

GREEN PUBLIC PROCUREMENT: LESSONS FROM THE FIELDS

Canada, France,
Italy, Portugal,
Netherlands and
Switzerland

Directed by
FRANÇOIS LICHÈRE



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Foreword

Some projects are the result of big ideas, and others emerge from the desire to unite a group. “GPP, Lessons From the Fields” is at the crossroads of the two.

Initially focusing on the issue of integrating sustainable development into public procurement law, the research project quickly turned its attention to the current environmental challenge in order to gain a better understanding of the obstacles preventing a genuine “environmentalization” of public procurement.

The economic impact of public procurement makes it an ideal vehicle for implementing environmental policies. On the one hand, it makes it possible to reduce the environmental consequences of the public authorities’ consumption; on the other, it serves as an example and an incentive for private operators and the general public. We therefore wanted to understand the extent to which environmental objectives are fully integrated and compatible with public contract law. While there is an abundance of literature on the environmentalization of public contracts, the authors are generally unable to explain the obstacles and reasons why, in practice, this consideration of the environment remains very relative and why public purchasers do not fully play their role as sustainable development players. On this point, the project attempts to overcome the limitations of a theoretical academic approach by relying on a field approach based on interviews and surveys. The approach, based on a sociology of law approach, aims to acquire new information on sustainable public contracts, taking into account market practices in particular, and thus to produce realistic research that will help to better understand and improve the sustainable public procurement process.

The project has also made it possible to initiate or consolidate international cooperation by bringing together the expertise of French-speaking researchers from five countries: Canada, with Laval University in Quebec; France, with Jean Moulin University Lyon 3 (project leader); Italy, with the University of Turin; the Netherlands, with the Vrije Universiteit Amsterdam; Portugal, with the University of Lisbon; and Switzerland, with the University of Geneva. In this sense, the project aims to establish a solid network of

researchers on public contracts and the new challenges facing society, in particular sustainable development. In addition, the comparative view of public contracts has enabled each of the project's partners to incorporate good practices from other countries and to consider improving domestic law in the light of innovative solutions existing in other countries.

The project lasted two years, during which the partners met several times by videoconference and in Lyon, despite the hazards of the COVID-19 health crisis. The project was funded by the various partner universities, the Chair in Public Contract Law at Jean Moulin University Lyon 3 and the Agence Universitaire de la Francophonie, which provided financial support of €25,000 between September 1, 2021, and December 1, 2022.

GREEN PUBLIC PROCUREMENT IN CANADA – QUEBEC

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Coordinated by **Antoine Pellerin**, Lawyer, Professor, Faculty of Law,
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Introduction

The following report presents the results of research conducted by a team from Laval University's Faculty of Law led by the late professor emeritus Pierre Lemieux to whom we wish to dedicate this work.

As mentioned in the report, during the research and development process, Quebec adopted Bill 12, an *Act promoting Québec-based and responsible purchasing by public bodies, to strengthen the integrity regime for businesses and to increase the powers of the Autorité des marchés publics*.¹ During the interviews, some respondents mentioned that they were awaiting the legislative amendments introduced by this bill before modifying their practices. A significant number of respondents felt this bill would have a positive impact on responsible purchasing practices, while others indicated that new laws would mainly have the effect of adding constraints and that the solution would rather be to increase skills at the procurement level.

In its current form, the act contains some very interesting provisions regarding green procurement. Section 14.6 states that “before the tendering or awarding process for a contract, a public body must conduct an evaluation of procurement requirements that furthers the pursuit of sustainable development.” Furthermore, Section 14.7 states that “with a view to continual improvement, a public body must give priority to include in the tender documents or the contract, as applicable, at least one condition relating to the responsible nature of the procurement, from an environmental, social or economic perspective.”

What is obvious, however, is that such rules are not binding. Even if other provisions (Sections 14.9 and 14.11) provide that government “may, by directive and in the cases it determines, require public bodies to include in the tender documents or the contract, as applicable, one or more conditions relating to the responsible nature of a procurement, from an environmental, social or economic perspective” and it can grant “a premium in the form of a preferential margin to enterprises that comply with environmental or

1. *Act promoting Québec-based and responsible purchasing by public bodies, to strengthen the integrity regime for businesses and to increase the powers of the Autorité des marchés publics*, LQ 2022, c. 18.

climate change-related standards more stringent than those set by the applicable legislation or the tender documents,” it is concerning that the main law governing Quebec’s public procurement process only obliges public bodies to take sustainable development objectives into account and leaves the decision to the discretion of the government.

As of now, the Bill 12 has been in effect for over a year. What conclusions can we draw about the above-mentioned hopes and limitations? Although it is too early to draw such conclusions, several elements suggest that public bodies are slow to significantly modify their practices despite the above-mentioned legislative amendments. If we rely on recent news on the subject and if we take a quick look at recent tender documents related to significant projects, everything suggests that the green shift is slow to materialize without binding rules. Even if these rules were restrictive, there is reason to believe that we should instead focus on training stakeholders. As mentioned in the discussion part of the report, nonlegal determinants seem equally important in bringing real change, if not more so.

The more the practices and expertise of stakeholders in the field are in harmony with the rules that govern them, the more likely they are to be effective. It is certainly a lesson we can learn from this research project thanks to which we were able to compare the practices and rules in different jurisdictions.

Finally, it will also be interesting to see if the new objective in Bill 12, which provides that “the conditions determined by this Act aim to promote . . . the search for the best value in the public interest” will be interpreted and applied in a way that considers the social and environmental dimensions of public interest.

Antoine Pellerin, Lawyer
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Summary of Green Public Procurement Framework – Quebec, Canada

CORE CONSTITUTIONAL RULES

Canada is a federal state, which means that legislative powers are shared among the federal government, the ten provincial governments and the three territorial governments. Its governance system is a constitutional monarchy and a federal parliamentary democracy. In this project, the province of Quebec will be the central topic of discussion, although a short presentation of Canada's core constitutional rules is essential to introduce the matter. Canada's constitutional statutes include the 1867 *Constitution Act*,² formerly known as the *British North America Act*,³ and the 1982 *Constitution Act*,⁴ which notably contains the *Canadian Charter of Rights and Freedoms*. The 1867 *Constitutional Act* does not provide direct constitutional rules related to public procurement or to green public procurement, although Section 92 provides clarity as to which matters are subjects of exclusive provincial legislation.⁵

2. *Constitution Act*, 1867, 30 & 31 Victoria, c. 3 (U.K.).

3. *British North America Act*, 1867, 30-31 Victoria, c. 3 (U.K.).

4. *The Constitution Act*, 1982, Schedule B to the *Canada Act 1982*, (U.K.), 1982, c. 11.

5. For example, the establishment, maintenance, and management of public and reformatory prisons in and for the province (par. 6); the establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the province, other than marine hospitals (par. 7); municipal institutions in the province (par. 8) and local works and undertakings (par. 10). *Constitution Act*, 1867, 30 & 31 Victoria, c. 3 (U.K.), s. 92.

Quasi-constitutional rules⁶ pertaining to the environment include Quebec's *Charter of Human Rights and Freedoms*,⁷ which contains Section 46.1, under which every person has a right to live in a healthful environment in which biodiversity is preserved, to the extent and according to the standards provided by law. Although Quebec's *Charter of Human Rights and Freedoms* possesses a quasi-constitutional status, only Sections 1 through 38 have priority over other laws. As a result, Section 46.1 has more of an interpretative nature than a normative one. The promotion of environmental protection to the status of fundamental value echoes Canada's case law, which will be discussed in the following summary. While some scholars disagree, economic and social rights are not considered real fundamental "rights" of the person calling for a legally binding sanction.⁸

JUDICIAL SYSTEM

Canada's judicial system derives from the *1867 Constitution Act*, by virtue of which authority over the judicial system is divided between the federal government and the ten provincial governments. While the federal government has the power to appoint provincial superior court judges,⁹ provinces such as Quebec are responsible for the administration of justice in the province, which includes the constitution, maintenance and organization of provincial courts of civil and criminal jurisdiction, as well as civil procedure in those courts.¹⁰ On the other hand, the federal government has the authority to establish a general court of appeal,¹¹ which it did by creating the Supreme Court of Canada, as well as the Federal Court of Appeal, the Federal Court and the Tax Court of Canada.

6. Although Canada's Supreme Court has yet to articulate comprehensive criteria for recognizing a statute or regulation as quasi-constitutional, MacDonnell argues that "quasi-constitutional legislation should be understood as implementing constitutional imperatives, which refers to constitutional obligations of varying degrees of specificity that emanate from the rights-conferring aspects of the Constitution, as well as from those aspects of the Constitution that establish the institutions and procedures of government." See Vanessa MacDonnell, "A Theory of Quasi-Constitutional Legislation," *Osgoode Hall Law Journal*, vol. 53, no. 2, 2016, 508-539, DOI: <<https://doi.org/10.60082/2817-5069.2995>>.
7. *Charter of Human Rights and Freedoms*, 1983, CQLR c. C-12.
8. For more information on the topic, see Sophie Thériault and David Robitaille, "Les droits environnementaux dans la Charte des droits et libertés de la personne du Québec : pistes de réflexion," *McGill Law Journal*, vol. 57, no. 2, 2011, 211-265.
9. *Constitution Act*, 1867, 30 & 31 Victoria, c. 3 (U.K.), s. 96.
10. *Constitution Act*, 1867, 30 & 31 Victoria, c. 3 (U.K.), s. 92(14).
11. *Constitution Act*, 1867, 30 & 31 Victoria, c. 3 (U.K.), s. 101.

Therefore, at the top of the judicial structure, and acting as a national court of last resort, sits the Supreme Court of Canada, which can hear appeals from provincial courts of appeal and the Federal Court of Appeal. Under these courts of appeal reside the Federal Court, the Tax Court of Canada and the provincial and territorial superior courts of general jurisdiction, which serve as the “lynchpin of the Canadian judicial system.”¹² The picture of Canada’s judicial system is completed by administrative tribunals. They resemble courts of law but are not part of Canada’s judicial system. While courts of law resolve disputes between citizens, administrative tribunals usually resolve disputes between citizens and the state.

Courts must enforce constitutional rules pertaining to the environment, such as Section 46.1 of Quebec’s *Charter of Human Rights and Freedoms*. This section was notably raised in *Centre québécois du droit de l’environnement c. Oléoduc Énergie Est ltée*.¹³ In this case, the applicants were seeking an order suspending or revoking the certificates authorizing geotechnical works by TransCanada. These certificates are issued by the Minister of Forests, Wildlife and Parks and by the Minister of Sustainable Development. The applicants alleged that the Minister of Sustainable Development had not considered Section 46.1 of Quebec’s *Charter of Human Rights and Freedoms* in the exercise of his discretionary power in issuing said certificate of authorization, and thus that its issuance would be patently unreasonable and constitute a breach of procedural fairness. These claims were not upheld by the court. Other cases also brought forth Section 46.1,¹⁴ but never called for a legally binding sanction. The Supreme Court of Canada still recognizes that environmental protection is a fundamental value of Canadian society and a collective imperative.¹⁵

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12. Supreme Court of Canada, “The Constitutional Framework,” *The Canadian Judicial System*, 2018, <<https://www.scc-csc.ca/court-cour/sys-eng.aspx>>.
 13. *Centre québécois du droit de l’environnement c. Oléoduc Énergie Est ltée*, 2014, QCCS 4147.
 14. Namely *Regroupement des citoyens du quartier St-Georges inc. c. Alcoa Canada ltée*, 2007, R.J.Q. 2691; *St-Luc-de-Vincennes (Municipalité de) c. Compostage Mauricie inc.*, 2008, QCCA 235; *Maltais c. Procureure générale du Québec*, 2018, QCCS 527 (upheld on appeal); *Hydro-Québec c. Bossé*, 2014, QCCA 323; *Environnement Jeunesse c. Procureur général du Canada*, 2021, QCCA 1871.
 15. See *Ontario v. Canadian Pacific Ltd.*, 1995, 2 R.C.S. 1031, par 55, and *Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992, 1 R.C.S. 3, par 16-17.

SUPRANATIONAL RULES

Unlike European countries, Canada and Quebec have no legally binding supranational rules regarding the environment and public procurement, except for the ones incorporated in federal or provincial laws and regulations. On the other hand, Canada¹⁶ and Quebec¹⁷ have entered into a multitude of free-trade agreements, which tentatively address green public procurement.

For example, supranational instruments such as the U.N. *Agenda 21*¹⁸ and *Agenda 2030*¹⁹ contain sustainable development goals pertaining to green public procurement. *Agenda 21* asserts the necessity for governments to exercise environmental leadership through purchasing, to improve environmental content of purchasing policies without prejudice to international trade principles, to promote the use of environmentally sound building materials and construction technologies notably by pursuing an innovative procurement policy, and to establish or modify standards or purchasing specifications to avoid discrimination against environmentally sound recycled materials.²⁰

16. The federal government has entered into the following free-trade agreements: Canada-Chile Free Trade Agreement (CCFTA); Canada-Colombia Free Trade Agreement; Canada-European Union Comprehensive Economic and Trade Agreement (CETA); Canada-Honduras Free Trade Agreement; Canada-Korea Free Trade Agreement; Canada-Panama Free Trade Agreement; Canada-Peru Free Trade Agreement (CPFTA); Canada-Ukraine Free Trade Agreement (CUFTA); Canada-United Kingdom Trade Continuity Agreement (Canada-UK TCA); Canadian Free Trade Agreement (CFTA); Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP); Revised World Trade Organization Agreement on Government Procurement (WTO-AGP).
17. Quebec's provincial government has entered into the following free-trade agreements: Trade and Cooperation Agreement Between Ontario and Quebec (OQTCA); Canadian Free Trade Agreement (CFTA); Agreement on the Opening of Public Procurement for New Brunswick and Québec (AQNB 2008); Agreement on Public Procurement Between the Government of Quebec and the Government of the State of New York (QNYA); Agreement for Construction Sector Labour Mobility Between Ontario and Québec (2006); World Trade Organization Agreement on Government Procurement (WTO-AGP); Canada-European Union Comprehensive Economic and Trade Agreement (CETA).
18. United Nations, *Agenda 21*, Department of Economic and Social Affairs – Sustainable Development, 1992, <<https://sdgs.un.org/publications/agenda21>>.
19. United Nations, “Transforming Our World: The 2030 Agenda for Sustainable Development,” *General Assembly A/RES/70/1*, 2015, <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf>.
20. United Nations, *Agenda 21*, Department of Economic and Social Affairs – Sustainable Development, 1992, s. 4.22(d), 4.23, 7.74 and 20.13.

Agenda 2030 promotes the development of quality, reliable, sustainable and resilient infrastructure, and aims to provide safe, affordable, accessible and sustainable transport systems for all, notably by expanding public transport, and encourages the adoption of public sustainable procurement practices.²¹ Although these agendas are not explicitly referred to in positive law and regulations, they led to the adoption of Canada's *2030 Agenda National Strategy*²² and to the establishment of the *Sustainable Development Goals (SDG) Funding Program*, a grants and contributions program that seeks to support the implementation of said strategy, notably by helping provinces and municipalities. One of the targets in Canada's strategy is to encourage the private sector to achieve SDGs through sustainable production and procurement processes.²³ As part of its 2030 plan for a green economy, Quebec adopted the *Framework Policy on Electrification and the Fight Against Climate Change*,²⁴ which notably aims to transfer trips to less energy-consuming means of transportation that translate into lower greenhouse gas emissions, such as public transportation, and addresses the need for decarbonizing building heating and using material with a lower carbon footprint.

