
Parliamentary year 2009-2010

30 196 **Sustainable development and policy**

No. 82 **WRITTEN STATEMENT BY THE MINISTER OF HOUSING, SPATIAL PLANNING AND THE ENVIRONMENT, THE MINISTER OF SOCIAL AFFAIRS AND EMPLOYMENT, AND THE MINISTER FOR DEVELOPMENT COOPERATION**

To the Speaker of the Lower House of Parliament

The Hague, 16 October 2009

On various fronts, the current administration continues to demonstrate that ‘working together, living together’ also implies that, where possible, one should seek to improve conditions in other countries than the Netherlands. The way that people live together cannot be regarded as sustainable when people’s fundamental rights are being violated on a daily basis. The choices that we make in the context of procurement are relevant in this context. The government accordingly pursues a policy of sustainable public procurement, which involves making carefully considered choices intended to help increase the markets for sustainable products and to serve as an example to others. The cabinet memorandum of 23 May 2008¹ indicated that, within its sustainable procurement policy, the government intended to establish a generic approach to promote international social standards, which placed the emphasis on realising improvements in the supply chain. This written statement describes how, by doing so, the Netherlands will take the lead in this field within Europe. The relationship between public procurement and international social standards is being examined at the European level as well, and the Netherlands is contributing actively to the ongoing debate. For the short term, the European Commission has defined the basic parameters on the basis of the Procurement Directive, while leaving member states to define their own national policies. The Dutch national approach described in this document is to remain in effect until 2012; it will be evaluated in good time and the House will be duly informed of the outcome.

By adopting the social criteria referred to in this written statement, the cabinet is seeking to tie in with existing policy activities, such as diplomacy and activity within multilateral organisations, ethical trading, and the encouragement of new supply chain initiatives through the Sustainable Trade Initiative. Other initiatives, such as the establishment of ‘fair trade municipalities’, are taking place at the local level. Using public procurement as

¹ Parliamentary Document II, 2007–2008, 30 196, no. 33.

a vehicle for the pursuit of policy objectives enables the government to make certain choices. Thus, the cabinet has chosen to apply fundamental labour standards and human rights on a generic basis (i.e. in a uniform manner in all public procurement) in order to realise improvements in the supply chain (process-oriented approach). For a limited amount of products, for which community-supported supply chain initiatives already exist, appropriate supplementary standards will apply in relation to liveable wages/income (or fair trade), working hours, and occupational health and safety. The relevant standards are described in the appendix.

The approach is designed to be as simple as possible for both contracting authorities and suppliers, and to be consistent with actual practice. It will apply only to large contracts.¹ In the context of public procurement, the business community will be held accountable for the way it discharges its supply chain responsibilities with regard to the product, work or service it delivers. Because sustainability is a dynamic process, the government cannot identify and retain a complete overview of all the risks associated with all supply chains. However, in certain circumstances, it is possible for the government, in its role as contracting authority, to indicate in the criteria documents for a particular product group that certain labour standards or human rights are not respected in a particular country. Other sources of risk-related information are also available.

Three scenarios are possible:

- If the supplier does not anticipate any risks, the supplier can make a statement to that effect and the statement can be trustfully accepted by the contracting authority (unless the latter has reason to do otherwise).
- If the risks in the supply chain are monitored by a supply chain initiative, it will be sufficient for the supplier to provide a certificate or otherwise demonstrate membership of the initiative. The government will draw up a list of *supply chain initiatives* that satisfy a number of conditions.
- In all other cases, the supplier is expected to make a *reasonable endeavour* to ensure that the standards are adhered to, which may involve subscribing to the standards, undertaking supply chain risk analysis, and acting to minimise any identified risks and exclude unacceptable practices. A supplier should take account of *alerts* from the community. Where unacceptable practices are actually observed, the supplier is required to take *urgent action*. Furthermore, either in connection with each contract or in its annual (social) report, the supplier should subsequently *report* the action undertaken to manage the supply chain and ensure ethical international trading, as recommended by the Social and Economic Council of the Netherlands (SER).²
- If supplementary standards apply to a product group, or if specific risks have been identified, the supplier should also indicate, when starting to fulfil the contract, whether the generic and supplementary standards and risk reports are relevant in the context of the contract, and what is being done to contain or manage the risks ('plan of action').

