for International Trade Regimes

We can note that policies limited to legal compliance are less likely to violate international trade regimes on procurement than those that go beyond this. For example, under EU law, Member States may exclude from major government procurements firms that have criminal convictions, but they are not permitted generally to exclude firms for non-compliance with government policies *not* embodied in general regulatory legislation (Arrowsmith, 2009). One reason for this may be that exclusions based on norms that are externally set and applied are less open to abuse than other exclusions – a consideration that also makes the former exclusions potentially more acceptable under national rules.

In general, legal norms applicable to performing the contract that are reinforced through procurement measures will be the norms of the awarding state itself: most bidders will be national contractors subject to national law. However, when contracts are performed by foreign contractors and/or contract work (such as the manufacture of supplies) is carried out abroad, legal norms laid down by another state – the state where the work is carried out – may apply, and these may also be the subject of procurement measures by the state awarding the contract. Indeed, as mentioned above, governments may find procurement sanctions particularly useful when other enforcement methods, such as criminal sanctions, are outside their own control. States may also wish to adopt policies that take account of compliance with the laws of other countries *beyond* the contract – for example, exclusions for corruption regardless of the country of conviction.

Policies that Go Beyond Compliance with General Legal Requirements

Some Examples and the Relationship with the Second and Third Distinctions

In addition, horizontal policies can provide social or environmental benefits that go beyond those arising from contractors' compliance with the general law.

Again, such policies may be limited to work on the contract itself – for example, a requirement for a contractor to engage a certain proportion of disabled persons on the contract. However, they may also extend beyond it. To promote gender and racial equality a government might exclude firms that do not adopt a pro-active policy to implement a gender and ethnic balance in their workforce, even though such a requirement is not imposed on firms in general. Such a policy has been adopted by the United States government, for example under a programme that extends also to other areas, such as veteran status (McCrudden, 2007, Chapter 6). This approach contrasts with the use of procurement to promote political and religious equality in Northern Ireland, where procurement sanctions support comprehensive legal obligations applicable to *all* firms in Northern Ireland, not just government contractors.

Constitutional Issues

Sometimes policies limited to government contractors are established without any legislative basis. Indeed, the fact that legislation may not be needed but is required for alternative approaches, such as criminal sanctions, or is needed only in a particular form – such as secondary rather than primary legislation – may be one reason for choosing procurement as a policy tool. The decision of the US government to implement equality policies through procurement appears to have been taken because of the difficulty of putting regulatory legislation through Congress (McCrudden, 2007, p. 139). Procurement may also be chosen because it is the *only* tool available. Local authorities in the UK in the 1980s used procurement to support various policies, such as gender equality (Carr, 1997 Date disagrees with RL), as more direct regulation was patently beyond their legal powers. This has sometimes raised constitutional concerns over whether it is appropriate for authorities to do indirectly what they may not do directly. In some cases the courts or legislature have intervened to clarify or provide that such “indirect regulation” is, indeed, forbidden – for example, with UK local authorities’ use of procurement to support anti-apartheid policy in the 1980s by excluding from government contracts firms that had dealings with South Africa (see *R v Lewisham L.B.C., ex p. Shell U.K* [1988] 1 All ER 938 and Local Government Act 1988, s.17). To some extent, however, this “horizontal” approach to policy making has recently been positively endorsed by legislation “mainstreaming” certain policies across all government activity. UK legislation now *requires* all public authorities to consider various equality matters in the exercise of all their functions, including procurement, even though most authorities have no regulatory powers over this subject matter (currently under the Race Relations Act 1976, s.71, Sex Discrimination Act 1975, s.76A and Disability Discrimination Act 1995, section 49A; and in future (when this is brought into force) under Equality Act 2010, s.149, which covers a whole range of characteristics).

Because horizontal policies often appear as a form of regulation, is it justifiable to use procurement in this manner when the effect is to “regulate” government contractors but not other firms? Whilst private individuals generally have no option but to express their social and environmental preferences through purchasing and similar

activities – and increasingly do so as one aspect of Corporate Social Responsibility (Vogel, 2005, chapter 4) - government does have the option of broader regulatory measures.

Two justifications can be offered for this use of procurement power as a means of regulation. One is ensuring that government is associated with the highest possible standards. As with policies designed to ensure legal compliance, horizontal procurement measures may be adopted both to set an example – which may encourage wider acceptance of the standards – and to avoid public criticism.

The second justification concerns effectiveness: procurement is in some fields a more effective policy instrument than alternatives, such as criminal sanctions and can justify a decision to focus limited resources on this approach. As Morris (1990) states (in the context of equal opportunities policies): “the individual complaint and adjudication model of tackling discrimination is fundamentally flawed by problems of legalism, tortuous procedure and satisfying the legal burden of proof. Contract compliance, in contrast, is not handicapped by these problems. It evades the inherent deficiencies of individual adjudication or institutional investigation...” (pp.88-89). Further, the government’s close relationship with its contractors can help ensure effective monitoring of policies.

The use of procurement in a way that goes beyond merely requiring compliance with the general law may also raise other constitutional concerns especially – as Daintith (1979) has highlighted – when procurement supports normative standards applied to behaviour *outside* the contract. Such concerns may relate to, for example, the democratic legitimacy of regulation through procurement, the adequacy of procedural safeguards, legal certainty, and transparency.

As already shown some similar concerns may arise with policies limited to legal compliance – for example, over procedural safeguards when a procuring entity makes its own determination of whether a contractor has violated the law. However, such concerns are more frequent with policies that go beyond the general law.

