

Financial Law Review

No. 32 (4)/2023

UNIVERSITY OF GDAŃSK • MASARYK UNIVERSITY • PAVEL JOZEF ŠAFÁRIK UNIVERSITY
<http://www.ejournals.eu/FLR>

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GREEN PUBLIC PROCUREMENT – PROBLEM OR CHALLENGE

Abstract

Green procurement policies (GPP) are procedures based on public procurement law that apply environmental criteria in at least one stage of the procedure in provisions related to the person of the contractor or the subject matter of the contract. The author addresses the subject of GPP in the context of an analysis of whether the introduction of the application of actual GPP requires changes to the existing public procurement legislation. The subject of the article is not to define the meaningful scope of GPP or the principle of effectiveness, but to look at it from the perspective of application.

The author, analysing the current legislation, indicates that the current legal system of public procurement due to the voluntary application of green procurement with some inclusions resulting from specific provisions is sufficient enough not to be an obstacle to its application.

In the author's opinion, other changes are necessary to change the behaviour, habits and mentality of those responsible for public procurement proceedings.

The article was prepared using the legal-dogmatic method related to the analysis and interpretation of legal acts related to the issue of green public procurement. It was supplemented by a comparative legal method, which allowed for the analysis and identification of existing legal norms as well as the basis for the use of green procurement in procedures based on public procurement law.

Keywords: Efficiency principle, green public procurement.

JEL Classification: K22, K32

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1. Introduction

I once read a sentence that Green public procurement (hereafter also referred to as GPP) is a bit like the Yeti: "everybody talks about them, but nobody has (yet) seen them in practice". GPP is a policy of green public procurement, i.e. procedures based on public procurement law that apply environmental criteria in at least one of their stages in provisions related to the person of the contractor or the subject matter of the contract. As an institution, GPPs are referred to in many publications and articles, policy documents. They are seen as rules that, on the one hand, ensure the possibility of acquiring products or services that meet the needs of the contracting authority, while at the same time incorporating environmental criteria, i.e. aiming to minimise the negative environmental impact of these products and services. This practice entails the involvement of public funds in the process of increasing demand for green products or services, while at the same time influencing their development. However, are these tools a declaration or are they a political idea that is 'waiting to be transformed' into additional regulations in public procurement? On the other hand, the question arises as to whether this pro-environmental instrumentalization of the law is congenial? Are additional regulations in public procurement legislation becoming necessary at all in order to speak of green procurement? If there is no need to amend existing legislation, what is the obstacle to GPP? If rules are created on minimum requirements for a given sector of the economy, setting a minimum level deemed necessary from an environmental perspective, should this be created at EU level or left to individual Member States?

The article was prepared using the legal-dogmatic method related to the analysis and interpretation of legal acts related to the issue of green public procurement. It was supplemented by a comparative legal method, which allowed for the analysis and identification of existing legal norms as well as the basis for the use of green procurement in procedures based on public procurement law.

2. Legal basis for the use of green procurement

Already in 2002, the World Summit on Sustainable Development promoted public procurement as a means to reach environmental goals [Smith 2016].

The pioneering document on GPP was the Communication from the European Commission - Public procurement for a better environment, COM (2008) 400. The European Commission has otherwise issued a number of guides in this area. There is an official website of the

European Commission dedicated to GPP, convincing that they are feasible and showing their application through selected examples. It can be said, therefore, that there has been a great deal of activity in the area of green procurement in recent years to promote its use and to make the European procurement market more efficient.

The GPP TOOLKIT is a set of guidelines developed by the European Commission, containing basic and comprehensive criteria related to the environmental performance of selected groups of products, which can directly influence the improvement of the environment.

environment. This tool is intended to make it easier for the contracting authority to select criteria to demonstrate the economic benefit of using environmental criteria.

In the early years of green public procurement, EU member states independently developed environmental criteria for selected products and services. However, it was recognised that it was necessary to develop a consistent formulation of these criteria for all European countries to avoid market distortions [Konenberg, Bergier 2010: 39].