SUBNATIONAL ENTITIES AND PUBLIC PROCUREMENT

In Canada, national and subnational entities, such as the province of Quebec, are competent for public procurement. Civil or common law rules applicable to the formation and execution of the contract apply to the administration unless specific derogatory rules—provided for by legislative or regulatory texts—exclude their application.²⁵ These exorbitant legislative and regulatory rules are numerous and undeniably create a hybrid regime, between common law and exorbitant law, applicable to public contracts. A contract is formed by the sole exchange of consents between persons having

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21. United Nations, "Transforming Our World: The 2030 Agenda for Sustainable Development," *General Assembly A/RES/70/1*, 2015, s. 9.1, 11.2 and 12.7.
 22. Government of Canada, "Moving Forward Together: Canada's 2030 Agenda National Strategy," Government of Canada, 2021, <<https://www.canada.ca/content/dam/esdc-edsc/documents/programs/agenda-2030/ESDC-PUB-050-2030Agenda-EN-v9.pdf>>.
 23. Government of Canada, "Moving Forward Together: Canada's 2030 Agenda National Strategy," Government of Canada, 2021, action 27.
 24. Gouvernement du Québec, "2030 Plan for a Green Economy," Gouvernement du Québec, 2020, <<https://cdn-contenu.quebec.ca/cdn-contenu/adm/min/environnement/publications-adm/plan-economie-verte/plan-economie-verte-2030-en.pdf>>.
 25. *Civil Code of Québec*, 1991, CQLR c. CCQ, art. 1376.

capacity to contract.²⁶ The Crown, whether federal or provincial, has the legal capacity of a person of full age, and therefore has a general power to contract. Therefore, the state does not need special authorization to contract, just like the ministers who represent it, unless legislation restricts this implicit contractual capacity.²⁷ While the Crown possesses the general power to contract, decentralized bodies—for example, municipalities or bodies resulting from functional decentralization—must be empowered by law to be able to contract and must exercise their contractual powers within the limits established by the law.

At the federal level, the normative framework notably²⁸ includes the *Financial Administration Act*,²⁹ which lists departments and agencies concerned by public procurement rules.³⁰ While these departments and agencies have the power to contract, the federal government has created a central purchasing agent named Public Services and Procurement Canada, which is governed by the *Department of Public Works and Government Services Act*.³¹

As for Quebec, the normative framework principally³² revolves around the *Act respecting contracting by public bodies*³³ and the *Cities and Towns Act*.³⁴ The main contracting authorities are the Ministry of Transport and

26. *Civil Code of Québec*, 1991, CQLR c. CCQ, art. 1385.

27. *Verreault et fils c. P.G. du Québec*, 1977, 1 RCS 41; *Inter-Ex c. Procureur général du Québec*, (1980) C.A. 18.

28. It also includes the *Public Procurement Regulations* issued under the *Financial Administration Act* and the constituent laws of the ministries and autonomous bodies, as well as the Treasury Board's directives, policies adopted, and the specifications published by the departments and autonomous bodies.

29. *Financial Administration Act*, 1985, RSC c. F-11.

30. For examples, see the departments and agencies listed in schedules I, I.1, and II of the *Financial Administration Act*: Treasury Board, Department of Citizenship and Immigration, Department of National Defence, Department for Women and Gender Equality, Department of Crown-Indigenous Relations and Northern Affairs, Canadian Space Agency, Office of Infrastructure of Canada, Royal Canadian Mounted Police, Social Sciences and Humanities Research Council, Canadian Energy Regulator, etc. See *Financial Administration Act*, 1985, RSC c. F-11, schedules I, I.1 and II.

31. *Department of Public Works and Government Services Act*, 1996, SC c. 16.

32. It also includes the regulations pursuant to the *Act respecting contracting by public bodies*, the *Financial Administration Act* (Chapter III), the *Public Infrastructure Act*, the *Anti-Corruption Act*, the constituent laws of ministries and autonomous bodies and the policies, directives and standard contracts established by the Treasury Board (in particular under the *Public Administration Act*, s. 72 and 74 and the *Act respecting contracting by public bodies*, s. 26 and 27).

33. *Act respecting contracting by public bodies*, CQLR c. C-65.1.

34. *Cities and Towns Act*, CQLR c. C-19.

Sustainable Mobility, for road infrastructure and public transportation projects, and the Société québécoise des infrastructures for vertical infrastructure projects, whose mission is to support other public bodies, such as school service centers and integrated health and social services centres, in managing their public infrastructure projects as well as to develop, maintain and manage immovable assets mainly by providing related construction, operation and management services.³⁵ The Centre d'acquisitions gouvernementales is also an important contracting body, whose mission is to provide to public bodies the goods and services they require in the exercise of their functions, with a view to optimizing government procurement in compliance with the applicable contract rules.³⁶

In Quebec, public bodies are defined under the *Act respecting contracting by public bodies*. Public bodies notably³⁷ include government departments, budget-funded bodies listed in Schedule I of the *Financial Administration Act*,³⁸ school service centres and school boards, and public institutions governed by the *Act respecting health services and social services*.³⁹

Municipalities are excluded from the definition of public bodies under Section 4 of the *Act respecting contracting by public bodies* since they do not meet any of the listed criteria. It is therefore necessary to consult the specific laws that apply to them, notably the *Municipal Code*⁴⁰ or the *Cities and Towns Act*, to determine which public procurement rules apply to them. Like decentralized or autonomous bodies, municipalities are created by law, so their contractual competence and capacity are limited by their constituent law.

PUBLIC PROCUREMENT SYSTEM

Regardless of the jurisdiction, whether federal, provincial or municipal, public contracts are usually divided into three distinct categories: goods, services and construction contracts. Goods or supply contracts include contracts by which the Administration purchases articles, commodities, goods, materials, merchandise or supplies, and leases movable property. Service contracts include all contracts for the hiring of professional and

35. *Public Infrastructure Act*, CQLR c. I-8.3, s. 25.

36. *Act respecting the Centre d'acquisitions gouvernementales*, CQLR c. C-7.01, s. 4.

37. For a comprehensive list of public bodies, see the *Act respecting contracting by public bodies*, CQLR c. C-65.1, s. 4.

38. *Financial Administration Act*, CQLR c. A-6.001.

39. *Act respecting health services and social services*, CQLR c. S-4.2.

40. *Municipal Code of Québec*, CQLR c. C-27.1.

technical services, but without creating an employer-employee relationship. Construction contracts are contracts regarding the construction, reconstruction, demolition, repair or renovation of a building, structure or other civil engineering work.⁴¹ In Quebec, the government has adopted a different set of regulations applicable to each contract category.⁴²

Without regard to the jurisdiction, the public procurement regime reflects the government's desire to award contracts with transparency and impartiality. Section 2 of Quebec's *Act respecting contracting by public bodies* states the general principles applicable to public procurement, namely (0.1) public confidence in the public procurement process by attesting to the integrity of tenderers; (1) transparency in contracting processes; (2) the honest and fair treatment of tenderers; (3) the opportunity for qualified tenderers to compete in calls for tenders made by public bodies;⁴³ (4) the use of effective and efficient contracting procedures, including careful, thorough evaluation of procurement requirements⁴⁴ that reflects the government's sustainable development and environmental policies; (5) the implementation of quality assurance systems for the goods, services or construction work required by public bodies;⁴⁵ and (6) accountability

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41. For federal procurement, see *Government Contracts Regulations*, SOR/87-402, s. 1 al. 2; *Contracting Policy*, Treasury Board, s. 4.1.9 and 16.2, <<https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=14494>>. For provincial procurement, see *Act respecting contracting by public bodies*, CQLR c. C-65.1, s. 3.1.2.3. For municipal procurement, see *Municipal Code of Québec*, CQLR c. C-27.1, s. 935; *Cities and Towns Act*, CQLR c. C-19, s. 573.
 42. For goods, see *Regulation respecting certain supply contracts of public bodies*, CQLR c. C-65.1, r. 2. For services, see *Regulation respecting service contracts of public bodies*, CQLR c. C-65.1, r. 4. For construction contracts, see *Regulation respecting construction contracts of public bodies*, CQLR c. C-65.1, r. 5.
 43. The rules of transparency and opportunity for qualified tenderers to compete for public contracts are notably reflected by the obligation to proceed with a public call for tenders by means of a notice disseminated in an electronic system. See *Act respecting contracting by public bodies*, CQLR c. C-65.1, s. 10 and 11.
 44. The rules applicable to the determination of needs are reflected mainly in Section 12 of the *Act respecting contracting by public bodies*, which indicates that, while assessing its needs, a public body may not decide to split or distribute them in order to avoid an obligation arising from the law. See *Act respecting contracting by public bodies*, CQLR c. C-65.1, s. 12.
 45. The different regulations applicable to public contracts allow a public body to require tenderers to have a quality assurance system. See *Regulation respecting certain supply contracts of public bodies*, CQLR c. C-65.1, r. 2, s. 37; *Regulation respecting service contracts of public bodies*, CQLR c. C-65.1, r. 4, s. 50; *Regulation respecting construction contracts of public bodies*, CQLR c. C-65.1, r. 5, s. 40.

reporting by the chief executive officers of public bodies to verify the proper use of public funds.⁴⁶

Although not as explicitly referred to in the normative instruments of the federal government, and although rules governing public contracts vary from one province and territory to another, the principles of value-for-money, fairness, openness and transparency apply across Canada. The common law applicable to public procurement has been very clear for many years regarding the application of these principles.⁴⁷

The three main procurement processes used in Quebec are contracts by mutual agreement (also called over-the-counter agreements), invitation to tender and public calls for tenders.⁴⁸ While Section 14 of the *Act respecting contracting by public bodies* states that public bodies must always consider the use of a public call for tenders or issue an invitation to tender, it is possible to use mutual agreements when the value of the contract is under the threshold applicable to the type of contract, as determined by intergovernmental agreements or by the Treasury Board.⁴⁹ Contracts over the threshold

46. This is notably achieved through Sections 22 and 22.1 of the *Act respecting contracting by public bodies*, which stipulate that a public body must publish information on the contracts it has entered into which involve an expenditure equal to or greater than \$25,000 and that the Chair of the Treasury Board must submit a report to the government on the carrying out of this act, a report which must be tabled in the National Assembly within 30 days after it is submitted to the government. More generally, accountability is addressed in Section 29 of the *Public Administration Act*, by which a deputy minister, or a person exercising the powers conferred by the *Public Service Act* on a deputy minister, and the chief executive officer of a body of the Administration are accountable to the National Assembly for their administrative management. See *Act respecting contracting by public bodies*, CQLR c. C-65.1, s. 22 and 22.1; *Public Administration Act*, CQLR c. A-6.01, s. 29; *Public Service Act*, CQLR c. F-3.1.1.

47. For example, the Supreme Court of Canada recognized in *Martel Building Ltd. v. Canada*, [2000] 2 SCR 860, that the use of a competitive bidding process entails an obligation to treat all bidders fairly and equally. The same court recently reiterated in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] 1 SCR 69, that it is in the public interest that the bidding process be fair and transparent. In Quebec, the Court of Appeal stated the same year in *Demix Construction, division de Holcim (Canada) inc. c. Québec (P.G.)*, 2010 QCCA 1871, that an honest, fair and equal treatment of bidders is a cornerstone of public procurement and government action. See *Martel Building Ltd. v. Canada*, 2000, 2 SCR 860; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010, 1 SCR 69; *Demix Construction, division de Holcim (Canada) inc. c. Québec (Procureur général)*, 2010, QCCA 1871.

48. *Act respecting contracting by public bodies*, CQLR c. C-65.1, s. 13, 14 and 10.

49. As a general rule of thumb, the threshold for the use of a public call for tenders is \$30,300 for goods contracts and \$121,200 for service and construction contracts. For a comprehensive list of thresholds, see Gouvernement du Québec, "Accords

can be entered into by mutual agreement only in certain specific situations.⁵⁰ Still, the main process used by all jurisdictions is the public call for tenders, which has a general scope and aims to inform the greatest number of companies of the existence of a market through publication in electronic tendering systems and newspapers.⁵¹

Public calls for tenders use different solicitation methods and adjudication criteria. Supply contracts can be procured through a single-step or two-step⁵² procurement process. While the general rule is to solicit solely a price and to award the contract to the supplier who submits the lowest price,⁵³ public bodies may consider additional costs related to the acquisition of goods⁵⁴ and evaluate the quality of a tender by requesting a price and a quality demonstration based on predetermined evaluation criteria.⁵⁵ Quality is evaluated through a minimum of three objective criteria, which can take numerous forms, such as the number of years of experience, the number of similar previous contracts, the performance of goods or the existence of a quality assurance system.

Service contracts are divided into two categories, namely services of a technical nature and professional services. Service contracts of a technical nature are aimed at the execution of the contract and the application of predetermined standards, while professional services do not apply only to the services provided by certain professionals as defined by the *Professional Code*.⁵⁶ They include design, creation, research, analysis and writing services. For service contracts of a technical nature, public bodies solicit solely a price and award the contract to the service provider who submits the lowest price.⁵⁷ For professional service contracts, public bodies must evaluate the quality

de libéralisation des marchés publics – Seuils d'application,” Secrétariat du Conseil du trésor, 2024, <https://www.tresor.gouv.qc.ca/fileadmin/PDF/faire_affaire_avec_etat/cadre_normatif/accords/tab_synthese_seuils_accords.pdf>.

50. *Act respecting contracting by public bodies*, CQLR c. C-65.1, s. 13.
51. See *Government Contracts Regulations*, SOR/87-402, s. 3; *Municipal Code of Québec*, CQLR c. C-27.1, s. 935; *Cities and Towns Act*, CQLR c. C-19, s. 573.
52. *Regulation respecting certain supply contracts of public bodies*, CQLR c. C-65.1, r. 2, s. 10 and 26.1.
53. *Regulation respecting certain supply contracts of public bodies*, CQLR c. C-65.1, r. 2, s. 13.
54. *Regulation respecting certain supply contracts of public bodies*, CQLR c. C-65.1, r. 2, s. 15.1.1.
55. *Regulation respecting certain supply contracts of public bodies*, CQLR c. C-65.1, r. 2, s. 19 and schedule 2.
56. *Professional Code*, CQLR c. C-26.
57. *Regulation respecting service contracts of public bodies*, CQLR c. C-65.1, r. 4, s. 10 and 13.

of a tender to award a professional service contract and request a price, if required, and a quality demonstration based on predetermined evaluation criteria. The quality of tenders is then evaluated as prescribed by the regulations.⁵⁸ Public bodies must solicit only a quality demonstration to award architecture or engineering contracts, excluding forest engineering contracts,⁵⁹ and may apply a two-stage procurement process by which, during the first stage, they select service providers by soliciting only a quality demonstration and, at the second stage, invite the selected service providers to submit a tender that includes only a price or a quality demonstration with or without a price.⁶⁰ In the course of publishing this book, new provisions were adopted for the process of soliciting and awarding architectural and engineering services for construction work. As a result, public bodies will now be able to request a demonstration of quality based on predetermined evaluation criteria, with a view to negotiating the contract price over a maximum period of 90 days, rather than applying the rates previously enacted by decree.⁶¹ This provision will come into force in July 2025. A public body may also opt for a quality/price award, with a minimum of 40 points and a maximum of 70 points for quality, and a minimum of 30 points and a maximum of 60 points for price.⁶² Price will be assessed in the light of the median market price. Finally, a third option is available to public bodies, which can hold a competition at the end of which a jury selects a concept.⁶³ These last two options are currently in force.

For construction works, public bodies solicit solely a price and must award the contract to the contractor that submits the lowest price.⁶⁴ However, public bodies may decide to evaluate the quality of a tender by issuing a call for tenders in two stages, the first stage consisting in selecting contractors by soliciting only a quality demonstration, and the second stage consisting in inviting selected contractors to submit a tender including only a price. Public bodies must then award the contract to the contractor that submits the lowest price.⁶⁵ Quebec's regulation also provides for mixed contracts for

58. *Regulation respecting service contracts of public bodies*, CQLR c. C-65.1, r. 4, s. 16 and 19, schedules 1 and 2.