One reason for this is that – as mentioned above – regulation through procurement may not require the primary legislation that tends to provide best for the application of constitutional principles to

administrative processes. A second, related, factor is that (as already mentioned) when procurement is used merely to enforce legal requirements, external mechanisms, such as the criminal courts, are often used to adjudicate compliance, and these provide for safeguards for contractors. A third consideration is that government contracting sometimes is not subject to adequate or clear constitutional controls – for example, general administrative law principles concerning due process and rationality in decision making (Bailey, 2007). Such concerns do not, however, cast any doubt on the suitability of procurement as a policy tool *per se*, but merely on the way in which constitutional principles are applied in practice to “regulation through procurement”. They merely highlight the need to take special care to implement such policies in accordance with ordinary constitutional values.

In practice many regimes do take steps to do this and use formal instruments – including legislation – to implement horizontal policies even when not constitutionally required. These often set out the policy in detail to ensure legal certainty, transparency and “due process” to safeguard contractors’ interests. As mentioned, one approach is to provide for a body external to the procuring entities to take decisions, such as whether contractors have violated applicable non-legal norms. An example is the United States Office of Federal Contract Compliance Programs (part of the US Department of Labor’s Employment Standards Administration) which has central responsibility for programmes on affirmative action in the workplace, including decisions on non-compliance by contractors. Central responsibility for making, collating and publicising decisions under horizontal programmes can help to promote transparency, consistency and effective enforcement; can ensure adequate safeguards for contractors, by focusing resources and expertise in one place; and can help avoid the delays to procurements that may occur when decisions are made *ad hoc*. This is especially important for complex decisions such as how non-compliance by one company should affect associated companies.

Implications for International Trade Regimes

We can finally note a point that is of increasing importance in the era of globalisation, namely that foreign participation creates

significant additional complexities for policies that extend beyond legal compliance.

In this respect, governments implementing such social policies must decide whether to apply them to foreign firms and/or work done abroad. When governments seek to 'buy' through government procurement social benefits, such as skills training (by providing for training of contract workers by contractors) or employment opportunities for persons with disabilities, they may not wish to pay for these when the benefits will go outside the jurisdiction. It may also seem inappropriate, as well as involving unjustified costs, to use procurement to "regulate" firms or activities that are generally outside domestic jurisdiction – for example, to ensure compliance with programmes to create a drug-free workplace. One possibility here is for governments to confine their measures to domestic contractors/activities. However, in procurements involving foreign competition (whether under international free trade regimes or otherwise), this may mean both losing an opportunity to use procurement as a policy tool (if the work goes to a foreign firms or is outsourced off-shore) and placing domestic firms at a competitive disadvantage (because of the extra costs of complying with the policy, which is a more visible and immediate disadvantage than a disadvantage arising out of more general regulatory legislation). Another possibility is to exclude foreign firms/activity altogether. However, where the contract is regulated under trade rules (such as that of the Government Procurement Agreement of the World Trade Organisation (GPA) this may require the negotiation of exceptions or use of treaty derogations that are of uncertain scope.

Such issues are becoming more prominent with increasing globalisation and the expanding coverage of trade agreements on procurement. How to balance the interests of government in using procurement to implement horizontal policies with considerations of free trade is, in fact, one of the most pressing and debated issues raised by trade agreements in procurement (Arrowsmith & Kunzlik, 2009; Arrowsmith, 2003; McCrudden, 2007). This is particularly in the case of policies going beyond legal compliance *and* going beyond the contract (see below), which may have a significant impact on trade

POLICIES CONFINED TO PERFORMANCE OF THE CONTRACT BEING AWARDED AND POLICIES THAT GO BEYOND CONTRACT PERFORMANCE

Introduction

The second distinction in this paper's taxonomy is between policies that are concerned only with the work under the contract awarded, and policies that extend to a contractor's other activities. This has sometimes been characterised as a distinction between the "government as purchaser" and "government as regulator" (e.g., Arrowsmith, 2005; McCrudden, 2007). Further, various policy concerns arise that often correspond broadly with these two groups of measures.

However, both in describing and assessing horizontal policies and in analysing the impact of legal rules, this simple characterisation is often too crude and a more detailed taxonomy as elaborated below (Arrowsmith & Kunzlik, 2009) is needed.

Policies Confined to Contract Performance

Policies relating to the contract may seek merely to ensure compliance with the law – for example, that the contractor complies with health and safety laws when carrying out the work. However, they may also seek benefits from the work that go beyond those provided for by law, such as the employment of disabled persons on the contract beyond any legal minimum requirements.

Policies within this group can be sub-divided into several further categories that are useful for legal analysis, in particular. The first two correspond with the first two mechanisms for implementing horizontal policies outlined below, whilst the others are sub-divisions that are relevant for all or some of the remaining mechanisms (contract conditions, award criteria, exclusions, etc.). They are as follows:

1. *Decision to purchase or not to purchase* – for example, a decision not to proceed with construction works because of the impact on the environment
2. *Decision on what to purchase* – for example, to purchase helicopters rather than life boats for sea rescue (see further below).

