

EWLA

General Assembly Resolution

on

Combating Gender Discrimination and Promoting Substantive Gender Equality through Public Procurement

May 12, 2007

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The General Assembly of the European Women Lawyers Association (EWLA), held on May 12, 2007 in Zurich, Switzerland, unanimously adopted the following

RESOLUTION ON COMBATING GENDER DISCRIMINATION AND PROMOTING SUBSTANTIVE GENDER EQUALITY THROUGH PUBLIC PROCUREMENT

Having regard to

- the principle of substantive equality between men and women, which is one of the constitutional principles upon which the European Union is built and a positive obligation of its institutions and Member States, as proclaimed by Articles 2 and 3(2) EC¹ and reaffirmed by Article 23 of the EU Charter of Fundamental Rights and Articles 3 and 4 of the UN Convention on the Elimination of Discrimination against Women (CEDAW) which binds all EU Member States and is a source of fundamental rights to be respected by the EU as well;
- the fact that one of the objectives of the European Community is to ensure substantive equality between men and women (Article 2 EC), and the concomitant obligation of the EC to realize it in all areas falling within the EC powers pursuant to Article 3 (2) EC;
- Recitals 1 of the Public Procurement Directives 2004/17/EC² and 2004/18/EC³ emphasising, in principle, the legality of awards criteria intending to meet public needs in the social area;
- Recital 54 of Directive 2004/17/EC and Recital 43 of Directive 2004/18/EC emphasising that the non-observance of national provisions implementing the Framework Directive 2000/78/EC on equal treatment in employment and occupation and Directive 76/207/EEC on equal treatment of men and women in employment may be considered an offence concerning the professional conduct of an economic operator;
- Article 38 of Directive 2004/17/EC and Article 26 of Directive 2004/18/EC, providing that contracting authorities may lay down special conditions relating to the performance of a contract, in particular social considerations;
- the case law of the European Court of Justice, notably the judgments in the cases of *Beentjes*, *Commission v. France*, *Concordia Bus*, and *Wienstrom*;⁴
- the “Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement”,⁵

EWLA recommends to the Member States of the European Union

1. to include in their public procurement legislation a provision that contractors and sub-contractors shall respect the principles of equal pay for men and women and non-discrimination of men and women and to promote substantive gender equality;

¹ See also the preamble to Directive 2002/73, 4th recital, [2002] O.J. L 269/15.

² Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, [2004] O.J. No. L 134/1.

³ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public work contracts, public supply contracts and public services contracts, [2004] O.J. No. L 134/114.

⁴ *Beentjes*, Case No. 31/87, [1988] E.C.R. 4635; *Commission v. France (Nord-Pas-de-Calais)*, Case No. C-255/98, [2000] E.C.R. I-7445; *Concordia Bus v. City of Helsinki and HKL*, Case No. 513/99, [2002] E.C.R. I-7213; *Wienstrom*, [2003] E.C.R. I-14527.

⁵ COM(2001) 566 fin., [2001] O.J. No. C 333/27.

2. to increase the use of public procurement legislation for realizing substantive equality between men and women. For this purpose, Member States should
 - a) oblige contracting authorities to lay down special conditions relating to the contract that concern equality between men and women;
 - b) introduce effective, proportionate, and dissuasive sanctions in case of violations of gender equality provisions by the tenderer who is awarded the contract. Such sanctions should, in particular, include the publication of such violations by successful tenderers and the sanctions imposed.

Moreover, Member States should ensure that in cases where there are several tenders that are equally economically advantageous the contract is awarded to

- c) the tenderer that has developed and implemented a programme of promoting gender equality within its workforce;
 - d) the tenderer on the basis of gender equality in relation to company ownership; or
 - e) the tenderer on the basis of balanced representation of women and men in its workforce.
3. Furthermore, EWLA recommends that Member States
 - a) gather statistics on the respect and promotion of gender equality in public procurement, in particular concerning the award of tenders and the distribution of public funds through public procurement;
 - b) set up effective monitoring mechanisms, including random inspections, to control respect for gender equality law by contractors, and provide sufficient financial means for such supervisory bodies.

EWLA calls upon the European Commission

1. to prepare a study on best practices in Europe and elsewhere on ways of using public procurement law to fight gender discrimination and promote substantive gender equality;
2. to prepare, on this basis, recommendations to the Member States on combating gender discrimination and promoting substantive gender equality through public procurement;
3. to monitor compliance of the EU Member States with its recommendations;
4. to gather statistics on the respect and promotion of gender equality in public procurement, in particular concerning the award of tenders and the distribution of public funds through public procurement;
5. to introduce, in case of wide-spread non-compliance, legislation obliging Member States to make respect for the principles of equal pay for men and women and for non-discrimination between the sexes in all working conditions, including hiring and promotion, as well as promotion of substantive gender equality binding conditions for awarding contracts.