59. *Regulation respecting service contracts of public bodies*, CQLR c. C-65.1, r. 4, s. 24.

60. *Regulation respecting service contracts of public bodies*, CQLR c. C-65.1, r. 4, s. 25.

61. Art. 40.1 RCSOP.

62. Art. 40.3 RCSOP.

63. Art. 40.8 RCSOP.

64. *Regulation respecting construction contracts of public bodies*, CQLR c. C-65.1, r. 5, s. 13 and 16.

65. *Regulation respecting construction contracts of public bodies*, CQLR c. C-65.1, r. 5, s. 22 and 23 and schedule 4.

construction work and professional services, which can be used in design-build procurements processes. For these types of contracts, public bodies may consider the quality of a tender and award the contract to the contractor that submits the lowest adjusted price.⁶⁶ Public bodies may also issue public calls for tenders in two stages like the ones previously described.⁶⁷ In the course of publishing this book, new provisions have been introduced for the process of soliciting and awarding construction contracts. Thus, the regime formerly applicable to public-private partnerships, governed by Sections 18 to 21 of the *Act respecting contracting by public bodies*, has given way to a regime for partnership contracts, which involve a collaborative approach during or after the award process, and which may notably involve a sharing of risks and rewards between the parties. This system allows public bodies to set their own solicitation process and award criteria, and should be available to municipalities following the tabling of Bill 79.⁶⁸

GREEN PUBLIC PROCUREMENT

Quebec and Canada's free-trade agreements regarding public procurement contain specific provisions pertaining to green public procurement. For example, the Comprehensive Economic and Trade Agreement (CETA) between Canada and Europe, stipulates in chapter 19 regarding government procurement and more specifically Article 19.9 regarding technical specifications and tender documentation, that parties "may prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment" and that the "evaluation criteria set out in the notice of intended procurement or tender documentation may include, among others, price and other cost factors, quality, technical merit, environmental characteristics and terms of delivery."

Furthermore, Article 19.3 regarding security and general exceptions stipulates that "nothing in this Chapter shall be construed to prevent a Party from imposing or enforcing measures necessary to protect human, animal or plant life or health." The exact same terms are found in the World Trade Organization's Government Procurement Agreement. It should be noted

66. *Regulation respecting construction contracts of public bodies*, CQLR c. C-65.1, r. 5, s. 24 and 25 and schedule 5.

67. *Regulation respecting construction contracts of public bodies*, CQLR c. C-65.1, r. 5, s. 26 and schedule 5.

68. An act to enact the *Act respecting contracting by municipal bodies* and to amend various provisions principally to reduce the administrative burden on municipal bodies.

that even though the CETA was signed between Canada and the European Union, it applies to Quebec's public bodies⁶⁹.

At the federal level, the *Policy on Green Procurement* is a soft law instrument aiming to “advance the protection of the environment and support sustainable development by integrating environmental performance considerations into the procurement decision-making process”⁷⁰. This policy specifically states that Deputy heads are accountable to buy environmentally preferable goods and services where value for money is demonstrated⁷¹.

At the provincial level, Section 2(4) of Quebec's *Act respecting contracting by public bodies*, which can be used to define public interest which in turn serves as an inherent limit in the exercise of the administration's discretionary power, states that the conditions determined by this Act aim to promote “the use of effective and efficient contracting procedures, including careful, thorough evaluation of procurement requirements that reflects the Government's sustainable development and environmental policies.” Sections 14.6 and 14.7 of the *Act respecting contracting by public bodies* require that public bodies (1) carry out a needs assessment as part of the quest for sustainable development before awarding or granting a contract and (2) include at least one condition relating to the environmentally, socially or economically responsible nature of the acquisition in the tender documents or contract, which may take the form of an eligibility criterion, a technical requirement, a quality evaluation criterion or a preferential margin.

Green public procurement objectives also take form in Section 37 of the *Regulation respecting certain supply contracts of public bodies*, which states that public bodies may require a quality assurance system, such as an ISO standard, or a specification relating to sustainable development and the environment for the carrying out of a contract. Public bodies must specify the requirement in the tender documents. In the case of such a requirement unduly reduces competition, any supplier can still submit a tender, but the public body will have the possibility to give a preferential margin, not exceeding 10% for supplies and 5% for construction works, to the tenderer

69. Government of Canada, “Annex 19-A – Market access schedule of Canada,” *Global Affairs Canada*, 2017, Annex 19-2 – Sub-central government entities, section 11, <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/19-a.aspx?lang=eng>>.

70. Government of Canada, “Policy on Green Procurement,” *Government of Canada*, 2022, section 6, <<https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=32573>>.

71. Government of Canada, “Policy on Green Procurement,” *Government of Canada*, 2022, section 7.2.4, <<https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=32573>>.

that fulfils said requirement. Section 40 of the *Regulation respecting construction contracts of public bodies*, Section 50 of the *Regulation respecting certain service contracts of public bodies* and Section 61 of the *Regulation respecting contracting by public bodies in the field of information technologies* are to the same effect.

Section 27 of the *Regulation respecting construction contracts of public bodies* also provides for the procurement of contracts to devise savings from the improvement of energy efficiency if the contracts involve both professional services and construction work and are paid for directly out of the savings. To do so, public bodies must consider the quality of tenders and include the tender evaluation process and in particular the evaluation grid, the criteria used and the weighting⁷². As a general rule, as long as the quality criteria allow the respect of the principles of fairness, openness and transparency, public bodies have the discretion to include the quality criteria it deems fit to answer their needs, which may include environmental criteria⁷³.

Public bodies may also evaluate the past experience of a company and the professional qualifications of its personnel, through the lens of environmental considerations, whether through request for qualifications of suppliers, service providers and contractors⁷⁴, although it should be noted that it is actually not possible to exclude companies that have breached environmental law or have other serious defects in their environmental performance, since breaching of environmental laws are not among the offenses listed in the ineligibility chapter of the *Act respecting contracting by public bodies* or under the federal government's *Ineligibility and Suspension Policy*.

For contracts below the thresholds, municipalities may, in a public call for tenders, require that all or part of the goods or services be Canadian goods or services or that all or part of the suppliers or contractors have an establishment in Canada as well as consider, as a qualitative evaluation criterion, the Canadian origin of part of the goods, services, suppliers,

72. *Regulation respecting construction contracts of public bodies*, CQLR c. C-65.1, r 5, section 28.

73. This notion is also applicable to municipal contracts. See *Cities and Towns Act*, RLRQ c. C-19, section 573.1.0.1; *Municipal Code of Québec*, CQLR c. C-27.1, section 936.0.1.

74. See *Regulation respecting certain supply contracts of public bodies*, CQLR c. C-65.1, r 2, section 32.1; *Regulation respecting service contracts of public bodies*, CQLR c. C-65.1, r 4, section 43; *Regulation respecting construction contracts of public bodies*, CQLR c. C-65.1, r 5, section 36.

insurers or contractors⁷⁵. Life-cycle costing may also be utilized by public bodies, including municipalities, as part of the total acquisition costs provisions⁷⁶ and the evaluation of the quality of the tender. Life-cycle costing is also explicitly provided for in the federal government *Policy on Green Procurement*.⁷⁷

Public bodies have the possibility to use criteria and labels, unless such requirements unduly reduce competition, and environmental considerations can be included in contract performance clauses for the supply of goods, services or construction works. For example, public construction contracts usually contain liquidated damages in the event the desired LEED certification is not achieved by the contractor, as well as for the incapacity to achieve energy-consumption targets.⁷⁸

Finally, during the research and redaction process of the current project, specifically on the 25th of May 2022, Quebec has adopted Bill 12, the *Act promoting Québec-based and responsible purchasing by public bodies, to strengthen the integrity regime for businesses and to increase the powers of the Autorité des marchés publics*.⁷⁹ This legislation promotes local purchasing for contracts under thresholds⁸⁰ notably by allowing a 10% preferential margin based on Quebec or otherwise Canadian value added. It also expressly requires public bodies to consider, when assessing their needs, governmental objectives set under the *Sustainable Development Act* and the sustainable development strategy adopted under that Act.⁸¹ Moreover, this Bill is part of the wider *Government procurement strategy*, which states objectives, identifies action steps and select an indicator to monitor advancement. For example, objective 1.2 is to increase responsible procurement by

75. *Cities and Towns Act*, RLRQ c. C-19, section 573.1.0.4.1; *Municipal Code of Québec*, CQLR c. C-27.1, section 936.0.4.1.

76. *Regulation respecting certain supply contracts of public bodies*, CQLR c. C-65.1, r 2, section 15.1.1.

77. Government of Canada, "Standard Acquisition Clauses and Conditions (SACC)," *Public Works and Government Services Canada*, 2006, section 3.140, <<https://publications.gc.ca/collections/Collection/P26-2-2006-1E.pdf>>.

78. Jobidon, Gabriel, Pierre Lemieux and Robert Beauregard, "Comparison of Quebec's Project Delivery Methods: Relational Contract Law and Differences in Contractual Language," *Laws*, vol. 8, no. 2, 2019, <<https://canlii.ca/t/sllk>>.

79. *Act promoting Québec-based and responsible purchasing by public bodies, to strengthen the integrity regime for businesses and to increase the powers of the Autorité des marchés publics*, LQ 2022, c. 18.

80. *Act respecting contracting by public bodies*, CQLR c. C-65.1, sections 14.1 to 14.5.

81. *Act respecting contracting by public bodies*, CQLR c. C-65.1, sections 14.6 and 14.7.

creating responsible procurement training and a responsible Procurement Toolkit and by identifying and tracking sustainable procurement. The indicator is the proportion of responsible procurement by public bodies, and the target is to eventually ensure 15% of procurement will be done responsibly by public bodies.⁸²

82. Government of Quebec, "Priorité à l'achat québécois: l'État donne l'exemple," *Government of Quebec*, 2023, <<https://www.quebec.ca/gouvernement/politiques-orientations/priorite-achat-quebécois#c132273>>.

Qualitative Analysis of Interviews – Green Public Procurement – Quebec, Canada

This section of the research report follows the legislative and regulatory analysis of Quebec's and Canada's green public procurement framework. It consists of the second section of this three-part research report on green public procurement, namely a qualitative analysis of interviews conducted with public bodies from the municipal and provincial levels in Quebec, which will be followed by the analysis of a questionnaire. The general research question of this section of the research is: "How do public buyers appropriate the green public procurement (GPP) legal framework?"

The first subsection contains a brief overview of the methodology used to conduct and analyze the interviews. It is followed by the types of procurement implemented by these public bodies, as well as the normative framework that applies to it. Then, the green public procurement policies adopted, or to be adopted, by these organizations are addressed, followed by their global environmental practices, such as adjudication criteria, contractual clauses and process of identification of needs. Afterwards, the monitoring processes put forth by public bodies to ensure the application of their policies are analyzed. Finally, perceived barriers and incentives to green public procurement are presented.

METHODOLOGY

The methodology consists of a semi-structured interview process. This implies the use of open-ended and closed questions complemented by follow-up or how questions. The same themes and some core questions as the other international researchers were used to favour comparison of answers.

An interview guide was prepared by the French researchers. It was slightly adapted to Quebec's framework. For example, comprehensive energy performance contracts do not exist in Quebec's public procurement framework, so they were left out of the interview guide. Also, adjudication criteria were adjusted to the existing possibilities in Quebec's normative framework, such as total cost of acquisition or lowest adjusted price. Same goes for the procurement process, which includes a two-step process and the one or two-envelope systems. The interview guide is presented in Appendix 1.

The interviews lasted 45 minutes to 1 hour. They were not recorded, but active notetaking helped ensure answers would be remembered. Municipal and provincial public bodies were initially approached via email, but the response rate was poor. Thus, a post on social media (LinkedIn) was made to solicit volunteers, which helped the recruitment process. In the end, eight different public bodies, from small municipalities to the largest employers in Canada, were interviewed, although there were two separate interviews with a larger public body, meaning nine total interviews were conducted.

The results were compiled and analyzed through deductive and inductive analysis. The deductive analysis roughly consists of a top-down analysis deriving from the interview guide, while the inductive analysis is a bottom-up analysis of themes that were raised through interviewees' discourses. The structure of this paper is modelled on the interview guide and the deductive analysis. However, throughout each subsection, results are classified according to themes that emerged from the discussions, thus recalling the inductive method.

ANALYSIS

Procurement by the public bodies

The first object of the interview process was to circumscribe the type of procurement performed by the public bodies, in terms of goods, services of a technical nature, professional services and construction works. The normative framework applicable to these types of procurement, such as thresholds and solicitation methods used, according to the public body, was also explored.

Types of procurement

Smaller public bodies, such as municipalities, have a broader procurement spectrum. They range from common goods for road maintenance and

works, namely vehicles, car parts, gas, propane and tires, as well as commodities for these same works, such as asphalt, road salt, sand and stone. They also rent equipment for road works and landscaping. Since municipalities are responsible for parks, goods such as day camp material and foosball and picnic tables are also procured. Municipalities also acquire more specialized equipment for fire and police departments, such as fire trucks and firearms. One interviewee mentioned that goods procurement is the most important for municipalities, quantitatively speaking.

Smaller public bodies also procure a lot of technical services, namely snow removal, lawn mowing, landscape maintenance, roofing, window washing, housekeeping and composting. Another important part of service contracts concerned transport and logistics, like waste management, waste collection, transport and treatment for landfill and sorting. Specialized equipment maintenance contracts are also adjudicated. A public body from the education system also procures food service concessions and in-house catering.

All public bodies interviewed hired professional service providers. Many interviewees mentioned that, in terms of volume, the procurement of engineering services was one of the most important parts of their yearly activities. Larger, specialized public bodies also procured a lot of professional services, such as architecture firms, as well as legal and financial advisors.

As far as construction works go, one interviewee reported that, even though smaller public bodies do not procure a lot of construction works, they still represent the largest portion of procurement in terms of monetary value. Larger public bodies adjudicate very important construction works, in terms of complexity as well as value. Construction works vary from renovations, refurbishment, redesign and, of course, new infrastructure. Most public bodies use fixed-price contracts and traditional delivery methods, which means professional service providers are retained and the design is completed before a call for tenders is issued for construction works. Larger public bodies use more diverse project delivery methods, such as design-build. Design-build contracts are mixed contracts: the private party, which is usually a joint venture, is responsible for the design, construction and supervision of the works, and the commissioning of the infrastructure. The public body from the education system is also planning to use a mixed contract for a future construction project. This public body also mentioned that they prefer to have direct control over design, so they prefer to use the traditional project delivery method, but that they consider using design-build for larger infrastructure projects.

One public body interviewed does not engage directly in contract awards, but rather subsidizes municipalities through grant programs, mostly regarding water treatment, namely aerated ponds, and sewage treatment plants. Grants are conditional on compliance with laws and regulations, and the programs stipulate terms and conditions.

Most public bodies, whether small or large, mentioned group purchasing, or clusters. These are used for administrative goods, such as pencils and paper, perishable goods and convenience goods such as petroleum products. More specialized equipment is also procured, especially in the medical field, namely laboratory devices, pharmaceutical products, medical imaging, as well as general health care supplies. Some services are also procured through groups, such as independent labour and elevator maintenance.

Normative framework, thresholds and usual procurement process

Municipalities are governed by the *Cities and Towns Act*. No municipalities interviewed were governed by the *Municipal Code*. Under the threshold, which is generally \$25,000, municipalities use over-the-counter agreements. For procurements between \$25,000 and \$75,000, some municipalities use the invitation to tender method, but it was noted by one interviewee that this method is too burdensome on the administrative level for smaller public bodies, and that they preferred to use competitive procurement. Two municipalities even mentioned during the interviews that they adopted by-laws to ensure the use of competitive bidding for procurements over \$25,000. For procurements over \$105,000, municipalities and smaller public bodies use competitive bidding. One interviewee mentioned that, when legally possible, they avoided using competitive bidding, since it is unfavourable to the local market and since it takes a lot of time and resources for the public body as well as the private parties.

