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#ЕУ ЗА ТЕБЕ

EU Support for further improvement of Public Procurement system in Serbia

GUIDELINES ON GREEN PUBLIC PROCUREMENT

HOW TO APPLY ENVIRONMENTAL CONSIDERATIONS IN PUBLIC PROCUREMENT

December 2019, Belgrade

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giz International Services
KPMG
EU Support for Further Improvement of Public Procurement System in Serbia

Support for further improvement of
Public Procurement system in Serbia
Gračanička 8
11000 Belgrade

Information about the Project

This paper has been prepared within a framework of the project "Support for Further Improvement of Public Procurement System in Serbia" which is funded by the European Union and implemented by a consortium led by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH.

The main purpose of the project is to support the strengthening and developing of a stable, transparent and competitive public procurement system in the Republic of Serbia in accordance with EU standards, including improved implementation of the public procurement strategic and policy framework for an effective and accountable public procurement system.

The results required from the project include:

- strengthened and further developed the strategic, legal and institutional framework for public procurement aligned with the EU legislation,
- improved implementation of regulations in area of public procurement in practice
- E-procurement platform developed and established and
- strengthened capacities and professional skills of the Serbian Public Procurement Office and other relevant target groups.

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Introduction

Green public procurement is defined as "*a process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life-cycle when compared to goods, services and works with the same primary function that would otherwise be procured*".[1] The way how natural resources are consumed currently in Europe is causing environmental damage at a rate that cannot be longer sustained. It is estimated that if the world as a whole would follow the European pattern of consumption, global resource use could quadruple within 20 years. This trend could also threaten economic growth due to decreasing natural resources and the costs of addressing those issues.

The public sector is the largest consumer in the economy. Government expenditure on works, goods and services represents in the European Union around 14% of EU GDP, accounting for roughly EUR 1,8 trillion annually[2]. In Serbia, approximately EUR 3 billion is spent every year on public procurement which is around 14% of country GDP [3].

Green public procurement (for short, 'GPP') is thus an important tool to achieve environmental policy goals relating to climate change, resource use and sustainable consumption and production – especially given the importance of public sector spending on goods and services. GPP policies aim to procure products and services that are more environment friendly. Examples of green procurement concern efficient computers, office furniture from sustainable timber, low energy buildings, recycled paper, cleaning services using ecologically sound products, electric, hybrid or low-emission vehicles as well as electricity from renewable energy sources

Public authorities should assume responsibility to take into account the environmental impacts of their activities. The current Public Procurement Law of the Republic of Serbia (the PPL)[4] identifies the principles of environment protection and energy efficiency as one of the core principles of public procurement. The PPL provides for a possibility of procuring goods, services and works with environmental and energy saving specifications and sets out the elements of contract award criteria which relate to environmental protection, energy efficiency and overall life cycle costs of the supplies. The PPL provides also for the exclusion from public procurement procedures of economic operators if they were convicted of environmental crimes.

There is no available, reliable data, showing how often environmental related aspects in public procurement are used in Serbia. Anecdotal evidence indicates that, notwithstanding legal possibilities, the contracting authorities rarely make recourse to those aspects in their public procurement procedures, mainly because of lack of knowledge, incentives to do so or because of fear that green products or services may be more expensive. To improve that situation it is necessary to better educate contracting authorities and to equip them with practical tools and examples facilitating application of green procurement in practice. The objective of this document is to analyse and explain what are possibilities of the existing and in particular the new Public Procurement Law[5] with regard to integration of environmental considerations into public procurement in Serbia.

1 European Commission: the Communication "Public procurement for a better environment" (COM (2008) 400, published on 16 July 2008.

2 https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en.

3 The official data of the Public Procurement Office of the Republic of Serbia.

4 Official Gazette of the Republic of Serbia, No. 124 of 29 December 2012, No. 14 of 4 February 2015 and No. 68 of 4 August 2015.

5 Official Gazette of the Republic of Serbia, No. 91 of 24 December 2019.

Advantages of green procurement

By using their purchasing power to choose goods, services and works with a reduced environmental impact, contracting authorities can make an important contribution towards local, regional, national and international sustainability goals. GPP can be a major driver for innovation, providing industry with real incentives for developing green products and services. This is particularly true in sectors where public purchasers represent a large share of the market (e.g. construction, health services, or transport). GPP may also provide financial savings for public authorities – especially if they consider the full life-cycle costs of a contract and not just the initial, purchase price. Purchasing energy-efficient or water-saving products for example, can help to significantly reduce utility bills. Reducing hazardous substances in products can cut their disposal costs. Authorities who implement GPP will be better equipped to meet evolving environmental challenges, for example to reduce greenhouse gas emissions or move towards a more circular economy[6].

There are numerous benefits of green procurement:

Political benefits

- it is an effective way to demonstrate public authorities' commitments to environmental protection and sustainable consumption and production

Environmental benefits

- it allows public authorities to achieve environmental targets
- it sets an example to private consumers
- it raises awareness of environmental issues in the society

Social/health benefits

- it can improve quality of life both directly and indirectly
- it helps to establish high environmental performance standards for products and services

Economic benefits

- it provides incentives for industry to innovate
- it promotes green products and environmental technologies
- it saves money when the life – cycle costing of products is considered

One of the misconceptions about green procurement is that green services and products are more expensive than traditional ones. Various studies show, however, that it is not necessarily the case. Green products can have a lower purchasing price as they have reduced impacts on the environment with often less energy and raw materials consumed and/or less waste generated.

Example:

The European Commission's study on the "*Costs and Benefits of Green Public Procurement in Europe*" found that the purchasing costs for public authorities of green (including 100% recycled and eco-certified copying paper) and non-green copying paper are very similar. In Germany, "green" versions of copying paper appeared to be significantly cheaper (23%). In Sweden, the same study showed that environmentally friendly floor care, sanitary and window cleaning products were all less expensive than their conventional counterparts (74%, 82% and 9%, respectively). Additionally, where a life-cycle costing

6 'Circular economy' is defined as economic system aimed at minimizing waste and making the most of resources.

approach is taken to competing products or services, greener alternatives may be cheaper even where the initial purchase price is higher.

The legal framework related to green procurement

The European Union rules

The legal framework for public procurement in the European Union is defined by the provisions of the Treaty on the functioning of the European Union (hereafter the Treaty) and by the EU Procurement Directives[7], as interpreted by the Court of Justice of the European Union ('Court of Justice'). From an international perspective, the EU is bound by the conditions of the Government Procurement Agreement (GPA) of the World Trade Organization (WTO), and by bilateral trade agreements. In addition to general EU public procurement legislation there is also sectoral legislation which refers only to specific types of procurement.

Sector-specific legislation creates mandatory obligations for the procurement of certain goods and services, for example by setting minimum energy-efficiency standards which must be applied. Mandatory obligations apply in the following sectors, in particular:

- **office IT equipment**: IT products purchased by central government authorities must meet the latest minimum energy efficiency requirements prescribed by the EU Energy Star Regulation[8]
- **road transport vehicles**: all contracting authorities must take into account the operational energy use and environmental impacts of vehicles as part of the procurement process. A common methodology for calculating lifetime operational costs is provided in Clean Vehicles Directive[9]
- **buildings**: minimum energy performance standards apply to public buildings, these are set at national level based on a common EU methodology. From 1 January 2019, all new buildings occupied and owned by public authorities must be "nearly zero-energy buildings"[10]. The Energy Efficiency Directive[11] also sets mandatory requirements regarding renovation of public buildings and purchase or new rental agreements meeting minimum energy-efficiency standards.

The Serbian provisions

The PPL envisages possibility of applying environmental considerations in public procurement and provides for a number of solutions related to green procurement (see for details below). The PPL will be replaced by the new Law on Public Procurement (the new PPL), transposing above – mentioned EU public procurement directives. The new PPL, which will become effective as of 1 July 2020[12], provides for even more instruments related to green procurement.

Both the current PPL and the new PPL enable public authorities to take environmental considerations into account. Article 13 of the PPL provides for the principle of environmental protection and ensuring energy

7 Mainly, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, and Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

8 Regulation No 106/2008 on a Community energy-efficiency labelling programme for office equipment.

9 Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles.

10 Directive 2010/31/EU on the energy performance of buildings.

11 Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC.

12 The new Public Procurement Law: http://eupodrska.ujn.gov.rs/wp-content/uploads/2019/12/PPL-OJ-91_2019.pdf.

efficiency. In accordance with this principle contracting authorities should procure non-polluting goods, services and works, or those having minimal influence on the environment, or those that ensure adequate decrease in energy consumption – energy efficiency.

Taking account of environmental considerations is possible during preparation of procurement processes, as part of the procurement process (procedure) itself, and in the performance of the contract. Rules regarding exclusion and selection of economic operators aim to ensure a minimum level of compliance with environmental law by contractors and sub-contractors. Techniques such as life-cycle costing, specification of sustainable production processes, and use of environmental award criteria are available to help contracting authorities identify environmentally preferable tenders.

In addition to the PPL the following specific legislation related to protection of environment should be mentioned:

- the Law on Environmental Protection,[13]
- the Law on Energy[14],
- the Law on Efficient Use of Energy[15].

In accordance with the Law on Efficient Use of Energy contracting authorities are obliged, in the public procurement procedures for goods, services and works, to take into account aspects of energy efficiency through the technical specification of goods, services and works and / or through criteria for selecting the best bidder of goods, services and works[16]. Contracting authorities are also obliged, in the procedures of public procurement of goods, services and works, to take into account the energy efficiency of goods, services and works while preparing tender documentation[17]. The Minister responsible for issues of energy is obliged to establish minimum criteria concerning energy efficiency in the procedure of public procurement of goods, services and works[18].

Accordingly, the rulebook concerning the minimum criteria concerning energy efficiency (EE) in in public procurement of goods[19] regulates minimum criteria to be applied in purchase of:

- office computer equipment,
- refrigerators and fridges with food freezer,
- air conditioning units and
- internal and external lighting.

Example:

On the basis of Article 15 of the Rulebook:

- non directional light bulbs intended for internal lighting meet the minimum EE criteria if they have an energy efficiency class A + or higher, or have an energy efficiency index of EEI ≤ 0.17, in accordance with the regulations governing the labeling of the energy efficiency of electric bulbs and lamps and the lifetime of at least 15,000 hours,

13 Official Gazette of the Republic of Serbia, No. 135/04, 36/09, 72/09.

14 Official Gazette of the Republic of Serbia, No. 145/2014.

15 Official Gazette of the Republic of Serbia No. 25/2013.

16 Article 69 (1).

17 Article 69 (2).

18 Article 69 (3).

19 Official Gazette of the Republic of Serbia No. 111/2015.

- directional light bulbs intended for internal lighting that are subject to public procurement meet the minimum EE criteria if they have an energy efficiency class A + or higher, or have an energy efficiency index of EEI ≤ 0.18, in accordance with the regulations governing the labeling of energy efficiency of electric bulbs and lamps and lifetime of at least 15,000 hours.