The appendix includes an itemised summary of the steps that the contracting authority and supplier are expected to take, as well as definitions of the italicised terms.

On the basis of the procurement regulations, the legal form adopted for this approach is what is known as 'special conditions for fulfilment of the contract'. The special conditions are to be included in the contract and are not to be used for pre-contract selection. Hence any potential supplier that is willing to accept the conditions may tender for the

¹ In line with the proportionality principle, this policy will apply at the national level only to contracts whose value exceeds the thresholds defined in European procurement regulations (€ 133 000 for goods and services, € 5 150 000 for works). Other levels of government must decide for themselves what thresholds to adopt.

² SER statement on ethical international trading, December 2008.

contract. Furthermore, because the policy is confined to large contracts, the administrative and other implications for the supplier and contracting authority are, in the cabinet's view, justifiable. The social criteria will be considered in the survey of administrative and intergovernmental burdens announced in the Sustainable Procurement Progress Report¹ and will be included in the request for advice made to the Business Regulatory Burdens Commission. The resulting recommendations will be taken into account in the implementation, if possible from the outset.

The cabinet is convinced that actual practice in an imperfect world, where it cannot be guaranteed that a complex supply chain is risk-free, will improve from the approach that we are now introducing. We expect the new approach to strengthen the social process driving the development of markets for sustainable products – especially if other countries follow our lead – and to encourage the establishment of supply chain initiatives. It is not socially acceptable for governmental bodies in the Netherlands to procure goods and services whose supply involves the infringement of the fundamental rights of people in other countries. The policy outlined in this statement provides a framework for the consistent and targeted application of this principle. Other levels of government (municipalities, regions) will be asked to subscribe to the approach defined by the cabinet.

This written statement defines the basic parameters of the new policy. It has yet to be decided what supplementary ILO standards will apply to which products and product groups. In addition, legally validated wording has yet to be devised for inclusion in all purchase contracts. The intention is also to include the contract conditions in the model public contracts. The Sustainable Procurement Criteria Documents, which already include the environmental criteria, will be modified to include information relevant to application of the social criteria, such as details of the supplementary standards that apply to the product group in question. This will mean that contracting authorities have a single reference source for all the information needed for sustainable procurement. In the context of these follow-up activities, the legal viability as well as the practicality of each measure will be major parameters for assessment.

In order to apply the social criteria, both contracting authorities and suppliers will need to acquire additional knowledge and competencies as needed. A communication programme will be established to help contracting authorities apply the new approach in practice. Suppliers will be able to make use of the information made available in this context as well. They will also be able to draw on the growing body of information about ethical trading that is in the public domain, such as that available from the websites of trade associations, employers' groups, and community organisations, or published by CSR Netherlands, the Agency for International Business and Cooperation (EVD), international databanks, and so forth.

It is anticipated that the finalised social criteria will be available to governmental bodies early in 2010, at which time their practical implementation may begin.

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The Minister of Social Affairs and Employment,
J.P.H. Donner

The Minister for Development Cooperation,
A.G. Koenders

¹ Parliamentary Document II, 2008–2009, 30 196, no. 64.

Appendix

The international social standards to be adopted and applied

The following *generic standards* apply to *all* product groups (even if they do not immediately appear relevant):

- The fundamental labour standards, as defined by the International Labour Organisation (ILO) in the following conventions:¹
 - The conventions on the abolition of forced labour and slavery (29, 105)
 - The conventions on protection against discrimination in employment and occupation (100, 111)
 - The conventions on the abolition of child labour (138, 182)
 - The conventions on the freedom of association and protection of the right to organise (87, 98)²
- The Universal Declaration of Human Rights (UDHR) and its implementations in binding treaties (such as BuPo and Esocul), insofar as relevant to labour and commerce. The cabinet has deliberately avoided any adaptation or specification of the relevant principles.

For *some* product groups, *supplementary standards* will apply. The product groups in question are those that consist of a relatively small number of products for which the standards are relevant and which are covered by multi-stakeholder supply chain initiatives that enable suppliers to effectively and reliably assess compliance with these standards and enforce them. Products to which supplementary standards apply are likely to include coffee, tea, cocoa, textiles, flowers and natural stone.³ The government will decide shortly which products will be covered by which of the following supplementary standards in the period up to 2012.