As for professional services, some municipalities mentioned the use of a one-envelope or two-envelope method. In the one-envelope system, public bodies can weigh their different criteria, including price, as they desire. As for the two-envelope system, the first envelope contains the technical proposal which is evaluated qualitatively. If bidders obtain the minimal qualitative score of 70, the second envelope containing the price is then opened by the public body. For construction works and goods, the most used adjudication criterion is the lowest compliant bidder.

The public body from the education system is governed by the *Act respecting contracting by public bodies* (ARCPB) and not the *Cities and*

Towns Act. The interviewee insisted on the importance of compliance with the legislative and regulatory framework. Thresholds are determined by the ARCPB. When possible, they use over-the-counter agreements, requests for quotes and invitations to tender. They do not like the invitation to tender process because, if the lowest submitted compliant bidder's price is over the threshold, they must start all over again and go to a call for tenders, losing three to four months in the process. When the contract value is over \$102,000, they use calls for tenders. The interviewee mentioned that cost overruns on contracts under \$102,000 lead to a new competitive bidding process, and cannot be processed as a contractual modification, which creates an added workload. Even when they can use over-the-counter agreements, they sometimes still use calls for tenders, even though it requires more energy and money, because they consider it a good practice. This public body, like other public bodies, uses mostly the lowest compliant bidder. Unlike municipalities, they usually qualify professional service providers in a two-step procurement process.

Larger and specialized public bodies are also governed by the ARCPB. They do not usually use over-the-counter agreements, mostly because the sheer value of their procurement puts them over the thresholds. They do use it for smaller procurements and in emergency situations and, when they do, they need to justify their decision through the publication of a notice of intent.⁸³ They use invitations to tender, coupled with a supplier rotation system, and invite at least three suppliers. However, the public body from the education system mentioned that they avoided using this process because they felt it represents essentially the same administrative burden as a public call for tenders. These public bodies also use price requests, even though the interviewee mentioned that it was not specifically provided for in their normative framework. For procurements over the threshold, they use public calls for tenders. They also use a two-step procurement process for professional service providers, and for major infrastructure projects, to qualify contractors or firms. For construction works, even though they mostly use the lowest compliant bidder criterion, public bodies also use the lowest adjusted price, which includes a quality assessment. For professional services, they use only a qualitative assessment. As for the public body responsible for group purchasing, since grouping almost always leads to a large contract value, they almost exclusively use public calls for tenders.

Almost all public bodies mentioned that they used requests for quotes for the procurement of goods, and mostly when the procurement value was

83. *Act respecting contracting by public bodies*, CQLR c. C-65.1, s. 13.1.

between \$25,000 and \$100,000. One interviewee from a smaller public body mentioned that, for procurements between \$25,000 and \$107,700, they used requests for quotes or a rotation of suppliers, consisting of a pool of four or five suppliers, which are changed at every mandate. One interviewee mentioned that, to favour smaller regional suppliers, they use “competitive price requests” when the contract value is under the threshold, and they can use over-the-counter agreements. They likened this process to what is done in the private sector. The price request can be as simple as just asking for a price, but they sometimes consider more criteria than just price, such as service, reliability and guarantees. This allows them to negotiate and to be agile and to do business with pre-selected suppliers.

Other information

During this section of the interview process, public bodies provided other information regarding their procurement processes. One interviewee mentioned that they used a writing tool, Edilex, for their procurement documents. The same interviewee indicated that they wanted to favour local suppliers and thus conducted an analysis of local markets. Another interviewee from a smaller public body mentioned that small contracts for regional suppliers are problematic, since some of the suppliers have trouble reading and understanding contractual documents and have trouble meeting all the bidding conditions. This interviewee said that doing business with these suppliers is very different from doing business with multinational firms providing road salts, for example. One municipality also mentioned that they have internalized some services, such as road marking, to reduce the negative impacts on their organization when the economical context is unfavourable, or when they must serve remote regions.

DEFINITION OF AN ENVIRONMENTALLY SUSTAINABLE PROCUREMENT POLICY BY THE PUBLIC BODY

Public bodies with policies

Of the eight different public bodies interviewed, four of them had an environmentally sustainable procurement policy. While most of these policies were recently adopted (2019-2021), one municipality had adopted one in 2013, although it was mentioned that it had been re-drafted, or as the interviewee put it, “butchered” because they thought it wasn’t in line with what the legal framework allowed them to do. Their policy consists of establishing sustainable development principles, as well as processes to

implement these principles. The policy was adopted as part of their organizational strategic planning in sustainable development.

Another municipality adopted their first policy in 2019, which mostly concerns responsible procurement and an asset disposal policy when they reach the end of their life cycle. It outlines procurement processes, and mostly focuses on principles of open competition, such as equity and fairness among bidders. In 2021, a new policy was adopted, which includes the same elements but with a greater focus on total acquisition costs of goods and services and on life cycle. It was mentioned that it was more a tool to raise awareness concerning procurement and to educate, to think and look at it differently, from the definition of needs, to planning, to end of life, more than a binding instrument. The interviewee noted that he “needs to keep his tools alive to help him do his job.” The inspiration for the content of the policy was based on the knowledge of the interviewee, which he acquired from his previous experience in procurement at the federal level and from working with the *Espace de concertation sur les pratiques d’approvisionnement responsable* (ECPAR).

One municipality published their policy at the end of 2020, and it was implemented in 2021 as part of the city’s 2017-2022 strategic plan. It is mainly an administrative procedure for responsible procurement. For example, the policy states that the procurement specialist must, before implementing sustainability in the specifications or requirements, analyze the economical context and determine whether it is a restricted or open market. When markets are restricted, sustainability aspects are not favoured. The policy also presents eligibility criteria and an evaluation grid of sustainability aspects for qualitative assessments, as well as preference clauses for suppliers meeting regional or sustainable requirements, which enables this municipality to give a preferential margin of up to five percent to suppliers meeting said requirements. This implies that the price submitted by suppliers or service providers will, for the sole purpose of determining the successful bidder, be reduced by the percentage of preferential margin provided for, without affecting the price submitted for the purpose of contract award. Certifications for products and services are also identified in the policy. The interviewee mentioned that he redacted the policy based on three or four policies from other municipalities, public bodies and private organizations, while also drawing experience from his training with ECPAR.

Finally, the last public body with a sustainable policy noted that it concerned general principles more than specific processes or requirements, and that its function is to raise awareness regarding sustainable procurement. The interviewee mentioned that it had “little or no impact on day-to-day

issues and contracts,” and that their legislative and regulatory framework doesn’t favour sustainability. They are looking to deepen their links with other organizations in the education system and create an advisory committee to finalize a three-year strategic sustainability plan. This organization is looking to find “quick wins,” meaning that they are trying to get more for less effort.

Public bodies with the intent of producing a policy

The other four public bodies did not have a sustainable procurement policy per se, but they all mentioned their intent to produce one soon, except for one. Some of these public bodies are more advanced in the process than others.

Although it does not have a sustainable procurement policy, one municipality has a “buy local” policy, which acts as a guide to standardizing the conduct of purchasers. Favouring regional suppliers is an important goal for this public body, and they feel their policy raises awareness and serves as an education tool regarding responsible purchasing.

A larger specialized public body said that they are a young organization and that they haven’t had the time yet to draft and implement a sustainable policy. They had six months to make a sustainable development action plan. They have also put in place a process for procurement consultants to consider sustainability in their purchases and favour buying local. They want to implement a responsible procurement policy, both internally and for their public clients’ procurement documents. They have already started detailing contract management processes with milestones and identifying when there needs to be a reflection on sustainability during the overall procurement process.

Finally, the other larger specialized procurement public body has just started working on their policy. They do have a sustainable strategy and action plan implementing responsible acquisition components, which is an obligation under the *Sustainable Development Act*. Public bodies must indeed produce a sustainable development action plan in which they set out the actions they plan to take to help achieve the objectives set out in the Government Sustainable Development Strategy 2015-2020,⁸⁴ which was

84. Gouvernement du Québec, “Stratégie gouvernementale de développement durable 2015-2020,” *Ministère du Développement durable, de l’Environnement et de la Lutte contre les changements climatiques*, 2015, <<https://cdn-contenu.quebec.ca/cdn-contenu/adm/min/environnement/publications-adm/developpement-durable/strategie-dd-2015-2020.pdf?1582816783>>.

extended to 2022. The interviewee expressed its desire to obtain direction from senior management. This public body has an internal procurement policy, which does not include sustainability aspects, but mostly reproduces and interprets the legislative and regulatory requirements for all contracts with suppliers for the purchase of goods and services. The interviewee expressed their intention to improve this directive by adding operational and strategic aspects to all procurement types, including price requests, as well as including the disposal of surplus assets. Next year, they intend to set up a reflection committee to identify more specific elements to be included in the policy, identify risks and challenges they might encounter, determine sustainability criteria, and finally make recommendations to the highest governance structure. An external firm has also been mandated to accompany this public body during this process. This organization mostly pays attention to what the education sector is doing in terms of responsible procurement, such as universities from all around Canada, as well as other public bodies from Quebec.

ENVIRONMENTAL PROCUREMENT PRACTICE

All interviewees were asked about their environmental procurement practice. The results were divided between 1) procurement process and adjudication; 2) contractual clauses; and 3) identification of needs with regard to sustainable development.

Procurement process and adjudication

To implement sustainability in their procurement practices, two municipalities mentioned that they used the one- or two-envelope systems for their professional service providers. One municipality mentioned their preference for the one-envelope system, in which they can “drown” the price factor. They use this system to evaluate the firms’ experience with similar mandates, such as budget or infrastructure type. The interviewee noted that they sometimes use exclusion criteria, which means that firms that do not achieve the minimum score for a specific criterion are automatically rejected from the procurement process.

This interviewee referred to a recent study by the Quebec Association of Architects in Private Practice,⁸⁵ which states that cities should use an

85. Association des Architectes en pratique privée du Québec, “Étude économique: Impact des formules d’appels d’offres avec prix dans les marchés municipal, provincial et fédéral,” *Association des Architectes en pratique privée du Québec*,

awarding method that gives more weight to quality, like at the federal level, where 90% of the score is for quality and 10%, for price. He affirmed that he is not against this, but wondered if the quality of the works was really better. However, they do include a general sustainability criterion, weighted between 5% and 10%, that evaluates whether firms have measures to reduce GHG emissions or an employee wellness policy. To be able to remove this criterion from procurement documents, employees must go to the municipality's executive committee and justify why they do not include the clause.

This municipality also gave an example of procurement of goods, namely the purchase of hotel lights, where they considered the energy consumed and the wattage of the lights. They also effectuated a total acquisition cost procurement process for recycling processing services. They evaluated a distance factor, between a central point in the city and the processing or transshipment site, to reduce GHG emissions and save money by reducing gas consumption. The process ended with close scores between bidders and that, in the end, made them pay \$1.5M more over a six to seven-year period. For procurements under \$25,000, this municipality has a preferential rate of 5% for social economy enterprises. The procurement teams are encouraged to solicit suppliers in their territories. They have the same provision between \$25,000 and \$100,000 for local businesses. Unfortunately, there have been no instances where they adjudicated a contract based on the preferential rate. However, they calculated that, if they had applied this formula in the previous three years, they would have invested \$450,000 in their regional economy.

Another municipality prefers the use of the one-envelope system to reduce the predominance of price as compared with quality and indicated that it gives them more flexibility as far as evaluation criteria go. They are using this process more and more and consider it the best process to ensure sustainability. They used the process recently for the procurement of street furniture. The interviewee specified that the two-envelope process is "too rigid and gives a disproportionate importance to price." This interviewee also stated that they do not specifically choose a procurement procedure for sustainability reasons alone. The municipality used the total acquisition cost only once for the conversion of fixtures to LED lights and did an in-house total cost of acquisition study. The interviewee explained that it is "hard to sell it [total acquisition cost] to the entire organization," although the results of the study showed it could help them save energy, travelling distance of technicians and electricians and replacement parts, while also creating

financial savings. As for professional services, this municipality verifies whether firms are ISO 14 000 certified, which means that they have implemented an environmental management system, but that they haven't yet discriminated based solely on an environmental criterion.

One smaller public body mostly uses one-step procurement processes, with adjudication to the lowest compliant bidder, but also includes eligibility criteria, such as a certified recycling rate. This public body is remotely located, and the interviewee mentioned that, given their territorial constraints, they have trouble procuring sustainably. For example, they cannot technically procure for propane vans which do not have the autonomy for efficient service.

The last municipality mentioned that, when aiming for sustainability, they use a quality-driven procurement process. They also use eligibility criteria, although they try not to overuse them since they consider it more restrictive marketwise. There is no automatic application of a process, which they choose according to each project's particularities. They also mentioned their preference for the one-envelope system over the two-envelope one because of the simplicity of adding sustainability criteria.

The smaller public body in the education system mentioned right off the bat that they were interested in total cost of acquisition, but since it was very new for them, they were not ready to implement it. As for quality-price adjudication, the interviewee mentioned that it was "a waste of time with a capital W" because quality is drowned in the adjusted price evaluation, because of the regulatory limit of 15% for quality and for the extra workload which amounts to approximately three to four more months than a normal price-driven process. They also mentioned that "90% of the time you get the same result" as in a price-driven process, and that the regulatory quality threshold should be increased to at least 40% to 50% to be effective. This public body thought it was too expensive to procure for sustainable goods, services and works. Finally, this interviewee said that "even though they have some sustainability requirements, it is not comparable to European laws and that there is much less latitude in Quebec."

The largest public body interviewed mentioned that the most used procurement process was the one-step process with adjudication to the lowest compliant bidder, especially for day-to-day operations, although they sometimes used quality-price for construction works. They vary procurement methods for construction works more than for goods, notably by using two-step processes and the qualification of contractors. They are more focused on supplier qualifications than on adjudication criteria.

As for the procurement of goods, this public body considers the use of quality-price “useless.” They consider that the thresholds hurt sustainable and regional purchasing tremendously. They gave the example of the procurement of office chairs, where they wanted to include a sustainability specification, which they were not able to do because the standardized templates usually used by the organization were not suitable, and they didn’t have the time to change them because of the additional workload. To that specific point, they are actively looking into Edilex, the legal drafting service, to automate templates and create less of an organizational and administrative burden. The interviewee feels their legal and contractual departments do not want to include preferential rates since it would limit competition, although it should be their duty to set an example for other public bodies. They have yet to use preferential margins in a purchase.

The public body responsible for group purchasing also uses one-step procurement processes with adjudication to the lowest compliant bidder. The interviewee mentioned that the preferential margin is difficult to use, because consensus is hard to achieve in group purchasing. They tried to use it once, but with the effects of competition, it does not create enough difference between bidders. When they did use it, the lowest compliant bidder’s price was 19% below other bidders, so the margin didn’t have an effect.

Contractual clauses

There were very few examples of environmental contractual clauses used by public bodies. For construction works, municipalities do not systematically use LEED certification or energy performance clauses, although one respondent expressed its desire to do so in their next project. One municipality said that they used “little to no environmental criteria in contracts, which are often very general.” The smaller public body in the education system requires LEED certification and energy performance in their construction contracts, and requires the use of a percentage of recycled construction materials. The larger specialized public body almost systematically uses LEED certification and energy performance clauses, BOMABEST certification for leases and rentals, and requires the use of a percentage of recycled construction materials.

One municipality has an obligation, for everything concerning motor vehicles, to turn off the engine after three minutes standing idle, and they ensure that this is enforced by supervisors. This municipality has a high participation rate in elections, compared with the rest of Quebec and Canada, and the interviewee said that citizens do not like noise and disturbances, which helps implement these kinds of clauses. They also use electronic

forms instead of paper forms for procurement, and all contracts have provisions regarding oil spills as prescribed by the *Sustainable Development Act* and the *Environment Quality Act*.