The use of public procurement in pursuit of specific goals, including environmental goals, has also been addressed by the Court of Justice, which in its rulings (*Concordia Bus*, *Gebroeders Beentjes BV vs. Netherlands Court*, *Wienstrom*, *v. French Republic (Nord-Pas de Calais)*) has indicated that it is possible to realise such effects as environmental and social effects through public procurement procedures. With regard to environmental issues, two judgments are relevant, i.e. the *Concordia Bus* judgment and the *Wienstrom* judgment. In the *Concordia Bus* judgment of 17 September 2002 (C-513/99), the CJEU indicated, inter alia, that a contracting authority may take environmental criteria into account, provided that these criteria are linked to the subject-matter of the contract, without conferring an absolute freedom of choice on the contracting authority, are expressly mentioned in the contract documents or the contract notice and comply with all general principles of Community law, in particular the principle of non-discrimination. In the *Wienstrom* case (C-448/01), on the other hand, tenderers were required to submit a bid for the supply of electricity from renewable sources. They were required to prove that they were able to supply a minimum amount of electricity from renewable energy sources annually corresponding to the estimated annual consumption in the offices of the Austrian Federal Republic. In doing so, this criterion accounted for 45% of the evaluation weighting, with additional points awarded if the bidder could supply energy in excess of the state's requirements. In the case in question, the CJEU ruled that it is permissible to use green award criteria even if the criterion in question does not provide a direct benefit to the contracting authority and that these can be given significant weight in the overall assessment of the tenders. It is permissible to establish an award criterion that is

linked to the production method of the product purchased, if it is relevant to the contract, but it must be clearly linked to the subject matter of the contract and must be verifiable, e.g. by means of certificates submitted.

The challenges facing the public sector are multifaceted as well as identified in different timeframes. They mainly concern issues related to technological transformation and ecological transformation. The ecological transformation is implemented primarily to achieve the intentions of the Paris Agreement concluded in 2015. During the Paris Climate Conference (COP 21), an agreement was adopted that envisages a series of measures aimed at implementing solutions that have a positive impact on the environment. Public procurement plays an important role in the implementation of the adopted goals [Dragos 2014:301; Brzezinski 2021: 57]. Nowadays, they are an instrument for the acquisition of supplies or services that are a factor in the creation of public policy and economic growth, becoming a tool to support development and meet the needs of procurers. Their role and importance in the process of achieving the adopted objectives is related to the market potential, shaped by the number of entities obliged to apply public procurement regulations and the amount of funds spent on the basis of the public procurement procedure. These two elements together allow to observe an increased influence on the observed phenomena or processes, including those related to environmental protection.

Article 11 of the TUFU indicates the possibility of using environmental criteria in public procurement procedures. According to it, environmental requirements should be taken into account in the definition and implementation of all Community policies.

In the December 2019 announced. European Green Deal, the European Union (EU) aims to achieve climate neutrality by 2050. The intention is to achieve zero net greenhouse gas emissions and to ensure that economic growth in EU member states is not linked to the use of natural resources. In order to achieve the adopted targets, legislative and factual measures have been identified as necessary to improve the state of the environment. With regard to the development of the EU economy, targets have been explicitly set and adopted in two key acts, i.e. the New European Green Deal and the New Industrial Strategy of the European Union.

Numerous legal acts in addition to soft law acts regulate environmental issues, including, among others, Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 establishing a framework for energy labelling and repealing Directive 2010/30/EU, 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, Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings, Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles. The cited provisions shape the contracting authorities' obligations to use solutions that involve a positive impact on the environment.

3. Green procurement in the regulations of the Public Procurement Law

Contracting authorities that conduct proceedings under the Public Procurement Law (hereafter: PPP) have the possibility to influence the state of the environment by using the instruments provided for in the PPP. Contracting authorities have two types of impact on the environment: direct impact by purchasing supplies, services and works that take into account environmental considerations; and indirect impact by creating demand for environmental solutions, thereby influencing the development of industries that offer the latest and most environmentally friendly solutions.