Choosing proper procurement procedure

The preparatory stage of any procurement procedure is crucial from the perspective of green procurement. When choosing a specific procedure, contracting authorities should consider at what stages they will be able to apply environmental considerations. In accordance with both the PPL and the new PPL contracting authorities have a wide plethora of procedures to choose from.

Open procedures

In an open procedure, any economic operator may submit a tender[20]. All tenderers who meet the pass/fail conditions specified by the contracting authority will be eligible to have their tender assessed. Contracting authorities have access to the maximum choice of potential environmentally friendly solutions – but they are not able to select who to invite to tender based on their environmental technical capacity, for example.

Restricted procedures

In a restricted procedure, which is a two-stage procedure, contracting authorities can assess environmental technical capacity in a stage prior to tendering stage[21]. Only those economic operators who meet specific requirements are in such a case invited to submit tenders[22]. Contracting authorities may apply also so called short - listing and limit the number of economic operators to invite to tender[23]. Short – listing consists in selecting, from amongst qualified economic operators, a limited number of those who will be invited to tender. A minimum number of five economic operators must be invited to tender, provided there are sufficient suitable candidates[24]. Due to its staged structure the restricted procedure may help contracting authorities to determine the appropriate level of environmental performance to aim for in their specifications, award criteria and contract performance clauses. By limiting the number of tenderers, however, the contracting authority may also miss out on offers with high environmental performance.

Competitive procedures with negotiation and competitive dialogue

The competitive procedure with negotiations (which is introduced by the new PPL)[25] and competitive dialogue[26] can be used by contracting authorities for purchases which require an element of adaptation of existing solutions, design or innovation, or in certain other circumstances[27].

These procedures may offer advantages in the context of GPP, as they introduce elements of flexibility not available in the open and restricted procedures and may allow for the effect of environmental requirements on cost to be better understood and controlled. However, both procedures require some level of skill and experience in engaging with economic operators if the best results are to be achieved.

20 Article 32 of the PPL and Article 52 (1) of the new PPL.

21 Article 33 (1) of the PPL and Article 53 (1) of the new PPL.

22 Article 33 (4) of the PPL and Article 53 (1) of the new PPL.

23 Article 53 (6) of the new PPL.

24 Article 64 (2) of the new PPL.

25 Article 55 of the new PPL.

26 Article 37 of the PPL and Article 57 of the new PPL.

27 Article 55 (1) of the new PPL.

Innovation partnership

The new PPL introduces an entirely new procedure – the innovation partnership. Accordingly, where a contracting authority wishes to purchase goods or services, which are not currently available on the market, it may establish an innovation partnership[28] with one or more partners. This allows for the research and development (R&D), piloting and subsequent purchase of a new product, service or work, by establishing a structured partnership. It may be particularly suitable where the current state-of-the-art in a sector is not sufficiently advanced to meet environmental challenges identified by a public authority, such as the need for adaptation to climate change or management of natural resources.

Each of the above-mentioned procedures includes a number of steps where environmental considerations can be applied:

- definition of a subject-matter of public procurement and technical specifications
- selection and exclusion criteria (e.g. compliance with environmental laws, technical and professional ability)
- award criteria, and
- contract performance clauses.

Those steps will be discussed below.

Defining the subject – matter of public procurement

The 'subject-matter' of public procurement is about what product, service or work the contracting authority wants to procure. This process of determination will generally result in a detailed description of the product, service or work by means of technical specifications, but it can also take the form of a functional or performance-based definition. In principle, contracting authorities are free to define the subject of the contract in any way that meets their specific needs. Public procurement legislation is less concerned with what contracting authorities buy, than how they buy it. For that reason, in principle, the PPL does not restrict the subject-matter of a contract as such. Exception could be found in Article 13 of the PPL which in accordance with above – mentioned principle of environmental protection and ensuring energy efficiency requires from contracting authorities to procure non-polluting goods, services and works, or those having minimal influence on the environment.

Note:

The possibilities for taking into account of environmental considerations will differ according to the different types of subject matter of public procurement.

In the case of **works**, the contract covers not only the final product, the work, but also the design and execution of the works. The best opportunity for contracting authorities to take into consideration environmental concerns are to be found in the phase of the design. Contracting authorities could give clear instructions to the architects and/or engineers to design for example, a low – energy consuming administrative building, not only taking account of insulation and the use of specific constructions materials, but also the installation of solar cells for generation of warmth. The contracting authorities could equally require that the building be designed so that the use of lifts is necessary only to a limited extent and the orientation of offices limits the use of artificial light.

As regards **service** contracts, the nature of those contracts allows also for a possibility to prescribe a mode of performing. Contracting authorities could, for example, insist on specific method of building cleaning, using only those materials which are less harmful for the environment. They could also define that, for

[28] Article 59 (1) of the new PPL.

instance, public transport services are to be carried out by electric buses as well as prescribe the method for the collections of household waste.

Supply contracts relate, generally, to the purchase of final or end products. Therefore, the possibilities to take into account environmental considerations are not that extensive as in the case of works or services. The contracting authorities may, however, have certain requirements concerning process of production (see below).

Important:

In some cases the choice of a specific product, service or work may distort the level playing-field in public procurement procedures. In order to avoid this there are some safeguards imposed by public procurement provisions.

- First, the general principle of non-discrimination applies[29]. In practice, this means that contracting authorities have to ensure that their definition of the contract does not affect access to the tender by other economic operators, be they national or from abroad[30].
- A second safeguard is that, according to public procurement rules, technical specifications must not create unjustified obstacles to competition. Contracting authorities should ensure as much competition as possible in public procurement procedures. In particular, contracting authorities may not restrict competition with the intention of unduly favouring or disadvantaging certain economic operators, and, in particular, may not prevent any economic operator from taking part in public procurement procedure by using discriminatory technical specifications, criteria (conditions) for qualitative selection of economic operator and contract award criteria. Contracting authorities may not impose such conditions that would constitute national, territorial, or personal discrimination among economic operators, directly or indirectly.

Assessing needs and identifying the main environmental impacts

A crucial step before starting the procurement process is to assess actual needs of contracting authorities in light of the potential environmental impact of the contract. Proper consultation with internal or end users may reveal that lower volumes, or more environmentally friendly options, can readily be applied. In some cases, the best solution may be to refrain from buying. For example, contracting authorities can, instead, share resources or equipment with other authorities, purchase used, recycled or re-manufactured products. Each individual contract will have a different set of potential environmental impacts to be considered.

Supply, service and works contracts will generally entail different considerations, as presented below.

Supply contracts:

- The environmental impact of materials used to make the product (e.g. the raw materials from renewable sources)
- The impact of the production processes used
- The energy and water consumption of the product during use
- Durability/life-span of the product

29 Article 10 of the PPL and Article 7 (2) and (3) of the new PPL.

30 Article 12 of the PPL and Article 9 of the new PPL.

- Opportunities for recycling/reusing the product at the end of its life
- The packaging and transportation of the product

Service contracts:

- The technical expertise and qualifications of staff to carry out the contract in an environmentally friendly way
- The products/materials used in carrying out the service
- Management procedures put in place to minimise the environmental impact of the service
- The energy and water consumed, and waste generated in carrying out the service

Works contracts:

- In addition to all of the above considerations, works contracts may have significant environmental impacts e.g. in respect of land use or traffic planning
- For some projects a formal Environmental Impact Assessment will need to be carried out – and the results should inform decisions of contracting authorities concerning given public procurement

Environmental technical specifications

After defining the subject – matter of the contract, contracting authorities need to express this in terms of technical specifications which should be included in the procurement documents. Technical specifications play two-fold role.

- First, they present the bidding opportunity (a prospective contract) to the market in such a way that economic operators, on the basis of this information, can decide whether it is of interest to them (and apply for the contract). In this way technical specifications are instrumental in determining the level of future competition.
- Second, they provide measurable benchmarks against which tenders can be evaluated – they constitute thus minimum compliance criteria. Tenders not complying with the technical specifications have to be rejected, unless the contracting authority has specifically authorized submission of variants (see below). Technical specifications need to relate to characteristics of the particular work, supply or service being purchased – and not to the general capacities or qualities of the economic operator. If they are not clear and correct, they inevitably lead to unsuitable offers being submitted in the procurement procedure.

It is also important that technical specifications are clear, understandable to all economic operators in the same way, and that the contracting authority is able to verify compliance with them when assessing tenders. The obligation of transparency implies that technical specifications are to be clearly indicated in the procurement documents.

Technical specifications may be formulated by reference to *European, international or national standards and/or in terms of performance or functionality*[31]. They may also refer to appropriate criteria that are defined in *labels* (see below for details). Public procurement rules allow contracting authorities to formulate technical specifications in terms of the *environmental and climate performance levels* of a product, service or work. For example, contracting authorities may require that a computer does not consume more than a certain amount of energy per hour; or that a vehicle does not emit more than a

[31] Article 71 of the PPL.

certain quantity of pollutants. Contracting authorities may also specify the p*roduction processes or methods for a good, service or work* (see below).

Standards and other technical reference systems

Standards have a major role in influencing the design of products and processes, and many standards include environmental characteristics such as material used, durability or consumption of energy or water. References to technical standards including such environmental characteristics can be made directly in the technical specifications, helping contracting authorities to define the subject - matter in a clear way. The PPL as well as the new PPL refer to European, international or national standards and various other technical reference systems as one of the means by which specifications can be defined[32].

When reference to a standard is used, it must be accompanied by the words 'or equivalent.'[33] This means that evidence of compliance with an equivalent standard must be accepted by the contracting authority[34]. Such evidence may be in the form of a test report or certificate from a conformity assessment body. A tenderer may also seek to rely upon a manufacturer's technical dossier if it is not able to obtain third-party evidence within the relevant time limits for reasons which are not attributable to it. The contracting authority must then determine whether this establishes compliance.

Unless justified by the subject-matter of the contract, *technical specifications may not refer to a specific make or source, or a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production which would have the effect of favouring or eliminating certain economic operators or certain products*. Exceptionally, such a reference is permitted where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to above mentioned requirements is not possible. In such a case this reference must be accompanied by the words 'or equivalent'[35].