3. *Policies implemented through mechanisms in the award process.* This third group may be divided into four sub-groups:

- a) **Consumption Measures.** This refers to the effect of products, works or services when consumed, whether by the procuring entity, the public, or others. For example, the government may require that the subject matter of the procurement can be used by all employees or members of the public – for example, that food served in government canteens or in schools caters to all religious groups, or that IT equipment in offices and libraries is accessible for disabled users (Boyle, 2009; Yukins, 2004).
- b) **Production/Delivery Measures.** A second sub-category comprises measures concerned with the impact of production or delivery (but excludes contract workforce issues, which are treated separately). Production and delivery are included in one category since in the case of certain works and services production and delivery to the customer are merged (although with goods they are generally separate processes). This sub-category is particularly important for environmental policy. Purchasers might specify that products should be composed of recycled materials or should be obtained from sustainable sources – for example, electricity from renewable sources (Kunzlik, 2009) or timber and timber-products from legal and sustainable sources (as is UK government policy: Department for Environment, Food and Rural Affairs, 2007, p.29). For works or services authorities might try to limit the environmental impact of delivery, such as through requirements not to waste energy during delivery. Social considerations may be implemented through requirements concerning the location of production (e.g., for goods to be locally produced) or manner of production – for example, the South African government has used labour-intensive methods for construction of works, such as rural gravel roads, to provide employment opportunities (Government of South Africa, 1997, pp. 61-65).

- c) **Disposal Measures.** Third, governments might include provisions on the disposal of goods such as requirements for contractors to recycle their supplied products after use.
- d) **Workforce Measures.** Finally, governments may implement horizontal policies through measures relating to the composition or working conditions of the contract workforce. Like other procurement measures, these may be limited to ensuring compliance with legal obligations, but often go beyond this. In the United Kingdom for the early part of the twentieth century, central government inserted contract terms requiring “fair” working conditions for those employed on government contracts that were more favourable than those under the general law (Bercusson, 1978). Contract clauses might also require contractors to provide work on the contract for persons with disabilities.

Policies may relate to more than one group – for example, an environmental award criterion that takes account of a product’s whole carbon footprint. However, it is useful to distinguish the four sub-groups both for purposes of exposition and because of different treatment in legal and policy discourse. For example, there is much debate in the context of trade agreements, including within the WTO and EU, over whether measures relating to production impacts are/should be treated differently from measures relating to consumption, especially with production measures included in contracts for the supply of goods (e.g. Kunzlik [1998]; and see Arrowsmith [2009] more generally on different treatment of these sub-categories under EU law). One reason for this is the greater impact of production measures on trade: in practice, production measures implemented for goods supplied to government may need to be implemented in a factory or business as a whole, and may thus deter participation. Another reason for concern over production measures potential extra-jurisdictional effect, since the regulated production may take place abroad. In these respects, production measures focused on contract performance may in fact be similar in their impacts to policies that go beyond the contract, as is discussed in the next section.

Policies that Go Beyond Contract Performance

For descriptive purposes, policies that go beyond contract performance can be divided into three main groups.

First, they include policies that regulate contractors' behaviour across their business activity as a whole. Examples already mentioned are policies in the US and Northern Ireland (under FETO) that exclude from government contracts firms that do not develop affirmative action policies for workforce equality. Other examples are measures excluding firms that have business dealings with "undesirable" third countries. A notable illustration of this kind of measure is the former policy of some US states to exclude contractors that had connections with Myanmar (Cleveland, 2001) – a policy ultimately declared unconstitutional, however, under US law (Linarelli, 2001) and also challenged under the GPA (Arrowsmith 2003, pp. 327-328). Again, some policies of this kind are limited to legal compliance – to ensuring that the contractor complies with the law in its activities, as with the Northern Ireland policy under FETO. However, others impose standards on contractors' businesses beyond those of undertakings in general – as with the US federal equality policy.

A second group of policies going beyond contract performance comprises policies under which the government does not so much seek to change behaviour as to support undertakings with particular characteristics. Examples are award preferences or set-asides to assist small businesses and/or those owned by disadvantaged social groups, as in South Africa - where the government has made extensive use of public procurement to redress the inequalities that were institutionalised under the old regime of apartheid (Bolton, 2007), and expressly endorses this use of procurement in the Constitution - and in the United States (McCrudden, 2007, Chapter 7). Procurement measures have often also been used to support workshops providing employment for the disabled, as under the EU procurement directives which allow set-asides for such workshops (Boyle, 2009). Of course, there is no clear-cut distinction between the first and second group here - for example, policies supporting minority-owned businesses may both seek to support these businesses and to encourage established firms to take minorities into the business.

Finally, this category includes “offsets” – policies that involve contractors to provide community benefits – for example, by building community facilities or factories - that are not necessarily connected with the contract.

Policies directed at, or affecting, behaviour outside government contracts often impose a greater burden on contractors than policies limited to the contract, especially when they extend to all the contractor’s activities. As a result, there are also potentially greater costs for the procurement process. These arise both because of the costs of compliance reflected in tenders, and because (especially with contract conditions laid down by government) these policies may reduce the pool of contractors. These policies have also generated concerns under trade rules because of their impact on market access: to the extent that they go beyond legal compliance, at least, they are generally prohibited under the EU procurement directives (Arrowsmith, 2009).

However, this difference between policies formally limited to contract performance and those going beyond it is a matter of degree, which depends on the nature of the contract. Thus, as we have already mentioned above, even policies formally limited to contract performance may have a significant impact on wider business activity. For example, compliance with a clause requiring supplies to be produced without pollution may effectively require a business to change its production methods (and has led the European Commission to suggest – controversially – that under EU law measures relating to production of supplies are not to be considered as measures relating to the performance of a contract – which are generally permitted – but are forbidden [European Commission, 2001, p.18]). Similarly, it may be difficult for a contractor to make required changes to working conditions only for workers on government contracts, either because individual workers are involved in both governmental and non-governmental work, or because it is problematic to apply different pay and conditions to similar work within the organisation.