One smaller public body more invested in landfills and recycling insists that their suppliers obtain Recyc-Québec certification for the recognition of sorting centres for construction, renovation and demolition waste. For road works, they require that technical service providers use not pure salt, but rather a sand mixture.

The public body in the education system always requires that house-keeping products be biodegradable. For goods, they gave an example of a failed sustainability requirement for the procurement of cellphones through a purchasing group, namely the fact that there was no reflection or consensus regarding their recovery after the end of their life cycle. The larger specialized public body also greened their maintenance contracts with biodegradable products instead of chemicals and require a percentage of recycled material in paper products.

Identification of needs regarding sustainable development

Across the board, no matter the type of public body, there was one constant: procurement specialists and purchasers are not responsible for defining and identifying sustainable development needs.

The municipalities interviewed stated that “needs are not defined by the procurement department,” that “procurement specialists are not systematically involved in defining requirements, which is a departmental prerogative” and that “environmental considerations depend on who oversees the file.” Although there is no systematic evaluation of sustainability needs, they do try to identify procurement where there is potential and try to coordinate with other departments, such as parks, engineering, or information technology. In construction projects, which include professional services, needs are defined through functional and technical programs. One interviewee mentioned that, in his previous job at the federal level, he started participating in the preliminary design and could throw out ideas in the early stages of a project.

One municipality also said that “some projects have political sensitivity and will tend to be seen from a sustainability and environmental perspective,” projects he calls “naturally tinted projects.” This was corroborated by another municipality, which said that division heads sometimes call for sustainability. One interviewee also said that “when a colleague is less sensitive or overwhelmed, sustainability and environment may take a back seat.

Once the project arrives on his or her desk, it's a little too late." This notion of personal will was also noted by a smaller public body, which uses only basic standardized forms for the identification needs, saying that the inclusion of sustainability in needs "is done by personal choice and not structured in the procedures and administrative steps."

The smaller public body in the education system sometimes tries to integrate sustainability into its needs, but has difficulty seeing it through, mostly because of budget concerns, when it comes, for example, to reusable containers or acquiring electric vehicles for environmental purposes which are thoroughly cost-prohibitive. They do not have systematic processes to include sustainability in their needs.

One of the large specialized public bodies stated that sustainability needs for construction works are often identified by professional service providers, even though other departments assist in programming and developing real estate solutions. This is also the case for another larger public body, which relies on a "group of engineers who evaluate the optimal solution at the best cost," although "they aim for the best technical solution, and not necessarily for the most environmentally efficient one." External professional service providers help with soil characterization, identifying nearby sensitive environments and decontamination, for example. For road works, they have programs for reducing the use of road salt near rivers, streams, and wet or sensitive sites, and have a salt application rate based on weather and soil type. Both larger specialized public bodies try to plan works to avoid interventions in wetlands or nesting areas.

One of the larger public bodies, although it intends to start systematizing the definition of needs regarding sustainable development, mentioned that "there is no systematic process in place" and that it relies more on the personal will of their specialists to "challenge the needs and the professionals." This public body mentioned that it often relies on regulations and zoning bylaws, such as those respecting water management and heat islands.

The public body responsible for group purchasing also relies on external counsel, through acquisition consultants helping clients define their needs and procurement strategies. The interviewee also intervened directly in contractual documents to include sustainability considerations, while also coordination with Quebec's Environment Ministry. It also relies heavily on use committees since "they are process experts, but not content experts." On those committees, it includes sustainability advisors from the different clients in the purchasing group, which the interviewee considers a "very winning strategy," even though they cannot reproduce this process for every

purchasing group. They also emphasize market analysis and identification of available certifications.

Four public bodies mentioned that they give importance to the social aspect of sustainability, notably through universal accessibility requirements in construction contracts.

MONITORING AND EVALUATION OF THE ENVIRONMENTALLY SUSTAINABLE PROCUREMENT POLICY

Of all the public bodies interviewed, only three mentioned monitoring their environmental purchasing policy. One municipality tracks the use of preferential rates on procurement, but stated that “under \$25,000, it is difficult given their current informatic systems,” although they are supposed to change them soon. One municipality mentioned that “this is the problem. How do you measure the fact that you’ve thought about the life cycle of the product” and that they have neither the data nor the systems to do follow-ups? One smaller public body noted that, because of their size and workload, they have trouble regarding accountability, they don’t have performance indicators, and it is “not in procurement culture to use performance indicators.” Another municipality mentioned that it started working on this aspect in May 2022, that it intends to question suppliers regarding the implementation of their environmental procurement policy and that it has a presentation prepared for the city council.

Monitoring consists mostly of a checklist to verify in databases whether an environmental criterion was used in the procurement documents, and that the only result given is the number of contracts, not what type of requirement was used. Thus, one public body stated that 17% of its procurement had sustainability considerations. One larger public body does one follow-up per year, which is provided for in their procurement plan, but noted that there was “very little tracking at the procurement level, although a little on the sustainable development steering committee” but that it “intends to have performance indicators in the future” and that it is waiting on Quebec’s Treasury Board to create indicators in the electronic tendering system. Both the electronic tendering system and the software used for the management of ministries and public bodies’ resources, called SAGIR, produce data on environmentally responsible purchasing. However, not all public bodies have access to SAGIR, such as Crown corporations. Thus, the Treasury Board intends to update the sustainable procurement indicators in the electronic

tendering system to ensure government consistency in public reporting on sustainable procurement.⁸⁶

The larger public body also mentioned that it assesses sustainability in projects through its evaluation of their strategic plan and its contribution to the 16 sustainable development goals, that it is currently conducting research regarding adapting buildings to climate change, and that it encourages life cycle analysis in infrastructure projects through building information modelling. Finally, one public body mentioned that it is developing an internal purchasing management system, which should include a component for monitoring responsible purchasing.

INCENTIVES TO GREEN PUBLIC PROCUREMENT

Incentives to green public procurement were identified by public bodies throughout the interviews, namely 1) education, awareness raising and training; 2) legislative and policy changes; and 3) mimicry and standardization.

Education, awareness raising and training

The primary incentive, education, awareness raising and training, was identified by almost all public bodies interviewed. One municipality said that they love to identify “champions” in the organization. The interviewee stated that, when he raises awareness through those champions, “he feels that the changes are more sustainable, quantities are reduced, and products are greener.” He also said that he is “a self-proclaimed sustainability ambassador, although this is not particularly his mandate.” This interviewee mentioned that “a procurement specialist is not an engineer. I cannot sit down with them and make them make environmental choices. He must go out and educate all the players.” The public body in the education system also confirmed the use of champions, and that a lot of people in their organization are motivated and do small actions, giving a collective woodland cleanup as an example. Another municipality intends to create an event to “demystify how to do business with the city,” and that they created a directory of suppliers on their website. A larger public body also stated the need for training and awareness raising of procurement specialists, who “don’t

86. Gouvernement du Québec, “Plan d’action de développement durable 2020-2022,” *Government of Quebec: Infrastructures technologiques Québec*, 2021, <https://cdn-contenu.quebec.ca/cdn-contenu/adm/min/cybersecurite_numerique/Publications/PADD_ITQ_2020-2022.pdf?1641495731>.

really know how to execute a quality-price purchase, are afraid of the normative framework, of getting it wrong, of the Public Markets Authority getting involved, of there being complaints from providers.” This same public body said that, although they have policies and directives, what they lack is tools to aid comprehension, noting that purchasers often wonder: “Why am I making a green project? Why am I asking for a minimum of three bidders?” This connection between the objective and the means of enforcing it must be clear. They have internally developed a sustainability grid to better projects. The interviewee gave an example of a highway project for which the grid helped enhance value, in terms of materials, means and methods. She mentioned that “tools end up suggesting solutions, which helps the decision-making process.”

A smaller public body mentioned that there is not enough training in the municipal world, and that what is available is “bogus.” This interviewee decried the fact that the Treasury Board does not really address municipal organizations and expressed its desire to have training not only for procurement specialists, but also “for directors of public works, for those who make the specifications and estimates.” This public body mentioned ECPAR and their brochures and would like to see them distributed and applied to municipalities, while also stating that it is too expensive for smaller public bodies to subscribe to ECPAR.

Legislative and policy changes

Opinions on legislation and policies differed a little between public bodies, some stating that it is a “double-edged sword.” One municipality said that “as long as legislation and case law do not follow the sustainable wave, it will not work.” It expressed the desire to “require cities to adopt sustainability plans and be accountable, like larger public bodies,” and that legislation should “allow more latitude and clarity for sustainable purchasing, like it is currently possible for regional or local purchasing,” while also mentioning the recently adopted Bill 12 which modifies the ARCPB to promote local and sustainable purchasing. This bill was also mentioned by a large public body, stating that it would enable them to set an example for other public bodies, and noting that “policies lead to the adoption of processes,” while also condemning the fact that considering the adaptation of infrastructure to climate change should become an obligation for public bodies since there now is “collective awareness on climate change and the environment.” This public body also noted that the “pandemic has made people aware of the importance of buying local,” and that this awareness could lead

to changes regarding sustainability. Finally, one public body said that they have “no legal constraints, they have flexibility.”

Mimicry and standardization

As for mimicry and standardization, one smaller public body stated that, since there are so few resources, “the idea of centralizing is not a bad one” and that promoting associations such as public works, recreation and waste management should help standardize procurement. One municipality stated that “they are now making standard contracts for managers to help them manage change, especially for over-the-counter contracts” and that they are “trying to simplify contracts, with colour codes, for managers, which include standard specifications with clause options.” A larger public body said that they would like to have clause banks to copy and paste in their procurement documents, but that it is difficult to achieve with so many specific markets. One municipality said that they haven’t developed environmental clauses that fit well into a construction contract yet, and that they “work a lot by mimicry and it seems like it [environmental clauses] hasn’t broken out yet,” something that was confirmed by another municipality. Another city noted that they did not invent their sustainable procurement policy and that it is “based on things that existed to make their policy, and we were inspired by three or four policies of other cities, public bodies and private organizations.” The public body in the education system mentioned it “looks at what other public education establishments do” and at the electronic tendering system to find sustainability clauses from other establishments. A large public body also mentioned that it “pays attention to the education sector and to other public bodies” in its green public procurement policy.

BARRIERS TO GREEN PUBLIC PROCUREMENT

Barriers to green public procurement were identified by public bodies throughout the interviews conducted, namely 1) cost of sustainability; 2) market considerations; 3) competition; 4) lack of resources; and 5) organizational culture.

Cost of sustainability

The first barrier identified by public bodies is the market, as in knowledge of the market and the availability of products, as well as the prohibitive cost of sustainability. One municipality, which expressed the desire to use LEED certification for construction works, stated that there is a cost to obtaining

this certification, as well as for the maintenance of the building in years to come. This same municipality gave the example of switching from gas to electric pickup trucks for road works but noted that, for the price of an electric pickup truck (more or less \$80,000), they could buy two gas-powered ones, which is problematic, since they have a large fleet of vehicles. The same example was given by another municipality, which said that fleet renewal budgets are insufficient. This same municipality mentioned that “since city budgets are based on property taxes, it creates a lot of pressure and that, if they pay more for sustainability, it compromises the realization of other projects and can lead to tax increases for citizens,” while also noting that their own municipality was wealthier than others, which can lead to more sustainable choices. A larger public body agreed: “There is a price to pay for buying local and sustainably: will we be ready?” This same organization declared that the lowest compliant bidder adjudication criterion was not problematic, and that it could add requirements and contractual clauses to ensure sustainability. Another large public body confirmed all of the above: “as soon as we talk about responsible acquisition, the next question is the budget. Organizations are not yet ready to address life cycle.” This is also true regarding decision-makers. One municipality stated that it is more difficult to justify the use of quality-price when scores are not highly differentiated.

Market considerations

Regarding market considerations, one municipality stated that the “market for more sustainable products and services is still difficult to access and that buyers do not have the knowledge of product availability,” while also noting that sometimes, the market is unable to meet their criteria, requirements or clauses, such as certifications or life cycle considerations, since data is not always available. One large public body said that it does not have sufficient knowledge of the market and that it does not have the time needed to do an analysis. This organization also said that it is difficult to get information from suppliers, and that even when “they send out questionnaires or notices of interest, they are not filled out by the suppliers.” This same public body wondered how to get knowledge of available certifications, and pointed out that there is no directory available. Finally, it was mentioned that supply issues hinder its ability to procure some products, giving the example of “a plant burning in Germany while there was a hailstorm in Texas, which created a glue supply problem, which in turn hindered their ability to use wood in construction projects.”

Competition

The notion of competition was also prevalent in responses about perceived barriers to green public procurement. One large public body stated that “criteria that favour local purchasing seems to contradict free trade agreements,” while agreeing that it is easier to procure sustainably in over-the-counter agreements, thus suggesting raising thresholds, although “the more you relax price measures, the more you increase the risk of collusion and corruption. The strict framework exists for a reason. Striking a balance is complex for public bodies.” The notion of directed bidding was also raised by two public bodies, which experienced purchases with product-pointing and using sustainability criteria, which led to only one possible bidder. One interviewee stated that the “more sustainability specifications you put in, the more directed is the procurement, although directed procurement is usually done unconsciously.” One public body expressed that “competition is problematic and somewhat contradictory with the mission of generating savings and sustainability” and that using “a preferential margin with certification kills competition, since small suppliers do not usually have the money to pay for the certification even if they have better practices.” One municipality noted that the current normative environment is not conducive to sustainable procurement and that the “rigidity of the regulatory framework hinders their willingness to do local purchasing, especially beyond the thresholds. You really have to know the market well.” Another municipality stated that its normative framework was somewhat “greyer” than that of other public bodies regarding its ability to use sustainability criteria in its procurement, and that it has “no legal opinion yet on whether they can do it or not” and that “lawyers are not convinced.” This was corroborated by another municipality, which also referred specifically to free-trade agreements.

Lack of resources

Another recurring theme was the overall lack of resources. Many public bodies said that they did not have the time to explore sustainability, and that they sometimes give projects to consultants, which hinders their organizations’ ownership or buy-in. One public body mentioned that financial resources were lacking, as well as human resources to work on projects or draft the contractual documents. This same public body said that reporting, accountability and administrative requirements created a “lack of time for their procurement processes, therefore a lack of time for sustainable development. The two hours per week we have to update our sustainability plan is systematically set aside.” Overall, smaller organizations have a lot of trouble

finding resources and just try “meeting the minimum criteria of the law,” especially in the municipal world, where there is “way too much responsibility for cities and a lack of qualified resources, especially for estimates, specifications and contracting advisors.”

Organizational culture

The last barrier concerns organizational culture. As one interviewee stated, “the law leaves no room for judgment and efficiency, and everything becomes procedural. A procurement role is no longer a professional role, there is too much procedure, and this can be done by a technician,” while also noting that the “zero-risk” approach of public bodies does not bode well for sustainability. Another interviewee said that “we make demands of the market, but we are not necessarily ready to change our needs, our practices. We want turnkey solutions,” and that change management is necessary to achieve sustainability. Another public body stated that rules “are applied mechanically with no room for latitude or flexibility. Our internal policies, even if non-binding, are applied as if they were. Instead of having a single guideline, I would like to give a threshold, a margin of appreciation to engineers and procurement specialists.” A municipality said that their managers are “used to the technical specifications already set up” and that change management is essential in the future.

CONCLUSION

The fact that a multitude of public bodies, from small municipalities to larger specialized bodies, were interviewed, and that these public bodies do not have the same normative framework, blurs the conclusions of this research report. However, there were many common themes that emerged from the interviews and that can help us answer the general research question: “How do public buyers appropriate the GPP legal framework?”