Efficient management of public funds, being one of the fundamental principles of the Public Procurement Law and the Public Finance Act, requires that the funds spent by public entities using the public procurement procedures should be used to make an impact in areas deemed to be important, including on the state of the environment.

Article 17(1) of the Public Procurement Law enshrines the principle of effectiveness, while at the same time failing to clarify the meaning of the principle. Assessing efficiency from the perspective of mainly economic efficiency is the predominant way to understand and apply the efficiency principle. However, there are no guidelines or criteria in the Public Procurement Law to establish the indicators, yardsticks or elements constituting the effectiveness of a given contract. Some solutions are provided by the Public Finance Act of 27 August 2009 (hereinafter also referred to as the Public Procurement Law), however without mentioning effectiveness, but referring to the elements constituting effectiveness, i.e. economy and purposefulness.

Article 44(3) of the A.l.f.p. states that public expenditure should be made in a manner that is

1. purposeful and economical, observing the principles of:
 - (a) obtaining the best results from given outlays,
 - b) optimal selection of methods and means to achieve the assumed objectives;
1. in such a way as to enable the tasks to be carried out in a timely manner;

2. in the amount and within the time limits resulting from previously incurred obligations.

The legislator, in shaping the principle of efficiency in spending public funds, does not specify the criteria for the selection of objectives, the measures for the implementation of the objective and the subsequent evaluation of efficiency. The legislator also does not specify on what basis it can be deemed that the selection of the method and means to achieve the objectives was inappropriate and thus the applicable legal provisions were violated. And here it should be noted that the legislator indicates the necessity to determine the objectives that a unit of the public finance sector is to achieve as a result of spending public funds. At the same time it is difficult to find in the relevant regulations, including the provisions of the Public Procurement Law, an obligation to make a proper identification of the objectives, and an analysis of the choice of method, and thus the means, to achieve the identified objectives.

The Court of Justice of the EU points out that the EU coordination of public procurement procedures was intended *inter alia* to minimise the risk that contracting authorities would be guided by non-economic considerations when awarding public contracts . This position confirms that decisions of public finance sector entities are primarily based on economic considerations. The resources that public finance sector units have at their disposal for the implementation of a given task, but also the skilful identification of needs and their proper gradation with the determination of financial consequences of their implementation, are closely related.

When analysing efficiency from the perspective of social phenomena, it is argued in the literature that efficiency must be detached from economic issues, due to its different perception as the occurrence of a positive transformation of social attitudes, so that in such a situation the study and evaluation of efficiency should be verified from the perspective of effectiveness [Pyszka 2015: 13-25]. One of the objectives that can be included in the efficiency principle is a positive impact on the environment – GPP. This means that, by meeting the defined needs for the procurement of goods, services or works on the basis of value for money throughout their life-cycle, the contracting authority generates benefits not only for itself, but also for society and the economy, while minimising environmental damage.

Cost-effective public procurement should take into account not only the purchase price, but also the costs associated with the performance of the contract, including: costs of delivery, installation, commissioning; costs related to the operation of the equipment or building, such as energy or water consumption, maintenance costs or spare parts; end-of-life costs, such as decommissioning, recycling, recovery or disposal. Contracting authorities, when conducting a procurement procedure, should take into account other aspects than just the parameters

of the good or service to be purchased. It should be necessary to perceive the performance of a contract not only from a short-term perspective related to the delivery of a supply, service or works, but also from a long-term perspective related to its use and withdrawal from circulation. Thus, among other things, the issues related to the waste hierarchy are relevant, which assumes that waste should be prevented from being generated in the first place, then prepared for reuse, recycled and, if this is not achievable, subjected to other recovery processes.

An aspect that seems to be completely overlooked by contracting authorities at the preparation stage of the procedure is the fact that green procurement can provide financial savings for public authorities, especially when taking into account the costs of the products or services procured over their entire life cycle, rather than deciding solely through the prism of their purchase price. They mainly focus on the cost of acquiring the object of the contract. However, it may turn out that, although the first procurement cost is higher, procurements that take environmental aspects into account are cheaper in the long run than those that do not take environmental aspects into account. Therefore, environmental aspects should be taken into account at the stage of preparation of the procedure in order to verify the cost-effectiveness of the contract throughout the entire period of use/utilisation of the object of the contract.