MECHANISMS FOR IMPLEMENTING HORIZONTAL POLICIES

As mentioned, a third distinction in the taxonomy is one between different mechanisms for implementing horizontal policies. Many of these mechanisms are appropriate for all types of policies – that is,

both for policies that are limited to compliance with the law and those that are not, and both for policies that are confined to contract performance and those that are not. However, this is not always the case: a contractor's ability to comply with external legal requirements may be unsuitable as an award criterion.

Whatever the mechanism chosen, incorporating horizontal policies into procurement generally involves costs that must be weighed against any benefits. There has been a significant amount of research assessing the impact of different policy mechanisms (usefully summarised in McCrudden [2007, pp. 594-617]) but much remains to be done.

First, horizontal policies often involve paying higher prices and/or involve some adverse impact on other features of a supplier's offer, such as service quality.

This is not, of course, invariably the case. Indeed, some horizontal policies bring commercial benefits. Thus buying more expensive low-energy light bulbs may save funds if extra initial expenditure is outweighed by lower energy costs, whilst policies to enhance access of small suppliers without any preferences (mechanism below) may lead to greater competition and hence to better prices.

However, many policies do involve additional costs. These may arise from costs to suppliers of providing the social or environmental benefits (for example, the extra costs of features to make buses accessible to wheelchairs or of enhanced working conditions). They may also arise from the fact that some firms are deterred from participating, reducing competition. The position here is, of course, no different in principle from that which applies when purchasing "commercial" benefits under a contract, such as where the government specifies for a high quality of service in a contract. However, the costs and benefits of certain horizontal policies, notably those that regulate behaviour beyond the contract, may be difficult to establish. We outline below how different policy mechanisms may affect the government's ability both to identify and to control the extent of costs and benefits.

A second cost may arise from increased discretion – for example, the discretion to exclude firms that do not meet horizontal requirements or the extra discretion involved in applying social award criteria. This discretion involved is not necessarily greater than that in

other assessments – for example, of technical capability – but the overall scope of discretion in the procurement may be increased. This will be a greater concern for systems that place significant emphasis on limiting discretion and its potential for abuse as a means of achieving procurement objectives, whether those objectives are value for money, reducing corruption and/or preventing discrimination on grounds of nationality. This is something that varies between individual states and entities according to such factors as the extent of corruption and skills of purchasing officers (see Kelman, 1990; Arrowsmith, 2002; Schooner, 2001).

Other costs from horizontal policies are the cost of checking for compliance, assessing additional award criteria and so forth, and the cost to firms of complying with additional administrative requirements (which may also deter participation) (e.g. Wittie [2002], considering the US federal system of domestic preferences). The potential for horizontal policies to create significant costs if implemented effectively is illustrated by the problems encountered in systems for excluding contractors involved in corruption: in particular, preventing unscrupulous firms from evading exclusion by setting up new companies may involve disproportionate costs for the administration and for suppliers in general (Anechiarico & Jacobs, 1995). The disruption and costs of complaints or legal disputes may also be increased by adding horizontal policies into the procurement process.

Both costs and benefits vary according to the mechanism used, as well as according to other factors, such as the consistency and effectiveness with which the policy is applied and monitored. The main inherent costs and benefits of the different policy mechanisms are noted briefly in the following taxonomy of available mechanisms.

The Decision to Purchase or Not to Purchase

The very reason for making many purchases in the first place is, of course, to implement social policies (to provide health facilities, education, etc.) or to provide environmental benefits (for example, with the procurement of a recycling plant). In addition, however, a decision whether to make a particular purchase at all may be influenced by social or environmental concerns *that are distinct from those achieved through the products, works or services themselves* – that is, by horizontal concerns.

First, a decision to purchase may be made not only because of the benefits from those products, works or services directly, but also because of the other resulting benefits. For example, states have often undertaken public works programmes to provide employment and an economic boost in times of high unemployment or recession – something being considered by many governments in the current economic climate. Here both the desire for buildings or other infrastructure to use for offices, transport *and* the boost to employment may influence the decision to go ahead with the project. A government might also undertake a programme that uses innovative products not merely because of the direct benefit (for housing) but to develop the products concerned – for example, constructing experimental housing using environmentally friendly materials.

Secondly, a government might decide not to proceed with a purchase that it *would* otherwise make because of social or environmental impacts. For example, it may decide after an enquiry to abandon a plan for a dam because of adverse environmental impact.

The Decision on What to Purchase

Assuming that a decision has been made to undertake a particular function or project, the basic means chosen for carrying it out may be influenced by social or environmental concerns, as well as by the direct requirements of the function itself. For example, a procuring entity might for environmental reasons decide to construct a video-conferencing facility, rather than to spend money on travel for meetings. Similarly, it might decide to purchase helicopters rather than lifeboats for sea rescue in order to support a national helicopter industry. The decision on *how* to implement a project – as well as the decision to undertake it – might also be influenced by the desire to develop new products or services.