It is clear from the responses of the different interviewees that:

- Public bodies have knowledge about the different processes, available adjudication criteria and contractual flexibility permitted by their respective normative frameworks.
- Green public procurement is either already implemented, whether in practice or through internal policies, or on the way to be implemented by public bodies.

- Common strategies to achieve sustainability are adopted by public bodies:
 - Preference of the one-envelope over the two-envelope solicitation methods for municipalities to promote the preponderance of quality and down out the criterion of price.
 - All public bodies rely on specifications and technical requirements to ensure a form of sustainability, whether those are made internally or by professional service providers.
 - Most public bodies rely on certifications such as ISO 14 001 or LEED to ensure the environmental aspect of their projects.
- Although public bodies have a common knowledge of their normative framework, they need to rely and insist on education, awareness raising and training of their purchasers to ensure the implementation of sustainability measures.
- Mimicry between public bodies, no matter their jurisdiction, is of the utmost importance in their environmental procurement practices, although most public bodies deplore a lack of expertise and traction regarding these matters.
- Many public bodies are waiting on major legislative changes (Bill 12) to reframe their practices.

However, a lot of common barriers still exist to ensure full efficiency and a definitive implementation of sustainable public procurement practices:

- The prohibitive cost of sustainability is problematic for every public body interviewed, and most of them do not feel that they are financially equipped to fully implement sustainable practices.
- Public bodies do not have sufficient knowledge of the market and the availability of products, services and resources to ensure an efficient procurement process.
- Many public bodies interviewed, and especially smaller ones such as municipalities, feel the normative framework lacks clarity regarding the junction between competition and price-driven markets, notably free-trade agreements, and would like to have clearer instructions from the government and their legal advisors on the matter.
- Almost all public bodies are plagued with a lack of resources, mostly human resources. Procuring sustainably implies more work, more research, more time to conduct the procurement process, and public

bodies do not feel they are equipped to tackle the challenge, a problem which could worsen given the economic context.

- Most public bodies believe that change management and organizational culture are barriers, and that the involvement of upper-echelon management and the provincial government are necessary to implement sustainable procurement practices.

Some of these matters, both positive and negative, will be further explored in the third part of the research, the questionnaire, and will be compared with the results of other international researchers.

Quantitative and Qualitative Analysis of Questionnaire – Green Public Procurement – Quebec, Canada

This section of the research report follows the legislative and regulatory analysis of Quebec's and Canada's green public procurement framework, and the qualitative analysis of interviews conducted with eight different public bodies regarding their green public procurement practices. It consists of the third section of this three-part research report on green public procurement, namely a quantitative analysis of a questionnaire developed following interviews conducted with public bodies at the municipal and provincial levels in Quebec.

The first subsection contains a brief overview of the methodology used to develop the questionnaire. It is followed by a presentation of the quantitative results of the questionnaire, then by an analysis and discussion of the results.

METHODOLOGY

The first methodological step was to participate in a training session offered by the Chaire de droit des contrats publics at Jean Moulin Lyon 3 University, which helped explain the steps involved in building a questionnaire and the basics of the software used to analyze the results, Limesurvey. Afterwards, we were able to set up our Limesurvey account, which would help us build our questionnaire.

In discussions with other members of the research project, it was decided that the questionnaire would contain approximately 10 questions, and that some of those should be similar, no matter the jurisdiction, to facilitate the comparison of results. Therefore, questions 1 to 6 should be almost identical to those of other researchers, with slight adaptations or variations according to the normative framework and specific vocabulary of each country.

Questions 7 to 11 are more specific, and result from the answers obtained in the second part of this research project, namely the interview process. Some of the themes that emerged throughout the interviews, such as group purchasing, mimicry between public bodies, clarity of the normative framework and procurement strategies used to ensure environmental considerations, are included in tenders. The final question was prospective in nature: Bill 12, the *Act promoting Québec-based and responsible purchasing by public bodies, to strengthen the integrity regime for businesses and to increase the powers of the Autorité des marchés publics*, which was adopted after the questionnaire was launched, was mentioned many times during the interviews, and we thought it would be interesting to survey respondents on this topic.

The questionnaire contains a total of 11 questions:

- Questions 1 and 2 are open-ended and concern the identification of respondents.
- Question 2 was added just before the launch to cross-reference the results by type of public body.
- Question 3 is a multiple-choice question.
- Question 4 is a multiple-choice question coupled with a 5-point Likert scale (Never, Rarely, Occasionally, Frequently, Always).
- Question 5 contains nine statements coupled with a 5-point Likert scale (Strongly disagree, Disagree, Neither disagree nor agree, Agree, Strongly agree).
- Question 6 is a multiple-choice question.
- Question 7 is a multiple-choice question.
- Question 8 contains three statements coupled with a 5-point Likert scale (Strongly disagree, Disagree, Neither disagree nor agree, Agree, Strongly agree).
- Question 9 contains one statement coupled with a 5-point Likert scale (Very positive, Positive, Neither positive nor negative, Negative, Very negative).
- Question 10 is a multiple-choice question.
- Question 11 contains one statement coupled with a 5-point Likert scale (Very positive, Positive, Neither positive nor negative, Negative, Very negative).

Most of the questions had an open-ended option, whether at the end in the case of multiple-choice questions or in Likert scale questions, to enable the survey respondents to justify or supplement their answers, which in turn would help identify further research topics. Likert scale questions were somewhat difficult to program in Limesurvey, with our limited training and experience using the software, but we were able to implement them in the end. According to the Likert scale bias matrix, to keep the bias as low as possible in a horizontal Likert scale, it appears best to place negative attitude options on the left side of the scale and positive attitude options on the right side of the scale, which we did.⁸⁷ The same is also true for vertical scales, which unfortunately the researcher forgot. However, this does not mean the results are worthless, but only that for questions 9 and 11, the bias level is higher than for questions 4, 5 and 8. The full questionnaire is available in French in Appendix 2 of this.

After completing and programming the questions, we set the general parameters of the questionnaire using a brief Limesurvey user guide on how to publish a public questionnaire. Once activated, the link to the questionnaire was transmitted on a public contracts group on LinkedIn. It was also sent to the interviewees who participated in the second part of the research by email, with the instruction to disseminate the survey in their respective organizations. Finally, it was sent to the researcher's and supervisor's contacts.

The questionnaire was launched in early June. By mid-June, there were only 5 complete answers and 8 incomplete answers, which were underwhelming results. Fortunately, as of today, a total of 18 complete answers and 14 incomplete answers have been received. We will leave the questionnaire active for at least another month to try to obtain more significant results and update the analysis.

QUESTIONNAIRE RESULTS

Questions 1 and 2

Q1: *What position do you hold in your public body?*

Q2: *Which public body do you work for?*

87. Limesurvey, "Likert Scale: How to Properly Scale Your Survey Responses," n.d., <<https://www.limesurvey.org/blog/knowledge/108-the-likert-scale-enhance-your-survey-data>>.

These questions were put forth to help better understand the profile of respondents, even if their answers will be discussed anonymously. We found it enticing to possibly cross-reference the results obtained in some questions of the survey with different types of public bodies, since two main normative frameworks are applicable to procurement in Quebec.

For question 1, the respondents' profiles included legal advisors and lawyers, purchasers, project managers, contract managers and members of senior management, such as project and service directors.

For question 2, about half the respondents worked for larger specialized public bodies, and the other half was made up of municipalities, public bodies in the education sector and other governmental agencies. This represents a similar type of sampling as in the second part of the research project involving semi-structured interviews.

Question 3

Q3: In your calls for tenders, do you integrate environmental aspects:

- a) In your selection criteria?
 - b) In your contractual clauses?
 - c) In your specifications or minimum requirements?
 - d) Never
-

As with all multiple-choice answers in this questionnaire, respondents had the opportunity to choose more than one answer. The results indicate that 9.38% of respondents integrate environmental aspects into their selection criteria, 34.38% include them in their contractual clauses and 43.75% include them in their specifications or minimum requirements. Only one respondent indicated that they never included them.

Respondents also had the opportunity to add comments to their answers. One respondent said they only included environmental aspects if there was a "sustainability issue." Another mentioned that "we have a general clause inviting our suppliers to take note of our orientations regarding sustainable development and ask that they respect our commitments." One respondent indicated that they rely on supplier evaluation. Regarding contractual clauses, one respondent mentioned that they had some regarding "vehicle

use, recycling, disposal of contaminated soil and paper reduction,” a large proportion of respondents said they relied on LEED certification and the LEED grid, and one mentioned that “depending on the project, we may require that the supplier hold certain certifications.” Finally, one respondent answered that it “depended on the type of market.”

Question 4

Q4: Into which type of contract do you integrate environmental aspects?

- a) Goods (Never, Rarely, Occasionally, Frequently, Always)
 - b) Services of a technical nature (Never, Rarely, Occasionally, Frequently, Always)
 - c) Professional Services (Never, Rarely, Occasionally, Frequently, Always)
 - d) Construction Work (Never, Rarely, Occasionally, Frequently, Always)
-

Regarding the integration of environmental aspects for the procurement of goods, 3.12% answered that they never do, 6.25% rarely, 18.75% occasionally, 6.25% frequently and 3.12% always. Some 28.12% of respondents did not answer the question, and 34.38% did not complete or display the question.

Regarding the integration of environmental aspects for the procurement of technical services, 3.12% answered that they never do, 9.38% rarely, 15.62% occasionally, 6.25% frequently and 9.38% always. Some 21.88% of respondents did not answer the question, and 34.38% did not complete or display the question.

Regarding the integration of environmental aspects for the procurement of professional services, 12.50% answered they never do, 3.12% rarely, 15.62% occasionally, 0% frequently and 18.75% always. Some 15.62% of respondents did not answer the question, and 34.38% did not complete or display the question.

Regarding the integration of environmental aspects for the procurement of construction works, 3.12% answered they never do, 9.38% rarely, 12.50% occasionally, 6.25% frequently and 18.75% always. Some 15.62% of respondents did not answer the question, and 34.38% did not complete or display the question.

Question 5

Q5: What do you think are the main reasons why you do not/no longer include environmental aspects in your tenders?

- a) Complexity of including environmental aspects in tenders (Strongly disagree, Disagree, Neither disagree nor agree, Agree, Strongly agree)
 - b) Difficulty taking environmental aspects into account in the definition of needs (Strongly disagree, Disagree, Neither disagree nor agree, Agree, Strongly agree)
 - c) Difficulty verifying compliance with environmental requirements (Strongly disagree, Disagree, Neither disagree nor agree, Agree, Strongly agree)
 - d) Lack of expertise or training (Strongly disagree, Disagree, Neither disagree nor agree, Agree, Strongly agree)
 - e) Higher purchase cost (Strongly disagree, Disagree, Neither disagree nor agree, Agree, Strongly agree)
 - f) Restriction of competition (Strongly disagree, Disagree, Neither disagree nor agree, Agree, Strongly agree)
 - g) Additional effort and time required (Strongly disagree, Disagree, Neither disagree nor agree, Agree, Strongly agree)
 - h) Increased legal uncertainty (Strongly disagree, Disagree, Neither disagree nor agree, Agree, Strongly agree)
 - i) Others, specify
-

This question aims to identify possible and prominent barriers to the implementation of environmental aspects in public calls for tenders by public bodies.

Regarding the complexity of including environmental aspects in tenders, 3.12% strongly disagreed, 9.38% disagreed, 9.38% neither disagreed nor agreed, 15.62% agreed and 3.12% strongly agreed. Some 25% of respondents did not answer the question, and 34.38% did not complete or display the question.

Regarding the difficulty taking environmental aspects into account in the definition of needs, 3.12% strongly disagreed, 6.25% disagreed, 12.50% neither disagreed nor agreed, 9.38% agreed and 9.38% strongly agreed. Some 25% of respondents did not answer the question, and 34.38% did not complete or display the question.

Regarding the difficulty verifying compliance with environmental requirements, 3.12% strongly disagreed, 9.38% disagreed, 6.25% neither disagreed nor agreed, 12.50% agreed and 9.38% strongly agreed. Some 25% of respondents did not answer the question, and 34.38% did not complete or display the question.

Regarding the lack of expertise or training, 3.12% strongly disagreed, 12.50% disagreed, 3.12% neither disagreed nor agreed, 15.62% agreed and 6.25% strongly agreed. Some 25% of respondents did not answer the question, and 34.38% did not complete or display the question.

Regarding the higher purchase cost, 0% strongly disagreed, 6.25% disagreed, 12.50% neither disagreed nor agreed, 15.62% agreed and 9.38% strongly agreed. Some 21.88% of respondents did not answer the question, and 34.38% did not complete or display the question.

Regarding the restriction of competition, 3.12% strongly disagreed, 3.12% disagreed, 12.50% neither disagreed nor agreed, 12.50% agreed and 12.50% strongly agreed. Some 21.88% of respondents did not answer the question, and 34.38% did not complete or display the question.

Regarding the additional effort and time required, 6.25% strongly disagreed, 6.25% disagreed, 6.25% neither disagreed nor agreed, 15.62% agreed and 6.25% strongly agreed. Some 25% of respondents did not answer the question, and 34.38% did not complete or display the question.

Regarding increased legal uncertainty, 9.38% strongly disagreed, 9.38% disagreed, 9.38% neither disagreed nor agreed, 3.12% agreed and 9.38% strongly agreed. Some 25% of respondents did not answer the question, and 34.38% did not complete or display the question.

Question 6

Q6: In your past tenders, what factors have facilitated the integration of environmental aspects?

- a) The existence of a responsible procurement policy within your organization
- b) Availability of sustainable procurement guidelines or manuals external to your organization
- c) The existence of legislative and regulatory provisions to integrate environmental considerations
- d) Availability of external technical assistance

- e) Funding programs related to the environment
 - f) Specialized training
 - g) Other, specify
-

This question aims to identify possible and prominent facilitators to the integration of environmental aspects into public call for tenders by public bodies.

Some 25% of respondents indicated that the existence of a responsible procurement policy within their organization facilitated the integration of environmental aspects into their procurement. Some 21.88% believe that the existence of legislative and regulatory provisions to integrate environmental considerations is helpful, while 18.75% believe it is facilitated by the availability of sustainable procurement guidelines or manuals external to their organization. Some 12.50% consider the availability of external technical assistance helpful. Some 6.25% stated that funding programs related to the environment facilitated the process, and only 3.12% thought specialized training would help them integrate environmental aspects into their procurement. Some 37.50% of respondents did not complete or display the question.

Finally, 12.5% of respondents mentioned that there were other facilitators, such as LEED certification, minimum client requirements or needs. One respondent noted that the “sensitivity of stakeholders to environmental aspects and support from upper management” facilitated the process. Finally, one respondent mentioned that environmental aspects are never integrated.

Question 7

Q7: When you write your calls for tenders, are you inspired by:

- a) Tenders issued within your organization
 - b) Tenders from other organizations
 - c) Tenders from other jurisdictions
 - d) Tenders from other levels (municipal, provincial, federal)
 - e) Other, specify
-

This question aims to define the mimicry patterns identified as a strategy by public bodies throughout the interview process.

Some 43.75% of respondents said they relied on tenders issued within their organization to produce their next call for tenders. Some 21.88% mentioned that they are inspired by tenders from other organizations, and only 6.25% said they paid attention to other levels of government. No respondents mentioned that they were inspired by tenders from other jurisdictions. Some 40% of respondents did not complete or display the question.

One respondent added that they looked at other organizations “for similar buildings or mandates.” A respondent from the education sector mentioned that “education public bodies in Quebec have been concerned with sustainable development for several years. We regularly exchange on our common experiences. We have a well-established community of interest.” Another respondent added that they had “training, reflection and exchange with other specialists from the same field.” Finally, one respondent stated that they had “compulsory standardized contractual models.”