Pursuant to the disposition of Article 96(1) of the Public Procurement Law, the contracting authority may specify in the contract notice or the contract documents the requirements connected with the performance of the contract, which may cover economic, environmental, social, innovation, employment or confidentiality of information provided to the contractor in the course of performance of the contract. When providing for such requirements, the contracting authority is obliged to specify the manner of documenting the contractor's compliance with these requirements, the rights of the contracting authority to control the contractor's compliance with these requirements and the sanctions for non-compliance.

Environmental aspects may relate to requirements concerning the composition and origin of materials, the ability to recycle, aspects relating to production processes, the level of consumption of specific resources (e.g. energy, water, fuel) by the object of the contract at the stage of its operation, the level of emissions associated with the use of the object of the contract, or the durability of the object of the contract and its usefulness in the long run. The Public Procurement Law also permits the contracting authority to take account of environmental criteria when shaping the criteria for evaluation of tenders.

Pursuant to Article 242(2)(3) of the Public Procurement Law, quality criteria may include criteria relating to environmental aspects, including energy efficiency of the subject matter of the contract. In turn, Art. 245 (1) of the Public Procurement Law points out that where the contracting authority applies life-cycle costing, it may cover to an appropriate extent some or all of the costs incurred during the life cycle of the product, service or works. These costs include in particular costs incurred by the contracting authority or other users relating to acquisition, use, in particular consumption of energy and other resources, maintenance, decommissioning, in particular demolition and recycling costs. The estimation of the costs of environmental externalities requires the contracting authority to define an assessment methodology taking into account objective, non-discriminatory and verifiable criteria. In certain areas, the legislator has adopted a generally applicable life-cycle costing method. This applies, for example, to the life cycle costing method for buildings regulated in the Regulation of the Minister of Investment and Development of 11 July 2018 on the method of calculating life cycle costs of buildings and the manner of presenting information on these costs - Journal of Laws of 2018, item 1357.

The European Commission has developed common criteria relating to green public procurement usable in EU Member States for selected product groups, which have been identified as the most appropriate both in terms of procurement value and environmental impact. They are published as a set of good practices, based on existing legislation but also on the experience of selected procurers.

When conducting a public procurement procedure, the contracting authority may use tender evaluation criteria that will be environmental criteria. These are criteria which are not necessarily related to savings in the operation of a product or facility, although their application translates into the achievement of environmental effects. Among the environmental criteria is the use of materials whose production is environmentally neutral or less harmful, including materials bearing eco-labels. These are quality labels that are used to mark products that demonstrate compliance with environmental criteria to an above-average degree.

Pursuant to Article 104(1) of the PP, in the case of contracts with specific environmental, social or other characteristics, in order to confirm the compliance of the works, supplies or services offered with the required characteristics, the contracting authority may, in the description of the subject-matter of the contract, in the description of the criteria for evaluation of tenders or in the requirements related to the performance of the contract, require a specific label from the economic operator if all of the following conditions are met:

1. the requirements of the label shall relate only to criteria that are linked to the subject-matter of the contract and are appropriate to define the characteristics of the works, supplies or services that are the subject-matter of that contract;
2. the requirements of the label are based on objectively verifiable and non-discriminatory criteria;
3. the requirements of the label are developed and adopted through an open and transparent procedure in which all stakeholders can participate, including public administrations, consumers, social partners, manufacturers, distributors and NGOs;
4. labels and the requirements of the label are available to all interested parties;
5. the requirements of the label are determined by a third party, over which the contractor applying for the label cannot exercise decisive influence.