There is no bright line between the concept of a decision *whether* to purchase, as discussed above, and the decision on *what* to purchase; nor between the decision on *what* to purchase and the decision on how to describe that purchase in the contract conditions (discussed below). Thus a choice of means may involve a compromise on functionality – for example, video-conferencing may be inferior to meetings in ensuring effective discussions but chosen

for the environmental benefits. Whether a decision to choose a particular means, or to scale down a project, should be classified as a decision not to make a purchase or a decision on *what* to purchase is a matter of degree. Similarly, whether a particular specified requirement is merely a function of a specified product or a different means of meeting a need is also a matter of degree. However, it is a convenient classification for descriptive purposes.

Contract Conditions Laid Down by the Purchaser

Once a decision is made to procure, entities may seek to implement social or environmental objectives through contractually binding conditions. These conditions may often be concerned solely with contract performance. Such conditions, like many of the other mechanisms to be discussed next, may be of several types: thus, as explained previously, they may relate to consumption effects, production or delivery effects, disposal effects, or workforce matters. In addition, conditions may be laid down to promote compliance with requirements that are *not* limited to the contract work. For example, a government requiring its contractors to implement fair recruitment policies across their business might include this as a contract term.

As well as laying down contract conditions to be performed by all successful tenderers, governments also often include contract terms as part of other policy mechanisms. For example, they might include warranties that the contractor concerned is eligible for a set-aside or award preference,

As with other contract conditions, it is advisable to draft “horizontal” contract conditions to maximise their benefits by giving suppliers the flexibility over *how* to meet the government’s functional requirements. For example, under a policy requiring firms to utilise long-term unemployed persons in government works contracts, it may not be appropriate to specify precisely *how* unemployed persons should be engaged (whether as employees, employees of sub-contractors etc); leaving contractors free to use the most cost-effective methods, especially since contractors are likely to have better knowledge of the market, might be more beneficial. Limiting specifications to functional requirements may, in fact, have benefits that extend beyond the contract by encouraging innovation.

The approach of laying down contract conditions for all contractors is suitable when there are overriding requirements that *must* be met. This will be the case, of course, if the conditions merely reflect existing legal requirements, such as minimum wage obligations.

Conditions to be met by all contractors may also be useful in other situations in which there is reliable information that additional costs of meeting the requirements are within acceptable limits or (more rarely) where the government is unwilling to make the purchase without these benefits. (In this case, if the price is too high the purchase will not be approved). As already mentioned, additional costs may arise both because of the extra cost for firms of meeting the requirements and because some firms cannot meet the requirements at all and thus cannot participate.

However, before laying down horizontal requirements that go beyond the law, it is useful for governments to consider whether an alternative approach is preferable. In particular, it is relevant to consider the possibility of social or environmental award criteria (mechanism viii). Using award criteria can allow a more precise assessment of costs, provide a mechanism to limit these costs, and facilitate the best overall combination of social/environmental benefits on the one hand, and price and other features, on the other.

One possible approach is to assess the costs of certain social or environmental requirements by requiring or allowing variants – that is, bids that propose a different approach to those suggested in a “standard” specified solution, including because they propose additional features or because they omit certain features of the standard bid. Allowing or requiring variants instead of or in addition to a standard bid can allow governments to assess the additional costs of the additional or omitted features, by comparing the costs of the variant and standard bids and taking these into account in the contract award criteria. For example, a government might include a requirement for providing specific employment for the unemployed in a standard bid, but also allow variant bids without these social benefits. The award criteria will then need to include the social benefits provided by each bid, so that if these outweigh any extra costs, the entity can then award the contract to a bid that offers the social benefit rather than one that does not.

On the other hand, it may sometimes be appropriate to require compliance with standards going beyond the law regardless of all these considerations. This is especially the case if these standards have a symbolic importance that might be compromised by an overt trade off between horizontal aspects and commercial considerations – for example, where the government seeks to promote compliance with certain environmental standards by setting an example. Even in this case, however, some flexibility might be provided through the discretion that exists in enforcing the conditions in practice (e.g. Bercusson, 1978).

In addition, *minimum requirements* on social or environmental features or benefits for all tenderers may sometimes be combined with award criteria that give additional credit to those products or services with *enhanced* environmental or social features. For example:

A mandatory specification might require that all IT for a new library should be accessible for deaf, blind and/or physically disabled users.... Alternatively, it might be required that a percentage of PCs must accommodate the needs of specified disabled users, but that credit will be given for extending this beyond the specified percentage (a mandatory specification combined with an award criterion) or merely that accessibility of the equipment will be one factor in judging the most advantageous tender (an award criterion only). An award criterion relating to accessibility might be used where the authority is prepared to commit a fixed budget for the IT refurbishment and wishes to select the bidder that can offer the best value for money or most accessibility (depending on its priorities, expressed through weighting the award criteria)... (Boyle, 2009, p. 326).

As well as including contract conditions to obtain specific social or environmental benefits under the contract (or to limit its adverse impact) a different – or, often, additional – motive for such conditions is to promote the development and mass production of products with desirable social or environmental features. (As noted, governments may even make initial decisions on what projects to undertake for this reason). For example, a government may decide to purchase IT equipment with features that make it accessible to disabled users not merely for the benefit of employees and the public who use this

equipment but also to encourage the development and manufacture of affordable equipment that can be bought by the private sector (Boyle, 2009; Yukins, 2004). This is an additional reason for including such features as mandatory requirements of the specifications rather than merely as award criteria, since this may be necessary to guarantee a market.