- The ILO's labour standards – which are widely regarded around the world as the most authoritative definition of workers' fundamental rights and as such are incorporated into various international codes of conduct – as set out in the following conventions:
 - The conventions on 'liveable' wages (26, 95, 131 and UDHR article 23)
 - The Hours of Work (Industry) Convention (1)
 - The Occupational Safety and Health Convention (155)
- Liveable income (as an equivalent of liveable wages): the income (or profit) that is sufficient to provide (agricultural) producers with the basic necessities of life plus a certain disposable income.
- The following fair trade standards,⁴ collectively:
 - A minimum price,⁵ payable to the producer, regardless of the market price.
 - Advance funding of the producer, to the tune of up to 60 per cent of the contract value, available on the producer's request.

Where relevant, it will be left to the contracting authority to choose between including the fair trade standards and the liveable wages/income standards in the contract conditions.⁶ The main difference between the two standards is that a minimum price affords

¹ Compliance is required with the general import of the cited labour standards, rather than with the specific treaty obligations, since the obligations in question are those of states rather than traders.

² Where such rights are limited by law, alternative solutions with a similar effect are to be given.

³ Wood is not included in this list, since it is covered by a separate policy initiative.

⁴ The standards referred to are based on those of, but are not exclusively applicable by the members of, the Fair Trade Labelling Organisations International.

⁵ The price that has been determined by a supply chain initiative to be the minimum required to cover the cost of sustainable production and to sustainably support the producers (typically cooperatives or plantations) and, where relevant, their employees, as well as covering development programme costs.

⁶ The cited standards are relevant in relation to the payment of a fair price, as referred to in the cabinet agenda 2015 for realisation of the Millennium Objectives (Parliamentary Document 31 105, no. 1).

producers more protection when global market prices are low. Contracting authorities will be provided with qualitative information to help them to decide when it is reasonable to opt for 'fair trade' ahead of 'liveable income' at times of depressed global trade prices. It has yet to be determined exactly how these arrangements will be applied in practice.

The terminology of the social criteria for sustainable procurement

Supply chain initiatives

Increasingly, responsibility for supply chains is being exercised through multi-stakeholder initiatives. These are initiatives in the context of which various stakeholders are represented, including businesses, unions and NGOs. A code of conduct applies and there is usually a system of independent verification. A supply chain initiative provides certain guarantees that the social criteria are satisfied. The government will publish a list of recognised supply chain initiatives that meet the following conditions:

1. Relevant stakeholders, such as producers, suppliers, employers, employees / employees' organisations and NGOs are represented, preferably in the structure of the initiative.¹ No one stakeholder group has a dominant position in the initiative.
2. The initiative seeks at least to ensure that the ILO's fundamental labour standards are upheld and does not interpret these standards weakly.
3. The design of the initiative provides for reliable verification of suppliers' implementation of the standards within their own businesses and in their supply chains.
4. The initiative publishes an annual report.

If supplementary standards apply to a given product, the associated supply chain initiative should cover the relevant supplementary standards. When considering supply chain initiatives for recognition, the government will consult its social partners regarding the ILO standards by following the usual ILO procedure. The list of recognised initiatives will be regularly updated in accordance with a protocol that will be defined in due course.

Risk analysis

In countries with adequate social institutions, such as an active and well-equipped labour inspectorate, strong unions, and an effective system of law and order, the need for suppliers to make checks and promote improvement will not be as great as in countries with weak social institutions. Suppliers have the scope to make their own risk assessments and, on the basis of their conclusions, to concentrate their influence on countries and regions where it will have the greatest effect. Risk analysis of this kind is of value mainly when the supplier works with large numbers of upstream suppliers and producers, and when those parties are distributed across numerous regions.² The supplier will decide how to utilise the risk analysis tool. Risk analyses should, where possible, be developed in consultation with the relevant stakeholders.

It is worth noting that information about the ethical trading issues associated with various countries is already available. There are, for example, 'ethical trading toolkits' for thirteen countries, which have been developed for the government and are available from the EVD website. Reports published by NGOs and unions can also be useful in flagging up apparent human or labour rights abuses in the supply chain.