Performance-based or functional specifications

Following the EU provisions both the PPL[36] and the new PPL[37] explicitly allow contracting authorities to apply specifications based on performance or functional requirements. A performance-based/functional specification describes the desired result and outputs (for example in terms of quality, quantity, and reliability) expected, including how they will be measured. It does not prescribe the inputs or work method for the tenderer. The tenderer is free to propose the most appropriate solution to achieved desired results and outputs.

A performance-based approach usually allows more scope for innovation and in some cases will challenge the market into developing new technical solutions. When setting performance-based specifications, contracting authorities should think carefully about how they will assess and compare tenders in a fair and transparent way. They may ask the tenderer to indicate how the desired result will be achieved and meet the level of quality specified in the procurement documents.

Example[38]:

32 Article 98 (5) of the new PPL.

33 Article 71 of the PPL and Article 99 of the new PPL

34 Article 103 of the new PPL.

35 Article 72 of the PPL and Article 100 of the new PPL.

36 Article 71 (1) item 2 of the PPL.

37 Article 99 of the new PPL.

38 Example provided in the European Commission '*Buying green! A handbook on green public procurement*', 3rd edition, 2016.

If the contracting authority wants to keep an office building at a certain temperature it could do this by setting very detailed specifications for a heating system.

Alternatively, it could state that the building must have a constant indoor temperature of 18-20°C but leave it to tenderers to propose different solutions allowing compliance with this requirement. The tenderers could then opt for innovative heating and ventilation systems which reduce dependence on fossil fuels. Contracting authorities can ask them to provide technical data to confirm the feasibility of their proposed methods. It is also important to consider by the contracting authorities how they will incorporate the precise terms of the offer into their contractual clauses.

Specifying materials and production methods

What a product is made of, how it is produced or how a service or work is performed, can form a significant part of its environmental impact. Under the public procurement rules, materials and methods of production or provision can be taken into account when defining technical specifications – even where such factors do not form part of material substance of what is purchased[39], for example, electricity which is produced from renewable sources or food produced from organic agriculture. However, since all technical specifications should bear a link to the subject matter of the contract, contracting authorities can only include those requirements which are related to the production of the good, service or work being purchased, rather than those which relate to the general practices or policies of the operator. As with all requirements, the contracting authority must ensure that the general principles of non-discrimination, equal treatment, transparency and proportionality are respected when specifying materials or production methods.

Contracting authorities have the right to insist that the product they are purchasing is made from a specific material, or contains a certain percentage of recycled or reused content. Contracting authorities can also set requirements regarding the restriction of hazardous substances in the product.

Typical green procurement approach restricts, for instance hazardous substances in cleaning products and textiles, or requires bidders to demonstrate that timber has been sustainably sourced. To ensure that the general principle of non-discrimination is respected, such restrictions should be based on an objective risk assessment. Labels and GPP criteria which will be presented below are a useful reference point, as they are based on scientific information and life-cycle assessment of the materials and substances found in the covered products and services.

Important:

The procurement provisions allow contracting authorities to include requirements regarding production or provision processes and methods in technical specifications for supply, service and works contracts. It is not allowed, however, to insist upon a production process which is proprietary or otherwise only available to one supplier – or to suppliers in one country or region – unless such a reference is justified by the exceptional circumstances of the contract and is accompanied by the words ‘or equivalent.’

Of particular importance is the principle of proportionality. Accordingly, contracting authorities should consider whether the requirements they set regarding production processes are appropriate to achieve the environmental objectives they are trying to promote. A careful analysis of the life-cycle of the goods, services or works they are purchasing will help contracting authorities to arrive at appropriate specifications for production processes and methods. Life-cycle assessment (LCA) which is presented below allows for cradle-to-grave analysis of the environmental impact of products. It thus includes the extraction and refinement of raw materials, manufacturing and other stages of production through to the use and disposal phase.

39 Article 98 (4) of the new PPL.

Use of variants

Variants are a means of introducing greater flexibility in description of the subject – matter of procurement which may result in a more environmentally-friendly solution being proposed by economic operators. Variants allow tenderers to submit an alternative solution which meets certain minimum requirements identified by contracting authorities[40].

Example[41]:

Contracting authorities may specify conventionally-fueled (petrol or diesel) vehicles but allow alternative-fueled, electric or hybrid vehicles as a variant. Both variant and non-variant bids are then evaluated against the same set of award criteria to identify the most economically advantageous tender.

This can be a useful approach if contracting authorities are unsure about the cost or other impacts of an alternative product or service – for example: will introducing higher insulation standards in a building works contract delay the completion date?

Contracting authorities can also allow tenderers to submit more than one tender: a standard and a variant solution. Variants must also be linked to the subject-matter of the contract[42], i.e. they cannot concern matters which are unrelated to the purchase contracting authorities plan to make.

To be able to accept or require variants in a public procurement procedure, contracting authorities should:

- indicate in the contract notice that variants will be accepted or required - without this specification variants are not authorized[43]
- specify the minimum requirements which the variants have to meet[44] - only the variants meeting the minimum requirements set by the contracting authority can be considered
- identify any specific requirements for presenting variants (such as that a variant can only be submitted combined with a non-variant bid)
- determine the award criteria so that they can be applied to variants meeting those minimum requirements, as well as to tenders which are not with variants[45]

Labels

Labels are defined in the new PPL as any documents, certificates or attestations confirming that the supplies, services or works, processes or procedures in question, meet certain requirements[46]. 'Label requirements' are defined, in turn as requirements to be met by the supplies, services or works, processes or procedures in question, in order to obtain the label concerned[47].

Note:

40 See Article 91 of the PPL and Article 136 of the new of the PPL.

41 Example provided in the European Commission '*Buying green! A handbook on green public procurement*', 3rd edition, 2016.

42 Article 136 (3) of the new PPL.

43 Article 91 (2) of the PPL and Article 136 (2) of the new PPL.

44 Article 91 (3) of the PPL and Article 136 (4) of the new PPL.

45 Article 136 (5) of the new PPL.

46 Article 2 item 21 of the new PPL.

47 Article 2 item 22 of the new PPL.

Labels can be used in different ways in the context of technical specifications:

1) they help contracting authorities to draw their technical specifications in order to define the characteristics of the goods or services they are purchasing

2) they enable checking compliance with these requirements - by accepting the label as one means of proof of compliance with the technical specifications by providing a means of third-party verification, labels can help to save time while ensuring that high environmental standards are be applied in public procurement.

Explanations how to use labels are provided in the new PPL[48]. Accordingly, when the contracting authority intends to purchase supplies, services or works with specific environmental, social or other characteristics it may require specific labels as means of proof that the supplies, services or works correspond to the required characteristics. Labels may be used:

1) in the technical specifications,

2) in the award criteria or

3) in the contract performance conditions.

Important:

Labels, should, however, fulfil certain conditions[49]:

- Label requirements may concern only the criteria which are linked to the subject-matter of the public procurement contract and are appropriate to define characteristics of the subject-matter of the public procurement.
- Label requirements should be based on objectively verifiable and non-discriminatory criteria.
- Labels which are used should be established in an open and transparent procedure with participation of all relevant stakeholders, such as government bodies, users of services, social partners, consumers, manufacturers, distributors, non-governmental organisations, and the like.
- Labels should be also accessible to all interested parties.
- The label requirements should be set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.

If the contracting authority is satisfied that a label meets all the above conditions, it can include it as part of its technical specifications.

However, the contracting authority should still accept other labels which have equivalent requirements, i.e. they demonstrate that the same objective criteria are met. If tenderers can show that they were unable to obtain a label within the relevant time limits for reasons which are not attributable to them, the contracting authority must consider alternative evidence submitted by them, such as a technical dossier which demonstrates that the label requirements are met.

It is also possible to require fulfilment of only part of relevant label requirements. If the contracting authority does not require that supplies, services or works should meet all of the label requirements, it should indicate which label requirements are referred to.

Public procurement rules distinguish between labels where all of the criteria are linked to the subject-matter of the contract (discussed above), and those which contain wider criteria, such as for example related to general management practices. The contracting authority may intend to use a label which while

48 Article 102 of the new PPL.

49 Article 73 (1) of the PPL and Article 102 (1) of the new PPL.

fulfilling the above-mentioned conditions relates also to the requirements which are not linked to subject-matter of procurement[50]. In such a case the contracting authority should not refer to the label as such but it should rather define the technical specification by reference to the detailed specifications of that label, or, as necessary, parts thereof, that are linked to the subject-matter of the procurement and are appropriate to define characteristics of subject-matter of procurement.

There are many environmental labels available which aim to help contracting authorities to identify sustainable products or services. The most valuable from green procurement perspective are those which are based on objective and transparent criteria and which are awarded by an independent third party. These labels can play a particular role in developing technical specifications and award criteria, and in verifying compliance.

There are various types of labels:

Multi-criteria labels are the most common type of environmental label and also the most commonly used in green procurement. Multi-criteria labels are based on scientific information about the environmental impact of a product or service throughout its life cycle, from extraction of the raw materials, through production and distribution, the use phase, and final disposal. They apply a number of criteria that set the standard for the label in question. Different sets of criteria are established for each product or service group covered.

Examples of this type of label include:

the EU Ecolabel[51]

the Nordic Swan[52]

the Blue Angel[53]

Single issue labels, in turn, are based on one or more pass/fail criteria linked to a specific issue, e.g. energy efficiency. If a product meets those criteria, then it may display the label.

Examples of this type of label are:

50 Article 102 (5) of the new PPL.

51 EU Ecolabel or EU Flower is a voluntary ecolabel scheme established in 1992 by the European Commission.

52 The Nordic Ecolabel or Nordic swan is the official sustainability ecolabel for the Nordic countries, introduced by the Nordic Council of Ministers in 1989. This is done by a voluntary license system where the applicant agrees to follow a certain criterion set outlined by the Nordic Ecolabelling in cooperation with stakeholders.

53 The Blue Angel (Der Blaue Engel) is a German certification for products and services that have environmentally friendly aspects. It has been awarded since 1978 by the Jury Umweltzeichen, a group of 13 people from environment and consumer protection groups, industry, unions, trade, media and churches. Blue Angel is the oldest ecolabel in the world, and it covers some 10,000 products in some 80 product categories.

the EU Organic label

the Energy Star label for office equipment

Sector specific labels – Sector-specific labels include forestry certification schemes operated by organisations such as:

the FSC (Forest Stewardship Council)[54]

PEFC (Programme for the Endorsement of Forest Certification[55])

Graded product labels grade products or services according to their environmental performance on the issue in question, rather than using pass/fail criteria. Examples include the EU Energy Label, which grades energy-related products according to their energy efficiency.