Question 8

Q8: Do you consider that the legislation and regulations applicable to your public body:

- a) Are sufficiently clear (Strongly disagree, Disagree, Neither disagree nor agree, Agree, Strongly agree)
 - b) Allow for the inclusion of selection criteria that address environmental issues (Strongly disagree, Disagree, Neither disagree nor agree, Agree, Strongly agree)
 - c) Allow for the inclusion of contractual clauses on environmental aspects (Strongly disagree, Disagree, Neither disagree nor agree, Agree, Strongly agree)
-

This question aims to further understand public bodies' perception of their normative framework regarding its clarity and its flexibility for using selection criteria and contractual clauses concerning environmental aspects.

Regarding the overall clarity of their respective normative frameworks, 3.12% of respondents strongly disagreed with its clarity, 6.25% disagreed, 6.25% neither disagreed nor agreed, 25% agreed and 9.38% strongly agreed. Some 9.38% of respondents did not answer the question, and 40.62% did not complete or display the question.

For the possible inclusion of selection criteria that address environmental issues, 0% of respondents strongly disagreed, 12.5% disagreed, 12.5% neither disagreed nor agreed, 15.62% agreed and 9.38% strongly agreed. Some 9.38% of respondents did not answer the question, and 40.62% did not complete or display the question.

Regarding the possible inclusion of contractual clauses on environmental aspects, 0% of respondents strongly disagreed, 9.38% disagreed, 9.38% neither disagreed nor agreed, 18.75% agreed and 12.5% strongly agreed. Some 9.38% of respondents did not answer the question, and 40.62% did not complete or display the question.

Question 9

Q9: What impact do you think group purchasing has on the integration of environmental considerations in tenders?

- a) Very positive
 - b) Positive
 - c) Neither positive nor negative
 - d) Negative
 - e) Very negative
 - f) Provide evidence to support your answer.
-

This question aims to further understand public bodies' perception of group purchasing and its impact on green public procurement, a notion that was mentioned by multiple interviewees in the second part of the research.

Some 9.38% of respondents believe that group purchasing has a very positive impact on the integration of environmental aspects in public procurement. Another 25% believe it has a positive impact, 12.5% think it has neither a positive nor negative impact, 3.12% think it has a negative impact and 0% think it has a very negative impact. Some 9.38% of respondents did not answer the question, and 40.62% did not complete or display the question.

One respondent added that “while it is positive for the environment, it creates an additional burden on bidders, resulting in higher costs, and it may make monitoring more difficult” and another noted that it “could encourage suppliers to go green faster and increase quality.” Finally, one respondent mentioned that “not all organizations have the same sensitivity. Expertise is absent in a majority of organizations.”

Question 10

Q10: When your public body conducts or wishes to conduct sustainable procurement, what procurement strategy do you prefer?

- a) One-step tendering
 - b) Multi-stage tendering
 - c) Consideration of supplier qualifications
 - d) Consideration of quality in the award (price-quality, quality only)
 - e) Use of the lowest compliant bidder criterion coupled with compliance requirements considering environmental aspects
 - f) Use of contract clauses that consider environmental aspects (specifications, quotations, body of contract, etc.)
 - g) Other, specify
-

This question aims to identify public bodies' procurement strategies to conduct sustainable procurement, notably in terms of solicitation methods and adjudication criteria. Some

34.38% of respondents prefer to use contractual clauses in their specifications. Another 21.88% use the lowest compliant bidder criterion coupled with compliance requirements considering environmental aspects, and 15.62% use one-step tendering. On the other hand, 12.5% of interviewees said they considered quality in the adjudication process, whether price-quality or quality only. Finally, 6.25% of respondents use multi-stage tendering and qualify suppliers. Some 9.38% of respondents did not answer the question, and 40.62% not complete or display the question.

One respondent mentioned that the lowest compliant bidder criterion coupled with compliance requirements considering environmental aspects is “the most common method used in markets where there are enough suppliers. In some circumstances, we use a preferential margin.”

Question 11

Q11: In your opinion, what impact will the adoption of Bill 12, An Act promoting Québec-based and responsible purchasing by public bodies, to strengthen the integrity regime for businesses and to increase the powers of the Autorité des marchés publics, have on the responsible purchasing practices of your public body?

- a) Very positive
 - b) Positive
 - c) Neither positive nor negative
 - d) Negative
 - e) Very negative
 - f) Provide evidence to support your answer.
-

This question aims to provide clarity regarding public bodies' perception of a new bill that was recently adopted in Quebec, and which was mentioned multiple times during the interview process.

Some 12.5% of respondents felt that Bill 12 would have a very positive impact on responsible purchasing practices. Another 12.5% felt it would be positive, 15.62% believed it would be neither positive nor negative, 9.38% thought it would be negative, and 0% that it would be very negative. Some 43.75% of respondents did not complete or display the question.

Numerous respondents added comments to their answers, most of which put the positive impact of the new law into perspective. One respondent mentioned that "the addition of procedures with positive effects often leads to delays and complexity," while another added that the "difficulty in calculating elements such as life cycle or cost pressure will limit benefits." Other respondents were worried about market considerations, stating that "a reduced pool of bidders equals a higher price" and that they "don't think the Quebec market could respond, since there is not enough research and development in sustainable development." One respondent said that it is "a step in the right direction, but buying from Quebec does not necessarily mean buying responsibly or sustainably." Finally, it was mentioned that "we currently have the necessary tools. The new law does not add new tools, only additional constraints. An increase in skills at the procurement level would be more effective."

DISCUSSION

One of the main results from this questionnaire is that public bodies do not seem to have generalized and standardized practices when it comes to green public procurement. Whether in terms of solicitation methods or adjudication criteria, there does not seem to be a consensus as to better strategies for ensuring the integration of environmental aspects into their procurement. However, there is some form of common ground that emerged from the second and third parts of this research:

- Question 3 of the survey confirms the fact that public bodies make very little use of selection criteria to decide between potential suppliers, relying instead on contractual clauses and minimum requirements contained in tender documents.
- Question 4 indicates that there is very little difference, in terms of integration of environmental criteria, between the types of purchases (goods, technical services, professional services, construction works). It is worth noting that there is a slight tendency for services of a technical nature (e.g. spreading salt on roads). Surprisingly, the survey results show that professional service contracts are the type of contracts which are least likely to integrate environmental aspects, although normative frameworks enable public bodies to use a preferential margin. At the same time, it is not surprising, considering that professional service providers are the ones who develop specifications and minimum requirements for projects, which seems to be the most prevalent strategy advocated by public bodies to integrate environmental aspects into their calls for tenders as noted in questions 3 and 10.
- Question 5 regarding the main reasons why public bodies do not/no longer include environmental aspects in their tenders mitigated results obtained in the interview process. Most notably, legal uncertainty does not seem to be a primary aspect for respondents. As for other factors, when considering respondents who agreed or strongly agreed, the most important were the lack of expertise and training, higher purchase costs, restriction of competition and the additional effort and time required. This validates some of the issues raised by interviewees, such as difficulty convincing upper management, budgetary issues and market considerations.
- As for factors facilitating the integration of environmental aspects into public bodies' past tenders, a large majority of respondents (43.75%) identified the existence of a responsible procurement policy,

internal procedures, guidelines and manuals as the most positive factors. All these elements refer to internal organizational normativity and self-regulation of public bodies, even more than external normativity such as legislation and regulations. Thus, only 21.88% believe that the existence of legislative and regulatory provisions to integrate environmental considerations is helpful, a result also represented in question 8 regarding the clarity and flexibility of the normative framework, as well as in question 11 regarding the impacts of the adoption of Bill 12.

- Question 7 concerning mimicry between public bodies, which emerged from the interview process, gives slightly contradictory results to what was mentioned in the second part of the research. It seems that public organizations are “inward-looking,” relying on tenders and contract documents they have already used, although a good portion of respondents indicated that they draw on tenders from other organizations. However, there is little reference to other levels of government and other jurisdictions, which may be explained by the different normative frameworks. However, despite these differences between the normative frameworks, particularly in terms of solicitation and adjudication methods, there is nothing to prevent public organizations from drawing inspiration from contractual clauses and minimum requirements, particularly when projects are similar. There seems to be a well-established community of practice in the education sector, which was mentioned in the interview, but this does not appear to be the case for other types of organizations. This is an interesting avenue to explore to facilitate the integration of environmental considerations into public tenders, whether these communities of practice are ad hoc or recurring, sectoral (roadworks, vertical infrastructure, goods) or global (provincial public bodies).
- As for question 8 regarding the clarity and flexibility of the normative framework, it seems that respondents think that their respective normative frameworks are clear and not particularly ambiguous, which is generally consistent with what was mentioned in the interviews. Most respondents also believe that their normative framework allows for the integration of selection criteria and contractual clauses on environmental aspects. This confirms the hypothesis that the normative framework itself is not particularly problematic given that it confers broad discretionary powers on public bodies, but that the barriers to sustainable procurement are more likely to be found in market and price considerations, at least from the point of view of those interviewed and surveyed.

- Public organizations have a very positive perception of purchasing groups in facilitating the integration of environmental aspects in calls for tenders, which was the topic of question 9. This is consistent with findings from the second part of the research: several public organizations have decried their lack of resources, whether human (lack of labour), financial (limited and closed budgets) or expertise (training and awareness raising). The fact that group purchasing frees up resources for these organizations may have a positive impact on their perception. However, one of the respondents to the questionnaire mentioned that group purchasing might create an increase in the price of the contract, which may have an impact on competition, and in particular on the possibility of regional suppliers winning the contract.
- As for preferred strategies to conduct sustainable procurement, the preference of one-step tendering confirms what was stated by municipalities in the interview process, namely their preference for the one-envelope system. It also confirms that even though public bodies have the latitude to use quality-price and environmental criteria, they still prefer to use the lowest compliant bidder coupled with minimum requirements and contractual clauses. This is consistent with answers obtained in questions 3 and 4.
- Finally, question 11 regarding the adoption of Bill 12 confirms the rather neutral perception of public bodies and interviewees of the importance of the normative framework on green public procurement. Although most of the survey respondents thought it would have a generally positive impact, many of the same respondents noted that it might represent more of a general intention of the government, but that market issues, the fact that restricting competition will lead to higher prices and the lack of tools and knowledge regarding life-cycle costs will hinder the implementation of green public procurement practices.

These results, although not statistically significant, still provide interesting future research avenues regarding green public procurement in Quebec. Furthermore, it will serve as a compelling basis of comparison with the results of researchers from other jurisdictions.

APPENDIX 1

Grille d'entrevues semi-dirigées – Québec

Note introductive :

Je vous remercie à nouveau de m'avoir accordé de votre temps pour cette discussion. Cet échange porte sur la prise en compte des considérations environnementales dans les marchés publics passés par votre organisme. L'entretien n'est pas enregistré. Il fait l'objet d'une prise de notes, mais il sera traité de façon anonyme. Notez que nous pouvons interrompre l'entrevue à tout moment.

1. Présentation de l'acheteur et de son organisme public

- Objectif: comprendre les fonctions de la personne interviewée et sa formation juridique.

Questions

- 1) Pourriez-vous présenter l'organisation pour laquelle vous travaillez ?
- 2) Pourriez-vous présenter vos principales fonctions ?
- 3) Quelle formation (universitaire ou non) avez-vous suivie avant d'entamer votre carrière ?

2. Marchés publics passés par l'acheteur

- Objectif: comprendre quels sont les types de marchés et de contrats, et quelles sont les procédures de passations régulièrement utilisées par l'organisation.

Questions et relances possibles

- 1) Quels types de marchés sont passés : fournitures, services, travaux ?
- 2) Quels types de contrats sont passés : location, à exécution successive, méthodes de paiement, etc. ?
- 3) Quelles procédures de passation sont utilisées : gré à gré, sur invitation, appel d'offres public ?

3. Définition d'une politique d'achat durable à visée environnementale par l'organisme public

- Objectif: est-ce qu'il existe une politique d'achats durable à visée environnementale dans votre organisation et quelle est-elle ?

Questions et relances possibles

- 1) Votre organisation possède-t-elle une politique d'achat environnemental explicite ?
- 2) Est-elle disponible dans un document ?
- 3) Qui a rédigé ce document, et sur quelle base ? Quel a été le processus ayant mené à cette politique ?
- 4) Faites-vous une évaluation de l'utilisation, de la mise en œuvre ou des résultats de cette politique ?
- 5) Avez-vous recours à des lignes directrices ou guides d'achat durable autre que ceux produits par votre organisation ? Lesquels ?
- 6) Vous référez-vous à un guide d'achat en particulier pour élaborer les considérations environnementales ?

4. Pratique des marchés publics à vocation environnementale

- Objectif: comprendre comment sont retranscrites, dans les marchés, les considérations environnementales.

Questions et relances possibles

- 1) Comment est défini le besoin au regard des considérations environnementales ?
- 2) Choix de la procédure: la prise en compte des considérations environnementales vous amène-t-elle à utiliser une procédure de passation en particulier (p. ex. appel d'offres en deux étapes, coût total d'acquisition, système à une ou deux enveloppes) ?
- 3) Critères environnementaux: quels sont vos critères en lien avec les préoccupations environnementales ? Comment sont-ils rédigés ?
- 4) Clauses environnementales: comment rédigez-vous les clauses environnementales dans vos contrats ? Comment les insérez-vous, et comment sont-elles formulées ?
- 5) Comment analysez-vous les capacités techniques du candidat (appel de qualification) ?

- 6) Choix de l'offre, ou critères d'adjudication.
 - a) Soumissionnaire le plus bas
 - b) Qualité-prix (prix ajusté le plus bas)
 - c) Qualité uniquement
 - d) Coût total d'acquisition
 - e) Considération du cycle de vie
- 7) Quelles sont la place et la pondération pour les critères environnementaux dans le choix du cocontractant ?
- 8) Exécution du marché : l'exécution correspond-elle aux prestations attendues au regard de la politique d'achat environnementale de l'entreprise ?

5. Suivi et évaluation de la politique d'achats environnementale

- Objectif: comprendre l'évaluation que font les acheteurs de leur politique d'achats environnementale.

Questions et relances possibles

- 1) Avez-vous une procédure de suivi et d'évaluation de la politique d'achats environnementale ?
- 2) Selon quelle méthode et quels critères ?

6. Conclusion

- 1) Selon vous, quels sont les freins à l'achat public environnemental ?
- 2) Selon vous, quelles pourraient être les pistes d'incitation à l'achat public environnemental ?