¹ The legal viability of requiring that stakeholders are included in the structure of the supply chain initiative will be investigated. If such a requirement is not legally enforceable, stakeholder involvement will be assured by some other means.

² De International Chamber of Commerce supports this approach and takes the view that risk analysis may entail estimating the likelihood of rights abuses in a given production region and the scope for realising improvement. SER Advisory Report on Sustainable Globalisation, 2008, p. 293.

Reasonable endeavour

Suppliers are expected to make a reasonable endeavour to ensure that the standards are upheld. The individual supplier is in the first instance responsible for determining what is reasonable. As emphasised in the written statement made to the Lower House in December 2008 under the title *Kansen door ketenverantwoordelijkheid (Opportunities afforded by Supply Chain Responsibility)*, Parliamentary Document 26 485, no. 62), the exercise of supply chain responsibility has to be tailored to the individual circumstances. Supply chains differ widely. To operate responsibly, it is essential for a business to have proper insight into its supply chain. The individual supplier has to determine how far into the supply chain results can and should be achieved and what degree of improvement should be sought where the standards are not being upheld. Nevertheless, as the SER has indicated,¹ it is reasonable to expect the greatest commitment from those suppliers that have most frequent and closest contact with their upstream suppliers and that have the greatest insight into the circumstances under which the upstream suppliers operate. The size of the contract and the negotiating strength of the various parties in the supply chain are also important in determining what is reasonable. A supplier may always be expected to make full use of whatever influence it has over the supply chain to take its responsibility. In some countries, certain standards, such as the freedom of association, are not recognised in law. Where this is the case, a supplier should seek to work through its trading contacts to promote improvement. Around the world, various enterprises and initiatives have already developed mechanisms to this end.

Alerts

Any party with an interest in compliance with the standards, such as a community organisation based in the Netherlands or in a country where production takes place, may alert a supplier to possible compliance problems in the relevant supply chain. An alert may be based on a social organisation's investigations or on information in the public domain. A party that observes a possible problem is advised to alert not only the supplier, but also the contracting authority and, where relevant, the supply chain initiative.

Urgent action

If it is discovered or suspected that a fundamental labour standard is not being upheld in the supply chain, the supplier is expected to take urgent action within its sphere of influence. To this end, the supplier should make immediate contact with its contracted upstream supplier with a view to ascertaining whether standards are indeed being breached and, if so, identifying a solution for the business where the problems exist as well as for the local stakeholders. Where necessary, the supplier should ask its contracted upstream supplier to put forward a plan for realising improvement within a specified timeframe. If the business where the problems exist demonstrably refuses to enter into dialogue or seek a solution, the supplier should cancel its contract with the upstream supplier. To enable influence to be exercised, suppliers are advised to make appropriate provisions in the conditions of supply, requiring upstream suppliers to adhere to the generic and, where relevant, supplementary standards and to make similar requirements of their own suppliers.

¹ SER, Declaration on International Corporate Social Responsibility, 2008.

Reporting

In its role as contracting authority, the government will ask its suppliers to submit annual reports on the steps taken to manage their supply chains and to ensure that international trade is ethical. A supplier will have the choice of reporting in connection with each contract or in its annual report. The report should cover the supplier's policy, the supervision of compliance with that policy, the actual situation in the supplier's supply chain, and the action accordingly taken. The report should enable the contracting authority as well as other stakeholders to assess the supplier's fulfilment of its contractual obligation to uphold the social criteria. To this end, the report should be made public. It may be written in English or Dutch and may be formatted as the supplier sees fit. However, a simple model will be developed as guidance for those suppliers that do not produce annual reports.

Contracting authority's and supplier's activities

Contracting authority

Tendering phase:

- The contract conditions stipulated by the contracting authority are to include provisions relating to the generic standards and, where relevant, to the supplementary standards and specific higher-risk countries (as indicated in the criteria document for the relevant product group) and possibly the contracting authority's own risk information.
- The contracting authority must publish the contract conditions when the contract is awarded (already obligatory).