Commonly used eco-labels include:

1. EU Ecolabel, which is the official European distinction applied to products with a reduced environmental impact,
2. the EKO eco-label, which is issued to certify that a product meets stringent requirements to protect health and the environment, as well as the sustainable use of natural resources,
3. BIO mark confirming that the product complies with the requirements of organic farming,
4. Forest Stewardship Council (FSC) mark promoting responsible forest management, awarded primarily to paper products,
5. Ecocert mark - a certificate awarded to food, cosmetics, cleaning products, textiles, among others, that meet the requirements of organic farming and have recyclable packaging,
6. LEED (*Leadership in Energy and Environmental Design*) label - a building certification system that assesses the design, construction, operation and maintenance of buildings to maintain green building standards,
7. BREEAM (*Building Research Establishment Environmental Assessment Method*) label - a certification that confirms a standard of best practice in the sustainable design, construction and use of buildings.

4. Barriers to the use of GPP

An analysis of the literature, publications of the Public Procurement Office on the subject of GPP shows that the practical application of green procurement faces a number of difficulties. In the Report of the President of the Public Procurement Office on the functioning of the public procurement system in 2020, it can be read that the share of green or innovative procurement in the total number of public contracts awarded was 1%, while its value accounted for 7% of the total value of public contracts awarded. It is clear from the report that Contracting Authorities continue to focus on the lowest price criterion, neglecting life cycle costs and quality criteria, including environmental criteria.

Identifying obstacles to the use of GPP in public procurement practice include:

1) the lack of adequate knowledge on the part of those responsible in public finance sector units on how to shape the requirements related to green public procurement. GPP is becoming a political idea for public finance sector units, which is implemented in cases where appropriate conditions are shaped in existing legislation - electromobility should be mentioned as an example. Only the shaping of the provisions of the law on electromobility resulted in the shaping of proper provisions of the terms of reference;

2) lack of knowledge on how to verify the application of environmental requirements at the stage of bid evaluation and then contract execution. We often deal with the phenomenon of greenwashing, which contracting authorities fail to identify and properly eliminate. Greenwashing is a way of manipulating an entity that creates and presents its services or products as green, or builds a so-called "green image", which is not quite true. By using greenwashing, they take advantage of the information noise in the market by presenting unreliable information, while at the same time profiting from it. Greenwashing is a misleading activity, which consists of misrepresenting or exaggerating environmental advantages, or passing over information that is convenient. The subject of greenwashing has not been off the agenda of the European legislator since 2007, i.e. since the adoption of Council Regulation (EC) No 834/2007 on organic production and labelling of organic products, which, inter alia, normalizes and conditions the use of terms such as 'bio' or 'eco';

3) the fear on the part of the contracting authority that the application of the GPP will be met with the charge of restriction of competition. As rightly pointed out by T. Szewc and K. Szymańska [Szewc, Szymańska 2023: 551] rightly point out, the fear on the part of contracting authorities that there may be a situation in which there is an insufficient number of potential contractors who can meet the contract criteria may become the basis for

considering that competition has been restricted, which is a violation of a fundamental principle of public procurement;

4) through the informed choice of products and services that comply with certain environmental criteria - such as energy efficiency, use of renewable resources and minimisation of emissions - GPP serves as a catalyst for the adoption of sustainable technologies [Cheng, Appolloni, D'Amato, Zhu 2018: 770-784]. What is lacking, however, is the promotion of green solutions and the fostering of green behaviours that would in effect allow procurers to make informed choices.

5) In the author's opinion, the above-discussed pro-environmental instrumentalisation of public procurement should be in line with the basic function of the public expenditure system, and be related to the spending of public funds for the purposes identified by a unit of the public finance sector, while ensuring equal access for contractors. Building a legal system, which is based only on unilaterally imposed standards not resulting in any way from the consciously identified needs of the contracting authority, is an erroneous solution, detrimental to the effectiveness of the public procurement system;

6) the inconsistently high cost of acquiring green products is becoming a major factor in the decision not to use green procurement. Viewing public procurement only from the perspective of purchase cost and not the total cost of purchase and use is becoming a significant barrier to the development of innovative and at the same time green solutions. As the Public Procurement Office points out in its published reports, the purchase price is the basic criterion in proceedings based on the Public Procurement Law;