There are various means available to secure compliance with contract conditions. First, contractual remedies may be available (which may, indeed, be the motivation for including the term as part of the contract). Often the remedies are simply those available under national contract law, which may include a right to terminate the contract, an order to compel performance and/or a right to compensation for violations (the nature and amount of which may depend on national contract law). General contractual remedies may, however, be difficult to exercise – for example a damages remedy may require specific and quantifiable damage to the government that is difficult to prove for breach of social conditions, whilst terminating the contract may be inconvenient because of the costs and delay. For this reason it may be useful to provide for suitable remedies directly in legislation (such as specific financial penalties) as has been done in South Africa, for enforcing contract requirements concerned with, *inter alia*, the involvement of disadvantaged groups in contracts: see Preferential Procurement Regulations 2001 pertaining to the Preferential Procurement Policy Framework Act: No 5 of 2000, Regulation 15.

In addition, to secure the benefits of the policy entities it may be appropriate to reject tenders that do not accept the conditions. Often entities will be obliged to do this under procurement laws that prohibit acceptance of any tenders that do not accept mandatory conditions.

An entity may also wish to exclude even tenderers who are *willing* to accept the requirement when the entity considers that the tenderer *cannot, or will not*, actually comply. This may be important because of the practical difficulties that may exist in exercising remedies for an actual violation. However, the possibility for rejecting contractors in advance increases discretion.

We can note that the EU's public sector procurement directive (Directive 2004/18/EC), which limits discretion in order to deter and

monitor discrimination, prohibits a public purchaser from excluding a contractor merely because the purchaser believes that the contractor is unable or unwilling to comply with workforce conditions in the contract, such as requirements to engage unemployed persons. This is apparently because of a concern over the increased discretion this entails. This position is criticised for elevating the commercial aspects of procurement above the social/environmental aspects by providing for stronger enforcement for the former than the latter: entities are generally permitted to exclude contractors that they believe cannot comply with the “commercial” elements of the contract, such as quality standards (Arrowsmith, 2009, section 8.1.4; McCrudden, 2007, chapters 16 and 17).

Packaging and Timing of Orders

Governments may also implement horizontal policies through the manner in which they place orders on the market, either through the way in which they package their requirements together and/or the timing of those requirements. This is a strategy often used to promote participation of Small and Medium Sized enterprises (SMEs) in public procurement (e.g. European Commission, 2008). For example, a large requirement may be divided into separate lots awarded at the same time or spread out over time to allow tendering for small amounts.

Such approaches may seek to enhance value for money by widening the market to include more firms – smaller as well as larger. However, they may also seek specifically to support SME development as an industrial policy objective. In the latter case any costs are mainly administrative costs, namely the additional costs of letting and administering a large number of smaller contracts rather than one large contract. (These costs can, if desired, be factored into the bid evaluation by considering them as an award criterion). However, governments may adopt such approaches even when they involve higher prices or other loss of value. For example, entities may package work in small amounts with separate award procedures even though it is recognised that this may lead to higher prices by deterring larger firms from tendering; or they may limit the amount of work that may be done by a single firm to promote SME participation even though this may mean rejecting tenders that offer better prices.

Set-Asides

Another mechanism for implementing horizontal policies is to limit participation to a particular group. This approach has been used, for example, to support workshops for prisoners and disabled persons. For example, the 2004 EU directives now expressly permit set-asides for workshops providing employment for persons with disabilities, by way of exception to a general prohibition on set-asides (Boyle 2009). Set-asides are also often used to provide economic opportunities for disadvantaged ethnic groups and SMEs. They are an important feature of the US government's policies to promote small businesses, in particular those owned by disadvantaged persons (Cibinic & Nash, 1998, Chapter 10).

Set-aside policies may be favoured by government both for their high visibility – through specific results in contracts awarded to the beneficiaries – and because their guaranteed and immediate allocation of contracts may produce rapid economic results. Governments can make set-asides more effective through contractual terms, such as a warranty that the contractor is eligible for the set aside.

However, set-asides can also involve a number of significant costs (International Trade Centre, 2000).

Thus costs may arise because of reduced competition combined with the fact that the targeted groups may not be as competitive as those excluded. Governments may be prepared to pay extra costs, or may attempt to eliminate them by allowing set-asides only when they can be operated on commercial terms. As with policies implemented through contract conditions, the procurement process itself will not provide precise information on the extra costs incurred. However, governments can to some extent retain the benefits of competition by holding a competition and then allowing the best bidder from the targeted group to provide the amount that has been set aside only if that bidder will match the best terms tendered (the “offer-back” approach). This approach was once used by the UK government for major contracts awarded to support workshops for the disabled (the “Priority Suppliers” scheme) although it was eventually abandoned because of restrictions imposed by EU law (Boyle, 2009).

Another problem with set-asides is that the targeted groups may have insufficient incentives to become competitive – and if one policy

objective is to develop industries or firms that are competitive in the wider market, procurement set-asides may then actually be counter-productive. Set-asides may also be introduced or maintained as a result of political pressure when they are not needed, leading to costs without concrete benefits.

In some cases, in particular when promoting a “national champion” or placing contracts strategically to maintain competition, contracts may be set aside not merely for a limited group but for specific firms. Contracts may also be allocated to specific firms without competition in other cases: Under the old UK scheme for supporting workshops for the disabled, the government allocated low value requirements to these workshops without competition when the government was satisfied that the supply was on commercial terms (Boyle, 2009).

Exclusion from Contracts for Non-Compliance with Government Policies

Another important mechanism for implementing horizontal policies is exclusion from contracts. Exclusion, or the threat of exclusion, may be used to encourage compliance with government policies and/or to penalise past violations.