Most labels conforming to the ISO Type I classification will meet these conditions, although they may also contain criteria which are not specific to the product or service being purchased, such as general management requirements. To determine whether this is the case the contracting authorities should review the full criteria underlying the label before referring to it in their documents – most are freely available online.

If a label contains some requirements which are relevant to a given contract but others which are not linked to the subject - matter, such as those relating to general management practices, then the contracting authorities can only refer to the specific label criteria which are linked to the subject-matter and not require the label itself. In fact, it may be considered good practice to always refer to the criteria underlying a label, to ensure that they are all relevant and will be clear to all tenderers.

Example:

Use of labels was discussed in one of the cases reviewed by the Court of Justice.

The case C-368/10[56] related to the award of a contract by the Dutch province of North Holland for the supply and management of automatic tea and coffee machines.

A contracting authority made reference to certain social and environmental labels in its tender documents for the supply of tea and coffee vending machines. In particular, the contracting authority identified as a

54 An international non-profit, multi-stakeholder organization established in 1993 to promote responsible management of the world's forests. The FSC does this by setting standards on forest products, along with certifying and labeling them as eco-friendly.

55 An international, non-profit, non-governmental organization which promotes sustainable forest management through independent third-party certification. It is considered the certification system of choice for small forest owners.

56 Ruling of 10 May 2012 in C – 368/10 *Commission v Netherlands.*

condition for participation the use of organic and fair-trade tea and coffee bearing specific labels (EKO label[57] and MAX HAVELAAR label[58]). It also stated that, if possible, the other ingredients used should comply with these labels and it allocated points in the evaluation scheme to reflect this preference. In subsequent clarifications the contracting authority confirmed that equivalents to the specified labels were also acceptable.

On the basis of facts of the case the Court of Justice established that the contracting authority had set an award criterion which consisted of a requirement that the ingredients to be supplied were to bear the EKO and MAX HAVELAAR labels. The Court held that award criteria may, in principle, be not only economic but also qualitative.

Qualitative award criteria can include environmental characteristics and also "*criteria based on considerations of a social nature, which may concern the persons using or receiving the works, supplies or services which are the object of the contract, but also other persons*."

The Court confirmed that award criteria must be linked to the subject-matter of the contract, objective, and comply with the principles of equal treatment and transparency of the award criteria.

Bearing those principles in mind the Court of Justice looked at the characteristics underlying the labels referred to in the case and concluded that they were environmental and social characteristics and as such were permitted criteria. They did not need to be an intrinsic part of the product and they related to the ingredients to be supplied so they did constitute part of the subject matter of the contract.

However, the Court concluded that a reference to the labels alone was not lawful under the EU Directive, as it breached the principles of equal treatment, non - discrimination and transparency. It is because, in accordance with those principles all conditions and detailed rules of the procurement procedure should be drawn up in the contract notice or procurement documents in a manner that is clear, precise and unequivocal, so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way, and secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria. According to the Court neither the criteria themselves not the information to show that they were met complied with this requirement.

Verifying compliance with technical specifications

Contracting authorities should pay special attention to the issue of verification of compliance with technical specifications. In particular, contracting authorities should set out in advance in procurement documents the types of evidence of compliance which tenderers can submit. This is often done by providing an indicative list, and stating that other equivalent forms of evidence will also be accepted.

Environmental requirements are often complex and assessing compliance may in some cases require technical expertise. However, for many environmental specifications, there are means of verifying compliance which do not require the input of technical experts. For example:

- As a starting point, contracting authorities should refer to relevant legislation with which all economic operators must comply
- Labels can be used to verify compliance with additional environmental requirements in the manner set out above
- A test report or certificate from a conformity assessment body can be required where appropriate, provided the contracting authority accepts certificates from equivalent conformity assessment

57 A private label for products made up of at least 95 % of ingredients from organic production methods.

58 A private 'fair – trade' label which certifies that the products concerned are purchased at a fair priced and under fair conditions from small – scale producers in developing countries.

bodies. This is one way to establish that a product meets a particular specification or performance level. Contracting authorities must consider a technical dossier or other form of proof if a tenderer has no access to a test report or certificate within the relevant time limits for reasons not attributable to the tenderer.

Note:

In some cases, a self-declaration on the part of tenderers that they comply with environmental requirements may need to be accepted due to the impossibility of proving compliance by objective third-party evidence during a tender procedure. Where this is permitted, contracting authorities must ensure that they apply the principles of equal treatment, transparency and proportionality, seeking clarification from tenderers where necessary to ensure that they do not unfairly accept or reject a tender.

Selection of economic operators

Introduction

This part of the Guidelines deals with the rules of the PPL relating to the qualitative selection of economic operators whom the contracting authority considers able to perform the contract. The rules laid down in public procurement provisions consist of three different types.

1) The first set of rules concerns the grounds that justify an exclusion of a tenderer or candidate from participation in a public procurement procedure[59]. These relate to situations such as conviction for specific criminal offences, non – payment of taxes or social contributions etc. The contracting authority should also exclude economic operators who were found in breach of environmental protection rules[60].

2) Second group covers provisions related suitability to pursue the professional activity, economic and financial standing and the technical and professional ability of economic operators to perform the contract in question. As regards the latter, when assessing ability to perform a contract, contracting authorities may take into account specific experience and competence related to environmental aspects which are relevant to the subject matter of the contract. They may ask, for instance, for evidence of the ability of economic operators to apply environmental and supply chain management measures when carrying out the contract.

3) Third group, relevant for staged procurement procedures[61] concerns rules and criteria applied for so called *short listing* of economic operators (see below for details).

Exclusion criteria

Exclusion criteria deal with circumstances where contracting authorities must or may exclude an economic operator from public procurement procedures[62]. In some particularly serious cases, exclusion of the economic operator is mandatory[63], while in other situations exclusion is optional – the contracting authority may exclude a given economic operator provided a specific ground for exclusion was envisaged in the procurement documents[64].

59 See Articles 111 – 113 of the new PPL.

60 Article 111 (1) item 3 of the new PPL.

61 Such as the restricted procedure, competitive procedure with negotiations, competitive dialogue and innovation partnership; in other words, all public procurement procedures except an open procedure.

62 See Article 75 of the PPL and Articles 111 – 112 of the new PPL.

63 Article 111 of the new PPL.

64 Article 112 of the new PPL.

From a green procurement perspective, the most relevant exclusion grounds are:

- violation (in the previous two years up to the date of expiry of the time limit for submission of tenders or requests for participation) of applicable obligations in the area of the environmental protection, including obligations in accordance with the provisions of the international conventions listed in Annex 8 of the new PPL[65]
- grave professional misconduct which renders integrity questionable[66]
- deficiencies in performance of substantive requirement under prior contract which led to termination, collection of security instruments, damages or comparable sanctions[67]
- submission of false information required for the verification of the absence of grounds for exclusion or the fulfilment of criteria for the selection of economic operator, or situation when the economic operator has not been able to submit evidence on fulfilment of the criteria for qualitative selection[68].

Contracting authorities can exclude an economic operator where they can demonstrate by any appropriate means that it has violated applicable environmental obligations not only under national law but also international one. The new PPL allows exclusion for violation of a limited list of international environmental conventions, namely:

- Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer
- Basel Convention on the Control of Transboundary Movement of Hazardous Waste and their Disposal
- Stockholm Convention on Persistent Organic Pollutants
- Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (the PIC Convention).

Example[69]:

A waste disposal company that has dumped waste illegally should be excluded from a public procurement procedure for rubbish collection services. The contracting authority may demonstrate such breaches by any appropriate means, however, the economic operator must also be given the opportunity to prove that it has met the self-cleaning requirement. Exclusion of an economic operator is subject to the ability of economic operators to 'self-clean' – that is to demonstrate their reliability despite the existence of one of the grounds of exclusion[70].

In order to do this, the economic operator must show that it has:

- paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or professional misconduct
- fully clarified the facts and circumstances by actively collaborating with the investigating authorities and

65 Article 111 (1) item 3 of the new PPL

66 Article 112 (1) item 2 of the new PPL.

67 Article 112 (1) item 5 of the new PPL.

68 Article 112 (1) item 6 of the new PPL.

69 Example provided in the European Commission '*Buying green! A handbook on green public procurement*', 3rd edition, 2016.

70 Article 113 of the new PPL.

- taken concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offences or professional misconduct[71].

It is up to the contracting authority to assess the measures taken by the economic operator concerned and to determine whether they are sufficient to allow him to participate in the procedure, providing reasons to the operator if he is excluded[72].

Selection criteria

Selection criteria assess the suitability of an economic operator to carry out a contract. In an open procedure they may be assessed only on a pass/fail basis, before tenders are evaluated against the contract award criteria. In staged procedures (such as the restricted procedure, the competitive procedure with negotiations or competitive dialogue), they form a part of the separate qualification stage, and can also be used to shortlist or reduce the number of candidates invited to tender ('short-listing'). The public procurement provisions provide an exhaustive list of the criteria which can be applied to select economic operators[73], and the types of evidence which may be requested from them[74].

The most relevant selection criteria which relate to technical and professional ability of economic operators are, from the perspective of green procurement, the following:

- Human and technical resources
- Experience and references
- Educational and professional qualifications of staff (if not evaluated as an award criterion)
- Environmental management systems and schemes (e.g. EMAS, ISO 14001)
- Supply chain management/tracking systems
- Samples of products
- Conformity assessment certificates

Each of these may help to establish whether an economic operator has suitable capacity to carry out the environmental aspects of a contract, as discussed below.

Important:

An overriding requirement in relation to all selection criteria is that they must be *related and proportionate to the subject-matter of the contract*. This means that contracting authorities should adjust their approach to the specific requirements of a given contract, including its value and the level of environmental risk involved. For example, the range of environmental selection criteria applied for a works contract will normally be greater than for a simple, off the shelf, supply contract, unless the supplies present a particular environmental risk, e.g. relate to chemicals or fuels which must be safely stored.

Environmental technical capacity

Fulfilling green procurement requirements can be complex tasks, for example when they relate to the design and construction of energy efficient buildings or the provision of a printing service which minimises waste. In order to confirm that economic operators have the ability to deliver such requirements, it makes

71 Article 113 (1) of the new PPL.

72 Article 113 (2) of the new PPL.

73 Articles 114 – 117 of the new PPL.

74 Articles 118 – 125 of the new PPL.

sense to verify their previous experience and human and technical resources available to them. Environmental technical capacity can include technical competence in minimising waste creation, avoiding spillage/leakage of pollutants, reducing fuel consumption or minimising disruption of natural habitats.