7) the effectiveness and efficiency of GPP as an environmental policy tool is questioned due to its similarity to command and control instruments;

8) Lack of perception by the contracting authority of the direct effects occurring on the side of the contracting authority as a result of the application of GPP;

9) Lack of training and information campaigns showing contracting authorities practical examples of the application of GPP in public procurement, with indication of tools to verify how such procurement is carried out;

10) Perception of GPP as a political idea, which does not have to be implemented by a public finance sector entity;

11) Lack of internal regulations in place at the contracting authority level relating to the integration of environmental aspects into tender procedures. Public organisations should realise how easy it is to transform a public procurement into a green public procurement and that contractors are already ready for this. The main difficulties in integrating environmental

aspects into tendering procedures include insufficient knowledge and experience of contracting authorities in their practical application;

12) [Grandia, Meehan 2017: 304] show a clear need to develop the evidence base for achieving the desired policy goals by public procurement. Evaluating the expected policy impacts requires evaluations that go beyond traditional financial metrics and include indirect and long-term measurements. Hence, assessment processes should acknowledge a wide range of network relations between different actors and their approaches. Thus, procurement agencies, different market operators from big companies to SMEs, and end-users should be acknowledged in these processes [Grandia, Meehan 2017].

GPP is currently voluntary, except in situations where the regulations for a given sector or scope enforce the use of environmental solutions. In the author's opinion, the adopted solution does not require changes to public procurement through the creation of additional regulations. It seems that this pro-environmental instrumentalisation of law is not necessary. This is indicated by the analysis of the obstacles indicated above. . regulations created at the EU level on minimum requirements for a given sector of the economy, setting the minimum level considered necessary from the perspective of environmental protection, seem to be a sufficient incentive for the implementation of green solutions in public procurement. Adequate knowledge of public employees, political will, as well as the fashion for green public procurement are important in the introduction of the above mentioned procurement.

5. Conclusions

Public procurement has, in the last two decades, gained a heightened role in implementing strategic policy goals and responding to grand societal challenges [Edquist, Zabala-Turriagoitia 2012; Chicot, Matt 2018; Uyarra et al. 2020].

GPP can be an important driver of environmentally friendly procurement. The public sector can influence green procurement both by developing appropriate policies and by exploiting 'green' markets through a significant dimension of public purchasing. As a result, we can expect green public procurement to potentially play a role in changing unsustainable consumption and production patterns [Cheng, Appolloni, D'Amato, Zhu 2018: 770-784].

Green public procurement is a voluntary instrument, which means that individual Member States and public authorities as contracting authorities can determine the extent to which they implement it. In some scopes, specific legislation can compel procurers to use green procurement such as the law on electromobility and alternative fuels obliging public finance

entities to ensure an adequate share of electric or hydrogen vehicles, in the total number of vehicles of these categories covered by the procurement. This means that if the applicable national regulations do not impose a specific solution related to the application of environmentally-friendly provisions on the contracting authority, it is up to the latter to decide whether, and to what extent, it will use such solutions.

In the author's opinion, the pro-environmental instrumentalization of public procurement discussed above should be consistent with the basic function of the public expenditure system, related to the spending of public funds for purposes identified by a public finance sector entity. Building a legal system, which is based only on unilaterally imposed standards not resulting in any way from the consciously identified needs of the ordering party, is an erroneous solution, compromising the effectiveness of the public procurement system.

Application of GPP mainly requires a change in the behaviour, habits and mentality of persons responsible for public procurement proceedings. Currently, the main, and often the only criterion that determines the choice of a solution or the drafting of a description of the subject of procurement is the price. This is undoubtedly the effect of the limited budgetary capacity of public finance sector entities, and thus the conservative actions of contracting managers, who expect direct effects for the contracting authority while maintaining the level of costs incurred. GPP is now becoming a challenge for contracting authorities, and a problem at the stage of control or contract implementation due to the barriers indicated.

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