Relating this mechanism to the first distinction in our taxonomy, we can note that as with many other procurement mechanisms, such as contractual conditions, exclusions may support general norms not limited to government contractors, such as those of the criminal law. The EU's mandatory exclusion of firms convicted of certain criminal offences and Northern Ireland's policy of excluding firms that violate obligations not to discriminate on grounds of religious or political belief - both discussed earlier - are examples of this.

Exclusions may also be used, however, to support norms laid down solely for government contractors. This, as previously noted, is the case with the US policy of excluding contractors that do not implement recruitment policies promoting workplace equality.

With regard to the second distinction in the taxonomy, exclusions (as again with some other mechanisms) may be limited to supporting compliance with norms relating to the contract awarded. Thus governments may exclude a firm merely to ensure that a contract is awarded only to a supplier that can perform certain contract

conditions (whether concerning consumption, delivery or production, disposal or the contract workforce) – for example, a condition that electricity supplied under the contract is from renewable sources. Exclusion may also, however, again be used as a tool to ensure compliance with requirements *not* limited to contract performance, as with the EU's mandatory exclusion provisions (which require exclusion for all past convictions) and the US policies promoting workplace equality. The government may also wish to use exclusion as a sanction for non-compliance with previous government contracts such as violation of previous contractual terms on fair working conditions. Failure to comply with past requirements may, of course, provide evidence of inability to comply in the future, and past non-compliance might be invoked to exclude for this reason, as well as by way of penalty for past violations.

A government may often wish to use both exclusions and contract conditions together. When a works contract includes requirements to engage the long-term unemployed on the contract both the threat of exclusion from future contracts and the availability of contractual remedies for violation may help induce compliance.

Exclusions may result in higher prices and/or a compromise of quality, both because they limit competition and because contractors that do compete may pass on compliance costs to the government. As with set-asides and contractual conditions, the precise costs may be difficult to assess. Further, the discretion involved may create scope for abuse: for example, exclusions may be abused to exclude firms that offer competition to a favoured supplier.

Nevertheless, exclusions can be useful. First, they allow governments to work closely with a limited group of firms on an on-going basis to improve practices – for example, on recruitment. Secondly, as with contractual conditions, they can be used to support existing legal norms, such as prohibitions on corruption, or other standards (including standards on human rights) when an explicit cost/benefit analysis through award criteria seems inappropriate because of the moral dimension. As with contract conditions, balancing of costs and benefits may also in practice occur through the exercise of discretion over whether or not to exclude. Even mandatory exclusions are often made subject to exceptions for public interest reasons, as is the case with the EU's mandatory exclusions for certain criminal convictions. Such exceptions could potentially be

based on cost considerations (although it is not clear that this is permitted under the EU's mandatory exclusions referred to above [see Williams, 2009]).

Preferences in Inviting Firms to Tender

In some procedures, entities may invite tenders from only a limited number of firms – for example, when the costs of evaluating many tenders will outweigh the benefits from greater competition, as permitted under the restricted tendering procedure under the Model Law on procurement of by the United Nations Commission on International Trade Law (UNCITRAL) (UNCITRAL, 1994, Article 20). Horizontal considerations might then be taken into account in deciding which firms to invite.

These considerations are most likely to concern the characteristics of suppliers – for example, preferences for inviting firms from poor regions or workshops for disabled persons. However, they could in theory also relate to firms' relative performance in complying with certain standards, such as fair recruitment standards, or be used in favour of firms considered likely to offer better social or environmental performance. As with award criteria, however, preferences might be considered unsuitable for addressing compliance with external norms, or with policies based on moral principles (such as use of child labour).

Using this mechanism need not affect other aspects of the procurement, such as price or quality, if it is used only when the qualified firms are otherwise equal. However, there may still be administrative or other costs. Further, value for money may also be affected if some firms are deterred from participating because of the reduced chance of being invited to tender.

Award Criteria

Another common approach to implementing horizontal policies is through award criteria – that is, by considering the relative merits of different tenders with regard to their social or environmental benefits when deciding which tender to accept.

Award criteria, like contract conditions, will often be limited to the performance of the contract. As with many other mechanisms they may concern consumption effects (for example, a preference for

wheelchair accessible buses), production or delivery effects such as a preference for products produced from recycled materials, disposal effects for example, a preference for tenders offering to take back the products for recycling) or workforce matters (for example, a preference for tenders offering contract work to the long-term unemployed). Criteria relating to workforce matters have been used in Northern Ireland where the government recently undertook a pilot project to examine the costs and benefit of such criteria. Under this project tenderers for selected projects were required to present an employment plan for hiring for work on the contract persons unemployed for more than three months. The quality of the plan was taken into account as an award criterion - although only when other aspects of tenders were equal (Erridge & Hennigan, 2006). The South African government has also used award criteria extensively to promote the development of disadvantaged groups (Bolton, 2007).

Award criteria can also, like many other mechanisms, relate to bidders' conduct beyond the contract, such as the merits of different firms' policies to combat discrimination in their general workforce. They can also concern the characteristics of the firm itself, such as whether it is owned by a disadvantaged ethnic minority or is located in a poor region, or the extent to which the supplier can offer offsets outside the contract.

Again, award criteria are not always suitable to support compliance with general legal norms, since it often seems inappropriate to weigh a contractor's compliance with the law overtly against cost and other considerations.