In practical terms, it typically concerns questions such as those:

- does the tenderer (candidate) have previous experience with performing contracts in sustainable way?
- does the tenderer (candidate) employ or have access to personnel with the required educational and professional qualifications and experience to deal with the environmental elements of the contract?
- does the tenderer (candidate) own or have access to the necessary technical equipment or facilities related to environmental protection?
- does the tenderer (candidate) have the means to ensure the quality of the environmental aspects of the contract (e.g. access to relevant technical bodies and measures)?

A useful instrument for integration of environmental criteria is the list of contracts carried out in the past. Contracting authorities can use this criterion to check the past experience of companies in carrying out contracts with similar environmental requirements, and (for works contracts only) certificates of satisfactory execution and outcome. In doing so they should ensure that they set out clearly what type of information is considered relevant and how it will be evaluated. Public procurement provisions set a maximum reference period of five years for works contracts and three for supplies or services, unless a longer period is needed to ensure adequate levels of competition.

Educational and professional qualifications of staff and their experience may also be relevant to green procurement.

Example[75]:

If the contracting authority is awarding contracts for road transport services it may wish to check that drivers have been trained in eco-driving to reduce fuel consumption and emissions.

Staff working on a catering contract will need to have qualifications relating to correct food handling, both to ensure safety and limit food waste.

Note:

Contracting authorities should be aware, though, that it may be better solution to assess some environmental aspects as part of their award criteria. If so, they should not form part of the selection criteria. At award stage, contracting authorities have greater flexibility regarding how they define criteria and the types of evidence they request.

Environmental management systems

Any organisation (public or private) wishing to improve its overall environmental performance can decide to run an environmental management system. Application of environmental management systems is dealt with in Article 127 of the new PPL.

Environmental management systems:

75 Example provided in the European Commission '*Buying green! A handbook on green public procurement*', 3rd edition, 2016.

Environmental management systems are organisation-related tools, aimed at improving overall environmental performance of the committing organisation.

They allow organizations to have a clear picture of their environmental impacts, help them to target those that are significant and manage them well, in the sense of continuously improving their environmental performance.

Relevant areas for improvement may be the *use of natural resources*, such as water and energy; *training of employees*; the *use of environmentally-friendly production methods* and *purchasing greener office materials*.

An organization running an environmental management system may request certification under one of the two main environmental management systems in use in the EU:

1) the 'Eco-management and audit scheme' (EMAS), or

2) the European/international standard on environmental management systems (EN/ ISO 14001).

The EMAS scheme is primarily used by organizations with a site in the European Union or in the European Economic Area, although it can also be used by organizations and sites located elsewhere (but is always verified under the control of a European Accreditation Body).

The ISO scheme is open to organizations across the globe.

Worldwide, there are around 250,000 ISO 14001-certified organizations and over 4,000 organizations and 7,500 sites registered under EMAS.

EMAS certification incorporates the requirements of EN/ ISO 14001, and includes additional elements such as verified compliance with environmental legislation, commitment to continual improvement of environmental performance, employee involvement, and mandatory public communication of annual performance (environmental statement) validated by a verification body. This last element differentiates EMAS from other systems since it provides a public and transparent view of the registered organization's environmental performance.

Contracting authorities may require evidence of the environmental management system which an economic operator has in place for any contract, provided this is proportionate and related to the subject matter. Equivalent certificates must be accepted, and other forms of evidence (such as an in-house system) must be considered where an operator has no access to third-party certification or no possibility to obtain it within the relevant time limits for reasons which are not attributable to it.

The use of EMAS is not limited to providing proof of technical capacity to perform environmental management measures. If a contracting authority sets other environmental selection criteria (for example requirements regarding technical equipment or training) an EMAS could, if it contains relevant information on the particular requirements, serve as a means of proof of capacity.

It is important to look at the actual elements of technical capacity covered by an EMAS which are relevant to the subject matter of the contract, and not just the presence of third-party certification. The principle of proportionality should be kept in mind when setting requirements for the environmental management measures to be applied – a low-value, low-impact contract may not be an appropriate case for such requirements.

Supply chain management measures

Any environmental impacts arise not only in the delivery of a final product or service but further back along the supply chain. For example, IT equipment typically has components sourced from many parts of the world, including metals and other substances which pose a high risk of environmental damage in their extraction and processing.

For these types of contracts, it makes sense for contracting authorities to look beyond the primary or first-tier contractor, to ensure that environmental requirements will be met. One way to do this is by including specific contract clauses relating to subcontractors.

At the selection stage, contracting authorities may request the following information:

- an indication of the proportion of the contract which the economic operator intends possibly to subcontract and
- an indication of the supply chain management and tracking systems that the economic operator will be able to apply when performing the contract.

Both of these may help to establish how environmental impacts will be managed in the context of a particular contract, and to select operators with strong systems in place.

Product samples, checks and conformity assessment

If a contract includes the supply of products or materials, the contracting authority may request, at selection stage a sample (or description or photograph). Certificates of conformity or quality may also be requested. These can be useful in verifying that products meet any specific environmental requirements for the procurement, for example in terms of durability or energy consumption.

A further option available to contracting authorities is to carry out a check on suppliers' production capacities or service providers' technical capacity, as well as their research facilities and quality control measures. This can be done if the products or services to be supplied are complex or, exceptionally, are required for a special purpose.

The checks may either be carried out by the contracting authority itself or by a competent body in the country where the operator is established.

Means of proof

The new PPL, following requirements of EU directives, provide not only a list of issues which may be examined at the selection stage but contain also some limits on the type of evidence which can be requested at the preliminary stages of a procurement procedure. Most importantly, contracting authorities are required to accept, as a preliminary evidence, from economic operators in their tenders (or requests for participation) a declaration of fulfilment of criteria for qualitative selection of economic operator (hereinafter: Declaration)[76]. This declaration is the Serbian equivalent of the European Single Procurement Directive provided by 2014 Procurement Directive[77]. The Declaration should be submitted on a standard form and should confirm that:

1) there are no grounds for exclusion of the economic operator
2) the economic operator meets the required selection criteria
3) the economic operator fulfils the rules or criteria that have been set for the limitation of the number of qualified candidates (shortlisting criteria – see above), where such are applied in a given procedure.

In the Declaration, economic operators should indicate the issuers of evidence on the fulfilment of criteria for qualitative selection and declare that they will be able to submit such evidence upon request of contracting authority and without delay.

[76] Article 118 of the new PPL.

[77] Article 59 of directive 2014/24.

In the Declaration, economic operators may also include information such as the internet address of the database, any necessary identification data and declaration of consent, on the basis of which evidence on the fulfilment of criteria for qualitative selection may be obtained, or accessed. Economic operators may reuse its Declaration already used in previous public procurement procedures, provided that they confirm that the information contained therein continues to be correct. The standard form of Declaration will be determined by the Public Procurement Office, in accordance with the European Single Procurement Document developed by the European Commission[78].

Before making a decision in the public procurement procedure, the contracting authority should require the tenderer which has submitted the most economically advantageous tender, to submit evidence on fulfilment of the criteria for qualitative selection of economic operator, in the form of unverified copies, within an appropriate time limit not shorter than five working days[79].

Contracting authority is not obliged to request such an evidence in the case of the public procurement with estimated value equal or less than RSD 5,000,000.00[80]. Contracting authorities should not require tenderers and candidates to submit evidence on fulfilment of the criteria for qualitative selection, if:

1) on the basis of the information contained in the Declaration, it can obtain the evidence, or have access to the evidence on fulfilment of the criteria for qualitative selection;

2) contracting authority/entity already possesses relevant valid evidence[81].

Regardless of the estimated value of the public procurement, contracting authority may ask tenderers and candidates to submit all or part of the evidence on fulfilment of the criteria for qualitative selection for the sake of verifying the information stated in the Declaration, where this is necessary to ensure the proper conduct of the procedure[82].

Groups of economic operators and green contracts

Companies applying for public contracts may decide to bring in specialist expertise to address green requirements. For example, a facilities management company may work with an environmental advisor to manage buildings in a more sustainable manner. In this case the technical capacity and experience of both companies should be evaluated at selection stage.

Important:

When evaluating the technical capacity of operators, the contracting authority should be aware that economic operators must be allowed to rely upon the capacity of other entities, regardless of links they have with those entities.

This means, for example, that if two or more companies wish to apply jointly for a contract – regardless of whether they have formed a formal consortium or have any legal links – contracting authorities should take into account their combined capacity.

This is subject to the ability of the economic operator to demonstrate that it will have at its disposal the resources of the other entity for the performance of the contract, for example by producing a signed undertaking to this effect.

78 Established by Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document.

79 Article 119 (1) of the new PPL.

80 Article 119 (2) of the new PPL.

81 Article 119 (4) of the new PPL.

82 Article 119 (3) of the new PPL.

Where reliance is placed on the capacity of another entity (including a parent company or subsidiary), it must also demonstrate compliance with the exclusion criteria and any relevant selection criteria applied for the contract.

If a tender (or request for participation) is submitted by a group of economic operators, a separate Declaration for each of the members in a group of economic operators should be submitted in a tender (a request) containing the information mentioned above for the relevant capacity of a member of the group. If the economic operator intends to award a part of a contract to a subcontractor or intends to rely on the capacities of other entities, it should also provide a separate Declaration containing the above-mentioned information for the relevant capacities of the subcontractor or other entity it relies on.

Awarding contracts

Award criteria

At the award stage of the public procurement procedure, contracting authorities evaluate the tenders and compare costs of different tenders. When they assess the tenders, they should stick to predetermined award criteria, published in advance, to decide which tender is the best. According to the PPL criteria for evaluating bids[83] are the economically most advantageous bid or the lowest price offered. The choice between those two options is left in principle to the discretion of contracting authorities[84]. If the contracting authority opts for applying the economically most advantageous tender the selection of the best tender is based on combination of factors chosen by the contracting authority. The PPL provides for a non – exhaustive list of such factors. Among those factors there are also those related to green procurement: environmental advantages and environment protection as well as energy efficiency.

Following the EU rules, the new PPL changes the approach. In accordance with the provisions of the new PPL all contracts must be awarded on the basis of most economically advantageous tender (MEAT)[85]. MEAT should be determined on the basis of one of the following criteria:

1) price or
2) costs by applying a cost-effectiveness approach, such as life-cycle costing (see below for more information) or
3) the price-quality ratio i.e. cost-quality ratio which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects.

Cost or price have to form part of the assessment in any procedure, and may be calculated on the basis of lifecycle costs as discussed below. Beyond costs, a wide range of factors may influence the value of a tender from the point of view of the contracting authority, and this includes environmental aspects. It is necessary for award criteria (as well as selection criteria, technical specifications and contract performance clauses) to be linked to the subject-matter of the contract[86].