Contract phase:

- The contracting authority must ensure prompt receipt from the supplier of either the supplier's own declaration or, where relevant, the details of the planned supply chain supervision activities and (annual) report(s), and must assess these documents.
- The contracting authority must be open to reports ('alerts') from community groups regarding apparent shortcomings in the implementation of the contract conditions by the supplier.
- Where appropriate, the contracting authority may, under the terms of the contract and in response to information provided in the supplier's declaration or report(s), or to alerts received from community groups take the following escalating forms of action:
 - a. Ask the supplier for an explanation. Where the contracting authority regards the matter as serious, the contracting authority is obliged to ask for a speedy public response.
 - b. Require the supplier to provide details of the planned supply chain supervision activities and/or reporting activities.
 - c. Obtain external advice.
 - d. Conduct an investigation. Before conducting an investigation, the contracting authority must give the supplier the opportunity to discharge its primary responsibility by responding to any alert. The investigation may involve a producer audit; it is to be carried out at the contracting authority's expense. The contracting authority and supplier are expected to seek agreement regarding the action to be taken to secure improvement.
 - e. Treat the situation as breach of contract or default. If all other options for resolution have been exhausted, the contracting authority is entitled to resort to the statutory sanctions associated with breach of contract.

Supplier

Tendering phase:

No activities.

Contract phase:

- A. The supplier has to make a declaration undertaking to uphold the standards applicable to the product group. (A model declaration will be made available, based on the SER declaration referred to above.)
- B1. If only the generic standards apply:
- If the supplier is affiliated to a recognised supply chain initiative, the supplier may simply provide a certificate or evidence of membership. The other conditions will then cease to apply, since compliance with them will be assumed to be taken care of by the supply chain initiative.

- If the supplier does not anticipate any risks, the supplier can make a statement to that effect. This is likely to be the case with numerous product groups whose (upstream) suppliers are in low-risk countries. In such cases, the only further conditions that will apply will be conditions D and E.
- If risks are known to exist, or the risk position is not clear, conditions C to F must be complied with.

B2. If supplementary standards or specific reports also apply:

- If the supplier is affiliated to a recognised supply chain initiative that supervises compliance with the supplementary standards, the supplier may simply provide a certificate or evidence of membership. The other conditions will then cease to apply, since compliance with them will be assumed to be taken care of by the supply chain initiative.
- If, nevertheless, the supplier does not anticipate any risks in this particular case, the supplier is able to state its reasons for holding that view. If the contracting authority accepts the supplier's view, the contracting authority may waive the need to satisfy conditions C and F. Conditions D and E will remain effective, however.
- In other cases, the supplier should, within a month of the contract's closure, publicly state how conditions C and D are to be met (in a supply chain supervision activity plan). The contracting authority may discuss the content of this plan with the supplier. Conditions C to F remain effective. *Note: No supply chain supervision activity plan is required in relation to direct-supply contracts.*

C. Conditions that apply during the contract implementation period ('reasonable endeavour'):

- The supplier must be ready to perform a risk analysis at any time. If such an analysis reveals no reason to anticipate (residual) risks, the remainder of condition C will not apply.
- The supplier must demonstrably act to uphold the standards that apply in relation to the relevant product group, both within the supplier's own business and in the supply chain.
- The supplier must at least endeavour to have the standards incorporated into the trade conditions governing upstream suppliers and producers ('apply or explain');
- The supplier must make improvements wherever necessary and possible. A supplier may always be expected to make full use of whatever influence it has over the supply chain. The degree of a supplier's influence is determined by various factors, such as the negotiating strength of the various parties in the supply chain, and the complexity, length and transparency of the supply chain. The supplier may devote available resources to the pursuit of improvements in the manner that the supplier sees fit, in the light of its risk analysis.
- The supplier must systematically monitor progress in the supply chain in relation to the standards.

D. The supplier must be open to and take account of alerts received from community groups concerning possible non-compliance with the standards.

E. The supplier must take urgent action if any infringement of a fundamental labour standard comes to light. See also the section headed 'Urgent action'.

F. Once a year, either in connection with each contract or in its annual (social) report, the supplier must report the action undertaken to manage the supply chain and ensure ethical international trading. If the relevant information is presented in the

annual report, the supply of goods, works or services to the government must be included in the activities on which the supplier reports.

Circumstances may sometimes change, thus invalidating the supplier's earlier declaration that no (residual) risks are envisaged. If that happens, the supplier must report the developments in question, whereupon satisfaction of the appropriate conditions will once more be necessary.