Various types of preferences at the award stage, according to the way in which they are implemented can also be distinguished as follows:

- i) One approach is a fixed price preference for tenders meeting certain minimum criteria. An example might be a 10% price preference for products made from recycled materials or for firms that can meet set requirements for providing work for the long-term unemployed. (As explained earlier, an entity could provide for such a programme as standard in bids but also allow firms to submit variant bids that do not include such a programme; it could then weigh the costs and benefits of each,

using award criterion that include both financial aspects and social benefits).

- ii) Another approach is to vary the preference according to the extent to which a firm offers horizontal benefits – for example, providing an ascending degree of preference according to *how many* unemployed persons the tenderer will engage. South Africa has followed this approach, providing for varying preferences according to the degree to which tenders engage certain disadvantaged groups on the contract (Bolton, 2007).
- iii) Finally, as with preferences in inviting firms to tender, horizontal benefits could be considered only when tenders are otherwise equal after applying other award criteria. This was the approach adopted in the Northern Ireland pilot project on unemployment referred to above. However, this may have limited impact since only rarely will other aspects be equal. (It was apparently chosen in Northern Ireland because the government considered that EU law allows “workforce” award criteria only when bids are otherwise equal, although this is a disputed interpretation of the law (Arrowsmith, 2009).

As already mentioned, award criteria can be combined with other approaches, such as setting minimum requirements as contract terms.

Using award criteria rather than other methods, such as exclusions or contractual conditions laid down for all participants, can provide a mechanism to assess the precise additional cost of horizontal policies – which will be reflected in the price and other terms of tenders – that may be more reliable than the authority’s own estimates (although we have seen that the costs of policies implemented through contract conditions can sometimes be established through use of variants). It also provides a mechanism to contain costs within parameters laid down in advance, through the weighting of criteria. For example, a weighting of 10% for social criteria sets clear limits on the proportion of the contract value that will be devoted to social or environmental benefits. Award criteria also allow for varying permutations of social/environmental and commercial features, according to which offers the best overall value for money, given the weighting placed on each one. (This applies where the authority uses the varying preference approach described

above). For all these reasons, award criteria may be preferred to other mechanisms.

The impact of award preferences will vary according to the competitiveness and structure of particular markets, but some general observations can be made on the potential costs (International Trade Centre, 2000).

One problem with award preferences to particular firms, such as disadvantaged minorities, is that, like some other mechanisms – although not necessarily to the same extent – they may involve awards to less efficient firms. Such firms are more likely to survive when the government segments the market with a price preference margin than when it segments the market with set-asides. In imperfect markets, award criteria may encourage firms to charge the government a higher price than they charge the private sector. As with set asides, there is also a danger that preferences will be applied when not necessary, giving rise to costs without corresponding benefits; this appears to have happened with set asides for small businesses in the United States. (See, for example, the review of the use of price preferences in certain US procurement measures in Federal Register Vol.63 No.125 at 35713). However, such policies do at least provide some incentives for the targeted suppliers to operate more efficiently to win contracts.

As in designing contractual requirements for maximum effectiveness, award criteria should focus on outcomes, and not be over-prescriptive in stipulating how benefits are to be achieved. In the same way as it may be useful not to specify precisely how unemployed persons should be used on a contract when their utilisation is specified as a contractual requirement (whether as employees, employees of sub-contractors, etc.), firms can be left free to propose how to use unemployed persons when this is taken into account as an award criterion.

Horizontal benefits offered in individual tenders can be included as contractual obligations. Where a firm offers to engage long-term unemployed persons above any required minimum, this commitment can be included as a contract term, thus making contractual remedies available to secure compliance. With award criteria based on the character of the contractor – for example, ownership by a disadvantaged group – the government may make the policy effective

by including a contractual warranty that the contractor meets the terms of the preference.

Measures for Improving Access to Government Contracts

A final approach comprises measures to facilitate access to contracts for certain groups without altering the conditions of competition (that is, without providing for favourable treatment in the competition) and without adjusting the government's requirements (for example, product features or timing of procurements). Governments may provide training on procurement procedures to SMEs or those from disadvantaged minority groups to help them learn about and access opportunities, but not give preferential treatment in tendering. Measures to simplify the procurement system and reduce burdens – for example, by allowing contractors to access contracts across government by completing a single questionnaire – also often aim to facilitate the participation of smaller and disadvantaged suppliers.

There may be costs in administering and financing such programmes. However, there is unlikely to be any adverse impact on value for money in the procurement itself – indeed, it is often an objective to improve value for money through fostering wider competition.

CONCLUDING REMARKS

This article has presented a taxonomy of horizontal policies in public procurement based on three key distinctions which are relevant regardless of the subject matter of the policy in question. The first is a distinction between policies that are limited to securing compliance with legal requirements and those that go beyond this; the second is a distinction between, measures applied only to the contract awarded are distinguished from those that go beyond this; and third nine different mechanisms by which horizontal policies are applied in procurement are identified.

As briefly explained, the different approaches and mechanisms used present various issues and challenges in terms of their transparency, legitimacy and effectiveness, as well as in terms of impact on the interests of government contractors and on international trade. The legal and policy questions that arise in this

area are challenging ones that are not easily answered. However, an understanding of the different variations and nuances of horizontal policies can help illuminate the choices to be made and so facilitate sound development of law and policy in this field.

NOTES

1. This article is based on chapter 3 of Arrowsmith, S. and Kunzlik, P. (Eds.) (2009). *Social and Environmental Policies in EC Procurement: New Directives and New Directions* (Cambridge, UK: CUP), which provides a slightly more detailed and nuanced version of the taxonomy set out here.

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