The award criteria are considered to be linked to the subject-matter of a contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in:

(a) the specific process of production, provision or trading of those works, supplies or services or

83 Article 85 of the PPL.

84 The exception is the case when the competitive dialogue is used or variants are allowed for submission of bids.

85 Article 132 of the new PPL.

86 Article 132 (1) of the new PPL.

(b) a specific process for another stage of their life cycle[87].

These factors do not need to form part of the 'material substance' of what is being purchased, i.e. they do not need to be visible or discernible in the final product or service. What this means is that, as with technical specifications, award criteria may relate to sustainability considerations such as renewable energy or organic production, or to the greenhouse gas emissions associated with a particular product or service.

Note:

The main difference between technical specifications and award criteria is that whereas the former is assessed on a pass/fail basis, award criteria are weighted and scored so that tenders offering better environmental performance can be given more points.

A number of considerations should be taken into account when assessing whether an environmental characteristic should be a minimum requirement (specification) assessed on the basis of pass/fail test or a preference (award criterion) which is used to select, among the suitable tenders, the best one from the perspective of the contracting authority.

Applying environmental award criteria may make sense, for example, if the contracting authority is not sure of the cost and/or market availability of products, works or services which meet certain environmental objectives. By including these factors in its award criteria, the contracting authority is able to weigh them against other factors including cost.

The contracting authority may also wish to set a minimum level of performance in the technical specifications, and then allocate extra points for even better performance at the award stage. This approach is used successfully by a number of contracting authorities to retain flexibility while implementing green public procurement.

The new PPL sets out also some basic rules regarding application of award criteria, which reflect EU directives on public procurement and the requirements specified in rulings adopted by the Court of Justice.

Award criteria must never confer an unrestricted freedom of choice on contracting authorities.

This means they must provide an objective basis for distinguishing between tenders, and be adequately specific. According to the case law of the Court of Justice, award criteria must be formulated in such a way that allows all "reasonably well-informed and normally diligent tenderers" to interpret them in the same way.

A further element of the objectivity requirement for award criteria concerns verifiability of criteria.

If award criteria relate to factors which cannot be verified by the contracting authority, it will be difficult to demonstrate that they have been applied objectively. This means that contracting authorities should consider in advance what means of proof tenderers can offer under each award criterion and how this evidence will be evaluated by the contracting authority[88].

Example:

The case C – 513/99 ('Concordia Bus') concerned application of environmental criteria for the selection of the best tender.

The city of Helsinki organized the tender for the supply of a dozen of buses. According to the procurement documents the contract was to be awarded to the supplier whose tender would be the most economically advantageous for the city. Tenders were to be evaluated on the basis of three criteria:

87 Article 133 (3) of the new PPL.

88 Article 134 (4) of the new PPL.

1) the total price of buses

2) the quality of vehicle fleet and

3) the operator's quality and environment programme.

As regard the second criterion a tenderer could receive additional points on a basis of various sub - criteria, inter alia for the use of buses with nitrogen oxide emissions below certain limit and with external noise below certain level. One of the participants of the procedures (Concordia Bus) submitted a request for annulling the award decision of the contracting authority on the basis that only one participant of the procedure was able to offer buses meeting those conditions.

Finnish court reviewing the complaint decided to refer to the Court of Justice with a number of questions. It was basically asking whether the use of the relevant environmental criteria was admissible on the basis of the relevant EU public procurement directives.

The Court of Justice noted, first of all, that according to the EU directives if the contract is awarded on the basis of the most economically advantageous tender the contracting authority may take into account various factors linked to the subject – matter of the procurement, for example price, quality, aesthetical and functional characteristics, technical assistance etc. The wording of the directives suggests also that the list of those factors is open. According to the Court of Justice the directives may not be interpreted in such a way that all factors taken into account must be strictly economic.

The Court of Justice concluded that the EU law does not prohibit application of environmental criteria. Certain conditions must be met however:

– all criteria applied must be linked to the subject - matter of public procurement

– they must be applied in accordance with procedural requirements of the directives, in particular concerning transparency – all criteria must be indicated therefore in the contract notice or procurement documentation

– they must be compliant with the fundamental principles in particular non – discrimination, and finally

– the contracting authority may not dispose unrestricted freedom of choice with their application.

Since, before evaluation of the tenders, the city of Helsinki had specified and published a system for awarding extra points for lower levels of noise and nitrogen oxide emissions the Court of Justice found the requirements of the contracting authority adequately specific and objective.

Non – discriminatory character of award criteria

Award criteria should ensure the possibility of effective competition. Environmental award criteria should not be formulated in a way which artificially forecloses the market. As one of the objectives of award criteria is to encourage the market to develop and deliver environmentally preferable solutions, it should always be possible for different operators to obtain marks under such criteria. One good way to ensure this is the case is to discuss environmental award criteria with potential bidders in the context of a pre-procurement market consultations[89].

Example:

The issue of discrimination in application of award criteria was expressly raised in 'Concordia Bus' case discussed above.

[89] See for details concerning application of market consultations a paper prepared by the Project: 'Market research as an instrument for encouraging competition'
http://eupodrska.ujn.gov.rs/wp-content/uploads/2018/07/MARKET_RESEARCH_EN-final.pdf.

One of the arguments of Concordia Bus was that the criteria set by the City of Helsinki (related to level of nitrogen oxide emissions) were discriminatory because only one from the participants of the procedure was able to satisfy the requirements of the contracting authority.

Helsinki's own bus company KL was the only one participant of the procedure disposing natural gas-powered vehicles that could gain full marks under this criterion.

The Court of Justice ruled that the fact that full marks under one of the award criteria set by the contracting could be attained by one company only did not in itself make this criterion discriminatory.

When determining whether an award criterion is discriminatory, all the facts of the case must be taken into account.

The Court ruled that in that case there was no violation of equal treatment principle because, in addition to the criterion which only one tenderer was able to satisfy, the contracting authority applied also other award criteria. It was thus possible for companies not meeting the emission criterion still to win the contract.

The presence or absence of a link with the subject matter of public procurement

In '*Concordia Bus'* case, the Court of Justice ruled that award criteria relating to the level of nitrogen oxide emissions and the noise level of buses to be used for municipal transport met the requirement of being linked to the subject - matter of the contract. There was also another case reviewed by the Court of Justice concerning this issue.

Example:

In 'Wienstrom' case [90] public procurement documents required that that tenderers should supply electricity from renewable resources. Bidders were obliged to prove that they had disposed of or would dispose of a minimum amount of electricity per year from renewable energy sources equivalent to the estimated annual consumption of the Austrian Federal Republic's offices (AFR). In addition, an award criterion was included, with a weighting of 45 %, with points to be awarded based on the amount of electricity from renewable resources which the bidder could supply in excess of the AFR's estimated requirements. The Court of Justice found the solutions applied by the contracting authority not consistent with the EU requirements.

The Court of Justice concluded that:

- it is acceptable to make use of ecological award criterion, even if the criterion in question does not provide an immediate benefit for the contracting authority
- it is furthermore possible to give an important weighting to such criteria
- it is also clearly admissible to establish an award criterion which is related to the production method of the purchase product, if it is relevant for the contract
- however, in order for the criterion to be acceptable, it should be expressly linked to the subject matter of public procurement and should be capable of verification, that implies that the contracting authority should require, through production of certificates, for example, elements enabling it to verify the information submitted by bidders in relation to the criterion
- it is not allowed to use an award criterion which is based on the total amount of electricity from renewable sources which can be provided in excess of the amount required under the contract because such a requirement is not linked to the subject matter of contract in question and leads to unjustified discrimination of bidders who are fully able to meet the contract's requirements.

90 Ruling of the Court of 4 December 2003 in case C – 448/01.

Concluding, 'Wienstrom' case defined two important elements for the application of the environmental criteria:

1. the criteria must be accompanied by requirements which enable the contracting authority to verify the information provided by bidders regarding compliance with environmental criteria
2. award criteria must be specifically linked to the subject matter of the contract in question and not to the general ability of an economic operator; it is not excluded, though, that such capacity is examined at the selection of economic operators' stage of public procurement procedure.

Transparency of award criteria

The procurement provisions require that award criteria must be advertised in advance and their weightings be set out either in the contract notice or in the procurement documents. Accordingly, contracting authorities must indicate in the notice or documents:

- the criteria they will apply to identify the most economically advantageous tender
- the relative weightings they will apply to the criteria, either as precise numbers or a range with an appropriate maximum spread and
- any sub-criteria they will apply and, in most cases, their weightings.

Weighting approaches

The weight given to each award criterion determines the influence it has in the final evaluation of tenders. The weighting of environmental award criteria may reflect the extent to which environmental aspects are already addressed in the technical specifications. If there are strong environmental requirements in the specifications, they may be given a lower weight in award criteria, and vice versa.

There is no set maximum for the weight to be assigned to environmental criteria. To determine an appropriate weighting, contracting authorities should consider:

- how important environmental objectives are for the contract, relative to other considerations such as cost and general quality
- to what extent these considerations are best addressed in award criteria, either in addition to or instead
- how many points the contracting authority can "afford" to allocate – this will vary depending on the product/service and the market conditions. For example, if there is a low degree of price variation for a product, but environmental performance varies greatly, it makes sense to allocate more marks to assess environmental characteristics of product performance (share of products complying with ISO Type I labels or equivalent) and the quality of environmental training programmes.

Using test reports and certificates

In some cases contracting authorities may wish to ask for a test report or certificate from a conformity assessment body to demonstrate the levels of environmental performance offered by products[91]. For example, in a contract for lighting they may wish to award more marks to lighting solutions which have a longer time-to-replacement (either a standalone criterion or as part of life-cycle costing). In this case the contracting authority could ask tenderers to provide a test report or certificate demonstrating this. If tenderers have no access to such reports or certificates for reasons which are not attributable to them,

91 Article 103 (1) of the new PPL.

then the contracting authority must also consider other evidence such as a technical dossier if this offers adequate proof[92].

Life-cycle costing (LCC) and environmental considerations

When the contracting authority buys a product, service or work, it always pays a price. Purchase price, however, is just one of the cost elements in the whole process of procuring, owning and disposing of a product. Life-cycle costing (LCC) means considering all the costs that will be incurred during the lifetime of the product, work or service:

- Purchase price and all associated costs (delivery, installation, insurance, etc.)
- Operating costs, including energy, fuel and water use, spares, and maintenance
- End-of-life costs, such as decommissioning or disposal.

LCC may also include the cost of externalities (such as greenhouse gas emissions) under the specific conditions. The new PPL requires that where LCC is used, the calculation method and the data to be provided by tenderers should be set out in the procurement documents. Specific rules also apply regarding methods for assigning costs to environmental externalities, which aim to ensure that these methods are fair and transparent.

By applying LCC contracting authorities take into account the costs of resource use, maintenance and disposal which are not reflected in the purchase price. Often this will lead to 'win-win' situations whereby a greener product work or service is also cheaper overall. The main potential, for savings over the life-cycle of a good, work or service are outlined below.

Savings on use of energy, water and fuel

The costs of energy, water and fuel consumption during use often make up a significant proportion of the total cost of owning a product, work or service, and of its life-cycle environmental impact. Reducing this consumption makes clear sense both financially and environmentally. In some cases, the greenest alternative will be one which is designed to maximise the period until replacement and/or minimise the amount of maintenance work which needs to be done. For example, the choice of materials on the exterior of a building or bridge can have a large effect on the frequency of maintenance and cleaning activities. The most sustainable option may be one which helps to avoid such costs, and this can be assessed as part of LCC.

Important:

Disposal costs are easily forgotten when procuring a product or a construction project. Costs of disposal will eventually have to be paid, although sometimes with a longer delay. Not taking these costs into account can turn a bargain into an expensive purchase. Disposal costs range from the cost of physical removal to paying for secure disposal. Frequently, disposal is governed by strict regulations. In certain cases, there may be a positive return to the owner at the end of life, for example where vehicles or equipment can be sold on or recycled profitably.

Assessing external environmental costs

As well as financial costs directly borne by the contracting authority, it may also take into account environmental externalities. Externalities are damages or benefits which are not paid by the polluter or beneficiary under normal conditions. They are defined as 'the costs and benefits which arise when social or economic activities of one group of people have an impact on another, and when the first group fail to

92 Article 103 (2) of the new PPL.

fully account for their impact'[93]. Examples of externalities are the costs linked to climate change or acidification of soil or water.

Example:

The building sector produces a high-volume of waste. The demolition of old buildings means not only removing a large quantity of debris, but also managing hazardous materials, like asbestos. Thus, the contracting authority in its procurement documents may ask constructors how much hazardous waste they expect to produce during demolition and the cost of removing it. In other cases, for example, in road building, it should also be possible to calculate the savings from using recycled waste materials, such as used asphalt or demolished building materials.

If the contracting authority intends to assign a cost to environmental externalities as part of its award criteria, the public procurement provisions require that the method used by the contracting authority:

- is based on objectively verifiable and non-discriminatory criteria
- is accessible to all interested parties and
- the data required can be provided with reasonable effort by diligent economic operators[94].

While it is possible to develop a bespoke method for calculating LCC which is suitable for a particular contract, this must not unduly favour or disadvantage any economic operator.

Where a common method for calculating LCC has been made mandatory under EU law, the contracting authority must apply that method[95]. Under the current EU rules this only applies in relation to road transport vehicles under the Clean Vehicles Directive, which provides both a common methodology and minimum costs to be assigned to certain environmental externalities if these are monetised.

Note:

The Clean Vehicles Directive makes it mandatory for contracting authorities to take energy and environmental impacts into account when purchasing road transport vehicles – either in the specifications or the award criteria. The Directive provides methodology for the monetisation of these impacts, for the purpose of assessing operational lifetime cost. This model allocates a monetary value to several types of emission – carbon dioxide (CO2), nitrous oxide (NOx), non-methane hydrocarbons (NMHC) and particulate matter. The lifetime emissions of each vehicle tendered may then be given a cost, which should be added to other direct costs such as purchase price, fuel costs and maintenance.

Applying LCC

An increasing number of public authorities in Europe are using LCC to evaluate tenders, and a variety of tools of different complexity and scope have been developed. An overview and links to some relevant LCC tools can be found at: *http://ec.europa.eu/environment/gpp/lcc.htm*.

In properly assessing LCC, certain issues must be considered:

- **Life-span** – the frequency with which a product needs to be replaced will have a major impact on its cost, especially over a longer period. A cheap product which needs to be replaced frequently may well cost more over the long term than a higher-priced product which lasts for many years. This should be taken into account when determining over how many years the contracting authorities wish to make a life-cycle cost comparison.

93 The European Commission, DG Environment: *A study on the Economic Valuation of Environmental Externalities from Landfill Disposal and Incineration of Waste. Final Main Report*, October 2000.

94 Article 134 (3) of the new PPL.

95 Article 134 (4) of the new PPL.

- **Discount rate** – since costs in the future are not 'worth' as much as those incurred today, as society places more weight on positive and negative impacts today than in the future. EUR 100 invested today at 5% interest would be worth EUR 105 in one year's time. Therefore EUR 105 spent in one year's time is only "worth" EUR 100 at the present time – its net present value (NPV). NPV can be taken into account when comparing life-cycle costs by applying a social discount rate to future costs. The rate differs between countries but is usually between 3% and 8% (adjusted to eliminate the effects of inflation).
- **Data availability and reliability** – assessing life-cycle costs inevitably includes an element of unpredictability regarding costs to be incurred in the future (for example, maintenance costs, energy consumption, as well as the product's actual lifespan). Requesting detailed supporting information for cost estimates provided by tenderers is therefore important. In some cases, where future costs are within the control of the contractor (e.g. they are responsible for maintenance or disposal), contracting authorities can build maximum future prices into their contract terms, giving greater certainty to their LCC calculations.

LCC tools

This is a non-exhaustive list of tools available for calculating LCC:

- The European Commission's calculator for LCC for vehicle procurement:

  http://ec.europa.eu/transport/themes/urban/vehicles/directive/
- The European Commission's common method for LCC in construction:

  http://ec.europa.eu/growth/sectors/construction/support-tools-studies/index_en.htm
- A tool for assessing both LCC and CO2 emissions in procurement, developed within the SMART-SPP project:

  www.smart-spp.eu
- An LCC tool produced by the Swedish Environmental Management Council (SEMCo):

  www.upphandlingsmyndigheten.se/omraden/lcc/lcc-kalkyler/
- An LCC tool developed within the BUY SMART project:

  www.buy-smart.info

More information about application of the most economically advantageous tender is provided in the *Guidelines for choosing the most economically advantageous tender*[96] and about application of the LCC in the *Guidelines for calculation of total life cycle costs*[97] developed by the Project.

Abnormally low tenders

In some cases it may happen that the contracting authority receives a tender which seems unusually low in relation to others or to the cost of the supply, service or work expected by the contracting authority. From a green procurement perspective, the low costs of a tender may raise doubts about compliance of the tenderer with environmental law and/or the viability of the tender in relation to environmental requirements.

96 Available at: http://eupodrska.ujn.gov.rs/wp-content/uploads/2020/01/Guidelines-on-EMAT.pdf.

97 Available at: http://eupodrska.ujn.gov.rs/wp-content/uploads/2018/11/Life-Cycle-Costs-LCC_guideline-102018.pdf

In such situations contracting authorities must seek an explanation from the tenderer concerning reasons for its abnormally low price or cost[98]. Legitimate factors such as the particular production method or technical solutions applied by the tenderer, or unusually favourable conditions available to it, may explain the low price (cost) of the tender[99]. The contracting authority may only reject the tender where the explanation and evidence supplied do not satisfactorily account for the abnormally low tender, taking into account the information provided by the tenderer concerned[100]. In some cases it may become clear in the course of enquiries that the abnormally low cost is due to the tender not complying with applicable environmental law – for example because certain components or materials have been sourced illegally. In such cases contracting authorities are obliged to reject an abnormally low tender[101].

Contract performance clauses

Contract performance clauses are used to specify how a contract must be executed.

Environmental considerations can be included in contract performance clauses, provided they are published in the contract notice or procurement documents and are linked to the subject-matter of the contract. Any special environmental conditions should be indicated in advance, to ensure economic operators are aware of these obligations and are able to reflect them in the price of their tenders.

The contracting authority may provide that economic operators will be excluded from further participation if they do not assent to the contractual clauses. Where such mandatory conditions are indicated, it is important to apply them to all tenderers in the manner set out in the procurement documents.

Example[102]:

For example, in a catering contract for a school canteen the contracting authority may wish to require the provision of sustainable and organic food, reduction of packaging and waste, and the use of energy and water-efficient equipment and methods of food preparation. The contracting authorities may ask tenderers to commit to specific targets under each of these headings, which will be assessed under award criteria and also form part of the final contract with the successful tenderer.

Contract performance clauses for the supply of goods

For supply contracts, environmental clauses may be included in the terms of delivery. Simple ways to improve the environmental impact of a contract include:

- Having the product delivered in the appropriate quantity; this often means a bulk delivery, as this will be more environmentally efficient in terms of transport impact per item than having smaller quantities delivered more often. Specifying a maximum number of deliveries per week or month can be another way of achieving the same result
- Requiring that goods should be delivered outside of peak traffic times to minimize the contribution of deliveries to traffic congestion
- Requiring that the supplier takes back (and recycles or reuses) any packaging that comes with the product – this has the double advantage of centralizing packaging prior to reuse or recycling and encouraging the supplier to cut down on any unnecessary packaging

98 Article 143 (2) of the new PPL.

99 Article 143 (3) of the new PPL.

100 Article 143 (4) of the new PPL.

101 Article 143 (7) of the new PPL.

102 Example provided in the European Commission '*Buying green! A handbook on green public procurement*', 3rd edition, 2016.

– Requiring the supplier to report regularly on the greenhouse gas emissions caused in delivering the product, and an indication of measures taken to reduce these emissions over the course of the contract (the latter would not apply to one-off supply contracts).

Where the contracting authority has included specific materials or production processes or methods as part of their technical specifications, these may also form part of the contract clauses for supply contracts.

For example, in a contract for paper products the contract could specify that these will be 'elemental or totally chlorine free'.

Supply contracts often involve some service or works elements (e.g. siting, installation or maintenance), for which the clauses listed below may be appropriate.

Contract performance clauses for the provision of works or services

Examples of possible contract performance clauses for works or service contracts[103] include:

How the service or work is performed:

– Application of specific environmental management measures, where appropriate in accordance with a third-party certified scheme such as EMAS or ISO 14001

– Reporting on any environmental issues arising in the performance of the contract and taking steps to remedy these, e.g. spillages or use of hazardous substances

– Efficient use of resources such as electricity and water on construction sites

– Use of dosage indicators to ensure appropriate quantities of cleaning products etc.

Training of contractor staff:

– Staff trained in the environmental impact of their work and the environmental policy of the contracting authority in whose buildings they will be working

– Drivers trained in eco-driving techniques to save emissions and fuel.

Transport of products and tools to the site:

– Delivery of products to the site in concentrated form and then dilution on site

– Use of reusable containers or packaging to transport products

– Reduction of CO_2 or other greenhouse gas emissions associated with transport.

Disposal of used products or packaging:

– Products or packaging taken away for reuse, recycling or appropriate disposal;

– Targets for the reduction of waste-to-landfill.

Monitoring contract compliance

Having environmental contract clauses is only effective if compliance with these clauses is properly monitored by contracting authorities. Different forms of contract compliance monitoring can be applied:

– the supplier may be requested to supply evidence of compliance

– the contracting authority may carry out spot checks or

[103] Supply contracts often involve some service or works elements (e.g. siting, installation or maintenance), for which the clauses listed may be appropriate.

– a third party may be contracted to monitor compliance.

Appropriate penalties for non-compliance or bonuses for good performance should be included within the contract.

Example:

Many contracting authorities include key performance indicators (KPIs) in contracts, which can be linked to the contractor's entitlement to claim payment. As good performance on environmental issues also helps to establish a contractor's reputation, incentives may take the form of positive publicity which highlights this to the public and other contracting authorities.

KPIs or other forms of monitoring compliance with environmental commitments should take into account the time and resources which will be needed to apply these in practice. It may be better to include a smaller number of such indicators which can be meaningfully enforced if it is unrealistic to monitor a long list of commitments. KPIs should always go beyond basic compliance with environmental law or other obligations which a contractor would have to meet anyway.

Green public procurement criteria (GPP criteria)

To assist contracting authorities in identifying and procuring greener products, services and works, a number of environmental procurement criteria (GPP criteria) have been developed in the European Union.

At the time of writing this paper GPP criteria are available for 19 product and service groups. Those GPP criteria can be directly inserted into procurement documents. GPP criteria are regularly reviewed and updated to take into account the latest scientific product data, new technologies, market developments and changes in legislation. Most of the criteria are available in all official EU languages. They are available at the website of the European Commission:

http://ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm.

The basic concept of GPP criteria relies on having clear, verifiable, justifiable and ambitious environmental criteria for products and services, based on a life-cycle approach and scientific evidence base. In the Communication "Public procurement for a better environment"[104] the Commission recommended the creation of a process for setting common GPP criteria.

The idea behind creating GPP criteria was that criteria used by the European Union Member States should be similar to avoid a distortion of the single market and a reduction of EU-wide competition. Having common criteria reduces considerably the administrative burden for economic operators and for public administrations implementing GPP. Common GPP criteria are of a particular benefit to companies operating in more than one Member State as well as SMEs (whose capacity to master differing procurement procedures is limited).

The priority sectors for implementing GPP were selected through a multi-criteria analysis including:

– scope for environmental improvement
– public expenditure
– potential impact on suppliers
– potential for setting an example to private or corporate consumers
– political sensitivity

104 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Public procurement for a better environment' (COM (2008) 400).

- existence of relevant and easy-to-use criteria
- market availability and economic efficiency.

At the moment of writing this paper the GPP criteria are available for:

- road transport
- indoor cleaning services
- road lighting and traffic signals
- paints, varnishes and road markings
- textiles products and services
- computer and monitors
- copying and graphic paper
- furniture
- electrical and electronic equipment used in health care sectors
- electricity
- food and catering services
- gardening products and services
- imaging equipment
- office building design, construction and management
- road design construction and maintenance
- sanitary tapware
- toilets and urinals.

All GPP criteria have similar structure. Basically, they follow a procurement process and include issues such as:

- a definition of the subject matter of public procurement
- minimum technical and functional specifications
- selection criteria related to the capacity of tenderers to perform the contract in question
- award criteria used for the comparison of tenders and selection of the best one and
- contract performance clauses.

Note:

GPP criteria are not legally binding - EU Member States are invited, though, to include the GPP criteria into their green public procurement national plans (policies) and individual contracting authorities to use them in their procurement procedures. In practice, a number of EU Member States have either made references to EU GPP criteria in their national action plans, or adopted national criteria which reflect these quite closely. Variations in the criteria adopted in Member States may reflect national differences in the market availability of products or services, approach to procurement and environmental and other priorities. Similarly, respective contracting authorities may choose to adapt the criteria to meet their specific requirements. Individual contracting authorities can choose which criteria to apply, in the absence of specific national laws regulating this issue.

GPP criteria are based on data from an evidence base, on existing ecolabel criteria and on information collected from stakeholders of industry, civil society and Member States. The evidence base uses available scientific information and data, adopts a life-cycle approach and engages stakeholders who meet to discuss issues and develop consensus.

GPP criteria are adopted in line with the following approach - for each sector covered two types of criteria are proposed:

1. core criteria and
2. comprehensive criteria.

The core criteria are those suitable for use by any contracting authority across the Member States and address the key environmental impacts. They are designed to be used with minimum additional verification effort or cost increases.

Example:

The following core criteria for cleaning services are provided with regard to technical specifications:

'The following types of cleaning products [list of cleaning products to be defined by the contracting authority – for instance all-purposes cleaners, sanitary cleaners] to be used to performed tasks related to the contract must be compliant with criterion 1 and 4 of the EU Ecolabel for hard surface cleaning products on, respectively, toxicity to aquatic organisms and excluded or restricted substances'.

More complex to verify during contract execution option (option B) would be that: *at least A % of all cleaning products, by volume at purchase, to be used to perform tasks related to the contract must be compliant with criterion 1 on toxicity to aquatic organisms and criterion 4 on excluded and restricted substances of the EU Ecolabel for hard surface cleaning products.*

As regards award criteria the core award criterion which could be used is the use of ecolabelled cleaning services: *points will be awarded proportionally to tenders in which more than A % of all cleaning products, by volume at purchase, to be used to perform tasks related to the contract must be compliant with criterion 1 and criterion 4 on the EU Ecolabel for hard surface cleaning products on, respectively to aquatic organisms and excluded or restricted substances* (this criterion can be used only in combination with option B above).

The comprehensive criteria, in turn, are for those contracting authorities who wish to purchase the best environmental products available on the market. These may require additional verification effort or a slight increase in cost compared to other products with the same functionality.

Example:

Again with regard to cleaning services, comprehensive criterion which could be used in technical specification is the requirement that '*all textile cleaning accessories (such as cloths, mop heads) to be used to perform tasks related to the contract must be made of microfiber or meet the requirements set out in in the EU Ecolabel for textile products'.*

GPP criteria provide also methods of verification that they are fulfilled. For example, with regard to indoor cleaning services GPP criteria specify that the tenderer must supply a list of the cleaning products that will be used to perform the contract and provide documentation proving their compliance with the requirements. Products that have been awarded the EU Ecolabel for hard surface cleaning products are deemed to comply with the requirements.

GPP criteria are intended as ready to be used in procurement documents. GPP does not set out to detail each and every aspect of a product's life cycle. Rather, by judicious use of published ecolabel and/or life cycle information, it focuses on key aspects.

Conclusions

Green public procurement is an important tool to achieve environmental policy goals relating to climate change, resource use and sustainable consumption and production, in particular taking account of the importance of public sector spending on goods and services.

Since public authorities are the largest consumer in the economy they can make, by using their purchasing power to choose goods, services and works with a reduced environmental impact, an important contribution towards sustainability goals.

Green procurement brings about numerous advantages: political (sets good examples to the public), environmental (raises awareness of environmental issues in the society), social and health (can improve the quality of life) and economic (enables saving money due to life cycle costing).

Contrary to the received wisdom green products or services are not necessarily more expensive than traditional ones. Studies show that, when life – cycling costing approach is used, the greener alternatives are, in longer term, cheaper even if their initial purchasing price is higher.

Serbian public authorities should consider how to make better use of public procurement to favor environmentally friendly products and services – these guidelines are meant to be a contribution to that end.

The objective of this document is to analyse and set out the possibilities of the public procurement legal framework with regard to integration of environmental considerations into public procurement processes.

The main possibilities for green procurement are to be found at the start of the public procurement process, namely when the decision on the subject matter of public procurement is taken. Existing Serbian environmental legislation is binding upon contracting authorities and may have an influence on the choices to be made and the specifications and criteria to be drawn by contracting authorities.

The current PPL and all the more provisions of the new PPL offer different possibilities to integrate environmental considerations in public procurement process, notably when defining the subject matter of public procurement (drawing technical specifications or functional requirements), application of exclusion and selection criteria and the award of contract (application of award criteria). In addition, contracting authorities may impose additional conditions concerning implementation of contracts compatible with the public procurement provisions.

Further reading

Public Procurement Office: '*Zelene javne nabavke*', Belgrade, September 2015.

EU Project 'Support for Further Improvement of Public Procurement System in Serbia': '*Guidelines for calculation of total life cycle costs'*, Belgrade, 2018.

SIGMA/OECD: '*Selected judgements of the Court of Justice of the European Union on public procurement* (2006-2014)', SIGMA (2014), OECD Publishing, Paris

SIGMA/OECD: '*Public Procurement Brief 13 Incorporating Environmental Considerations into Public Procurement*, SIGMA (2016), OECD Publishing, Paris

SIGMA/OECD: '*Public Procurement Brief 34 Life – cycle costing'*, SIGMA (2016), OECD Publishing, Paris

SIGMA/OECD: '*Public Procurement Brief 35 Abnormally low tenders'*, SIGMA (2016), OECD Publishing, Paris

SIGMA/OECD: '*Public Procurement Training Manual – Module C5*', SIGMA (2015), OECD Publishing, Paris,

The European Commission: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions '*Public procurement for a better environment*' (COM (2008) 400), published on 16 July 2008.

The European Commission, DG Environment*: A study on the Economic Valuation of Environmental Externalities from Landfill Disposal and Incineration of Waste. Final Main Report*, October 2000.

The European Commission: '*Buying green! A handbook on green public procurement*', 3rd edition, 2016.

Useful Internet addresses

The European Commission public procurement related websites:

https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en.

http://ec.europa.eu/environment/gpp/index_en.htm

SIGMA/OECD publications:

http://www.sigmaweb.org/publications/key-public-procurement-publications.htm

http://www.sigmaweb.org/publications/public-procurement-training-manual.htm

The Public Procurement Office, the Republic of Serbia:

http://www.ujn.gov.rs/

The website of the Project: Support for further improvement of Public Procurement system in Serbia, IPA 2013:

http://eupodrska.ujn.gov.rs/

The Court of Justice of the European Union:

https://curia.europa.eu/jcms/jcms/index.html