APPENDIX 2

Questionnaire – Québec

1. **Quel poste occupez-vous au sein de votre organisation publique ?**
2. **Pour quel organisme public travaillez-vous ?**
3. **Dans le cadre de vos appels d'offres, intégrez-vous des aspects environnementaux ? Si oui, comment ?**
 - a) Dans vos critères de sélection
 - b) Dans vos clauses contractuelles
 - c) Dans vos devis ou exigences minimales
4. **Pour quel(s) type(s) de contrat(s) intégrez-vous des aspects environnementaux ?**
 - a) Biens (Jamais, Rarement, Occasionnellement, Fréquemment, Toujours)
 - b) Services de nature technique (Jamais, Rarement, Occasionnellement, Fréquemment, Toujours)
 - c) Services professionnels (Jamais, Rarement, Occasionnellement, Fréquemment, Toujours)
 - d) Travaux de construction (Jamais, Rarement, Occasionnellement, Fréquemment, Toujours)
5. **Quelles sont, selon vous, les principales raisons pour lesquelles vous n'incluez pas/plus d'aspects environnementaux dans vos appels d'offres ?**
 - a) Complexité d'inclure des aspects environnementaux dans les appels d'offres (Pas du tout d'accord, Pas d'accord, Ni en désaccord ni d'accord, D'accord, Tout à fait d'accord)
 - b) Difficulté à prendre en compte des aspects environnementaux dans la définition des besoins (Pas du tout d'accord, Pas d'accord, Ni en désaccord ni d'accord, D'accord, Tout à fait d'accord)

- c) Difficulté à vérifier la conformité aux exigences environnementales (Pas du tout d'accord, Pas d'accord, Ni en désaccord ni d'accord, D'accord, Tout à fait d'accord)
 - d) Manque d'expertise ou de formation (Pas du tout d'accord, Pas d'accord, Ni en désaccord ni d'accord, D'accord, Tout à fait d'accord)
 - e) Coût d'achat plus élevé (Pas du tout d'accord, Pas d'accord, Ni en désaccord ni d'accord, D'accord, Tout à fait d'accord)
 - f) Restriction de la concurrence (Pas du tout d'accord, Pas d'accord, Ni en désaccord ni d'accord, D'accord, Tout à fait d'accord)
 - g) Efforts et heures supplémentaires nécessaires (Pas du tout d'accord, Pas d'accord, Ni en désaccord ni d'accord, D'accord, Tout à fait d'accord)
 - h) Augmentation de l'incertitude juridique (Pas du tout d'accord, Pas d'accord, Ni en désaccord ni d'accord, D'accord, Tout à fait d'accord)
 - i) Autres, précisez
- 6. Dans vos appels d'offres passés, quels sont les facteurs ayant facilité l'intégration d'aspects environnementaux dans ceux-ci ?**
- a) L'existence d'une politique d'approvisionnement responsable au sein de votre organisme
 - b) Disponibilité de lignes directrices ou de manuels sur l'approvisionnement responsable externe à votre organisation
 - c) L'existence de dispositions législatives et réglementaires permettant d'intégrer des aspects environnementaux
 - d) Disponibilité d'une assistance technique externe
 - e) Programmes de financement en lien avec l'environnement
 - f) Formation spécialisée
 - g) Autres, précisez
- 7. Lorsque vous rédigez vos appels d'offres, vous inspirez-vous :**
- a) D'appels d'offres passés au sein de votre organisation
 - b) D'appels d'offres d'autres organisations
 - c) D'appels d'offres d'autres juridictions
 - d) D'appels d'offres d'autres paliers de gouvernement (municipal, provincial, fédéral)
 - e) Autres, précisez

- 8. Vous considérez que la législation et la réglementation applicables à votre organisme public :**
- a) Sont suffisamment claires (Pas du tout d'accord, Pas d'accord, Ni en désaccord ni d'accord, D'accord, Tout à fait d'accord)
 - b) Permettent d'intégrer des critères de sélection portant sur des aspects environnementaux (Pas du tout d'accord, Pas d'accord, Ni en désaccord ni d'accord, D'accord, Tout à fait d'accord)
 - c) Permettent d'intégrer des clauses contractuelles portant sur des aspects environnementaux (Pas du tout d'accord, Pas d'accord, Ni en désaccord ni d'accord, D'accord, Tout à fait d'accord)
- 9. Quel est, selon vous, l'effet des regroupements d'achats sur l'intégration d'aspects environnementaux dans les appels d'offres ?**
- a) Tout à fait positif
 - b) Positif
 - c) Ni positif ni négatif
 - d) Négatif
 - e) Tout à fait négatif
 - f) Indiquez des éléments à l'appui de votre réponse
- 10. Lorsque votre organisme public effectue ou souhaite effectuer un approvisionnement responsable, quelle stratégie d'approvisionnement mettez-vous en œuvre ?**
- a) Appel d'offres en une étape
 - b) Appel d'offres en plusieurs étapes
 - c) Prise en compte des qualifications des fournisseurs
 - d) Prise en compte de la qualité dans l'adjudication (qualité-prix, qualité uniquement)
 - e) Utilisation du critère du plus bas soumissionnaire conforme avec des exigences de conformité prenant en compte des aspects environnementaux
 - f) Utilisation de clauses contractuelles prenant en compte des aspects environnementaux (cahier des charges, devis, corps du contrat, etc.)
 - g) Autres, précisez

- 11. Quel sera, selon vous, l'effet de l'adoption du projet de loi 12, intitulé *Loi visant principalement à promouvoir l'achat québécois et responsable par les organismes publics, à renforcer le régime d'intégrité des entreprises et à accroître les pouvoirs de l'Autorité des marchés publics*, sur les pratiques d'approvisionnement responsable de votre organisme public ?**
- a) Tout à fait positif
 - b) Positif
 - c) Ni positif ni négatif
 - d) Négatif
 - e) Tout à fait négatif
 - f) Indiquez des éléments à l'appui de votre réponse

LEGAL FRAMEWORK OF GREEN PUBLIC PROCUREMENT IN FRANCE

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Introduction

The greening of public procurement reflects the integration of environmental considerations in public contracts in France. It sheds light on the ambiguities of sustainable development as a core principle of public policy.¹ It is commonly assumed that the definition of sustainable development comes from the *Our Common Future* report of 1987, and that it has three dimensions: economic, social and environmental.

Green public procurement deals with the integration of environmental considerations in public procurement, that is to say an environmentalization of public contracts. Consequently, we use the following definition of environmentalization: “a residual integration of environmental issues in public policies, allowing for the maintenance of productivist and consumerist options. We are far from an ecologization of these policies, which leads to a reformulation of the orientations and purposes of politics based on environmental constraints.”²

Green public procurement is also a research field shared by legal researchers and economists. In this sense, this scientific field participates in the construction of a “green public procurement” object, which is both a political slogan (the European Commission’s “Buying Green!”) and a research object.

In this chapter, we will concentrate our research on the legal activities that construct the environmental public order in France. In this respect, the construction of a legal field is the result of the practice of various actors, academics and legal scholars, as well as administrations that participate in the emergence and existence of a legal framework. We will also seek to understand the obstacles to the implementation of green public procurement in France.

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1. Philippe Hamman, “Urbanisme durable,” in Aurélie Choné, Isabelle Hajek and Philippe Hamman, *Guide des Humanités environnementales*, Presses universitaires du Septentrion, 2016, p. 201-212.
 2. Bruno Villalba, *L'écologie politique en France*, La Découverte, 2022, p. 6 (free translation).

In order to work on this theme, we will focus on the appropriation of the environmental legal framework by stakeholders in public procurement. In this sense, Bruno Villalba emphasizes the importance of identifying the logic of the “appropriation” of sustainable development.³ Thus, our research will focus on the legal activities that shape environmental public procurement. We assume that a multitude of legal activities constitute as many appropriations of the environmental frame of reference to produce a legal framework constituting a repertoire of action.⁴ It will then be possible to identify the incentives and obstacles to the environmentalization of public procurement, both in its law and in the practice of this law.

In Part 1 of this chapter, we will present the gradual construction of a legal framework for green public procurement in France. In Part 2, we will investigate the multiple appropriations of this framework by stakeholders in procurement and, in Part 3, we will address the obstacles and incentives inherent in this policy.

3. Bruno Villalba, *Appropriations du développement durable – Émergences, diffusions, traductions*, Presses universitaires du Septentrion, 2009.

4. Pierre Lascoumes and Evelyne Serverin, “Le droit comme activité sociale: pour une approche wébérienne des activités juridiques,” *Droits et sociétés*, no. 9, 1988, p. 165-187.

The Building of the Legal Framework for Green Public Procurement in France

Since 2000, the environmentalization of public procurement in France has been of growing concern. It remains modest, and is making slow progress both through legal provisions (I) and through the emergence of incentive instruments (II).

THE TIMID INCLUSION IN FRENCH LAW OF ENVIRONMENTAL PUBLIC PROCUREMENT

The inclusion of environmental considerations in the French *Code de la commande publique* suffers from two defects: on the one hand it is weakly binding; on the other, it is hardly enforced. A parliamentary report of 2021 claims that “there is no provision in the public procurement code that requires environmental concerns to be reflected in contract clauses or to be a criterion for selecting the tenderer.”⁵ In this report, members of parliament recommended that purchasers be given quantified targets, a proposal that has not been taken up.

The *Climat et Résilience* law of 2021 and its implementing decree strengthen the inclusion of environment in public procurement, but is the subject of much criticism.⁶ According to the law, starting in 2026 at the latest,

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5. Sophie Beaudouin-Hubi re and Nad ge Havet, “Pour une commande publique sociale et environnementale:  tat des lieux et pr conisations,” *R publique Fran aise*, 2021, p. 10, <<https://www.vie-publique.fr/files/rapport/pdf/282039.pdf>> (free translation).
 6. Alexandre Delavay, “Loi ‘Climat’ et commande publique: *greenwashing* l gislatif ou vraie avanc e ?” Dalloz, 2021, <<https://www.dalloz-actualite.fr/flash/loi-climat-et-commande-publique-greenwashing-legislatif-ou-vraie-avancee>>, and Fran ois Lich re, “La loi du 22 ao t 2021 et la commande publique,” *Actualit  juridique – Droit administratif*, 2022, p. 142, <<https://shs.hal.science/halshs-03547470>>.

at least one of the contract award criteria will relate to the environmental characteristics of the bid.⁷

Moreover, a decree published on May 2, 2022, amends the text of Article R.2152-7 of the *Code de la commande publique*. It removes the option of selecting bids on the basis of a single price criterion. The only single criterion will no longer be price, but overall cost, provided that the environmental characteristics of the offer are taken into account. In addition, public buyers will still be allowed to use a plurality of criteria to select bids. This new version of Article R.2152-7 will come into force on August 21, 2026. Article D.2111-3 of the *Code de la commande publique* is also amended by this decree. It extends the obligation to draw up a SPASER (*schéma de promotion des achats publics socialement et économiquement responsables*: scheme to promote socially and economically responsible public procurement) for purchasers with annual purchases of €50 million, which was previously set at €100 million. This measure came into force on January 1, 2023. Furthermore, the Plan national pour des achats durables (national plan for sustainable public procurement, PNAD)⁸ requires that 100% of contracts notified during the year include at least one environmental consideration.

As the law currently stands in France, environmental considerations can be included at different stages of the contract:

- definition of needs (A)
- definition of selection criteria (B)
- definition of contract clauses (C)
- eco-labels (D)
- sectoral obligations (E)
- specific forms of contract, with energy performance itself defining the subject matter of the contract (energy performance contracts and global performance contracts) (F)
- via innovation partnerships (G)

7. *Loi portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets*, 2021-1104, article 35.

8. French Republic, “Plan national pour des achats durables – 2022-2025,” Commissariat général au développement durable, 2022, <<https://www.ecologie.gouv.fr/sites/default/files/PNAD-PAGEAPAGE-SCREEN%283%29.pdf>>.

Definition of needs

The definition of needs must take into account the objectives of sustainable development, particularly in their environmental dimension. Article L.2111-1 of the *Code de la commande publique* states that “the nature and extent of the needs to be met shall be precisely determined before the consultation is launched, taking into account the objectives of sustainable development in their economic, social and environmental dimensions.”⁹ Needs must be described precisely, as soon as they lead to a criterion for judging tenders.¹⁰ The purchaser must “reconcile, in determining the nature and extent of the needs to be met, the objectives of environmental protection and enhancement, economic development and social progress.”¹¹ This is an obligation of means.¹²

The definition of needs often requires preliminary studies. In this regard, sourcing is the possibility of “carrying out consultations or market studies, seeking advice or informing economic operators of the project and its requirements.”¹³ In order to help buyers, the State Purchasing Office has made available guidelines for sourcing.¹⁴ Thus, public purchasers may specify the environmental characteristics of a product.¹⁵

Writing technical specifications is a very important step in specifying needs.¹⁶ According to the *Climat et Résilience* law of 2021, by a date to be determined by decree and no later than August 22, 2026, the objectives of sustainable development in their economic, social and environmental dimensions shall be taken into account.¹⁷

9. Free translation.

10. CE, December 15, 2008, *Communauté urbaine Dunkerque*, no. 310380.

11. CE, November 23, 2011, *Communauté urbaine de Nice-Côte-d'Azur*, no. 351570 (free translation).

12. *Idem*; Rép. min. no. 2 5167, B. Piras : JO Sénat Q 9 nov. 2006, p. 2793.

13. *Décret relatif aux marchés publics*, 2016-360, article 4; *Code de la commande publique*, 2019, article R2111-1 (free translation).

14. Direction des Achats de l'État, “Le sourcing opérationnel,” *Ministère de l'Action et des Comptes publics*, 2019, <https://www.economie.gouv.fr/files/files/directions_services/dae/doc/Guide_sourcing.pdf>.

15. European Union law, “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 Text with EEA relevance,” *Official Journal of the European Union*, 2014, article 42, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024>>.

16. *Code de la commande publique*, article L2111-2.

17. *Loi portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets*, 2021-1104, article 35.

Thus, needs shall be formulated in one of the following ways:

- By reference to standards or other equivalent documents available to candidates. In this case, Article R. 2111-9 of the *Code de la commande publique* establishes the following order of preference: national standards transposing European standards, European technical assessments, common technical specifications, international standards and other technical reference documents.
- In terms of performance or functional requirements. In this case, they must be sufficiently precise to enable candidates to know exactly what the contract is about. They may include environmental or social characteristics.¹⁸
- By a combination of the above, which means reference to standards and to terms of performance.

The environmentalization of the definition of award criteria

The “environmentalization”¹⁹ of award criteria for the selection of bids has accelerated in recent years. These environmental criteria can be defined as related “to environmental protection and ecological considerations.”²⁰ Environmental criteria are relevant when the purchaser decides not to refer solely to the price of the works, supplies or services. By August 21, 2026, it will no longer be possible for purchasers to refer to the single price criterion. They will have to choose between the overall cost or a plurality of criteria, taking into account the environmental characteristics of the bid.²¹ These criteria must be precise and related to the subject matter of the contract.²²

A distinction can be made between a sustainable development criterion and an environmental criterion. In this respect, Fanette Akoka explains that an environmental criterion is not necessarily a sustainable development criterion, using the example of the European Court of Justice (ECJ)’s *Max Havelaar Eko* case law.²³ Fanette Akoka argues that a criterion requiring

18. *Code de la commande publique*, article R.2111-10.

19. Fanette Akoka, *Contrats de la commande publique et environnement*, Presses universitaires d’Aix-Marseille, 2020, p. 273.

20. Fanette Akoka, *Contrats de la commande publique et environnement*, Presses universitaires d’Aix-Marseille, 2020, p. 271 (free translation).

21. *Décret portant diverses modifications du code de la commande publique*, no. 2022-767, article 2.

22. CE, May 25, 2018, *Nantes Métropole*, no. 417580.

23. CJUE, May 19, 2012, *Commission contre Pays-Bas*, C-368/10.

that fairtrade coffee be packaged in plastic (i.e. non-compostable) pods is a sustainable development criterion in all its social, economic and ecological dimensions, but does not constitute a strict environmental criterion, since the coffee pods are not compostable.²⁴ Therefore, the sustainable development criterion combines economic, social and ecological issues, while the environmental criterion focuses on environmental characteristics only. Thus, for example, an environmental criterion may require that the product be organically produced, regardless of the working conditions of the farm workers. In this respect, the environmentalization of public procurement does not cover all the objectives of sustainable development. Indeed, as the French Ministry of the Economy states, “Successive reforms of public procurement law have progressively established purchasing as leverage for sustainable development and more particularly for the ecological transition.”²⁵ This reflection raises the question of a possible future dissociation of a sustainable development criterion on the one hand and an environmental criterion on the other.

Furthermore, the examination of the technical and professional capacity of the candidates is the only possibility of verifying their environmental capacity at the bid examination stage. The annexes of the *Code de la commande publique*²⁶ describe these possibilities.²⁷ This may include verification of environmental certifications (e.g. ISO 1400) or that the candidate demonstrates experience and expertise in the environmental field.²⁸

In order to select bids, purchasers can use the life cycle cost criteria, the environmental performance criterion or the environmental quality criterion:

- The cost criteria include the life cycle of a product.
- The environmental performance criterion consists in fact of two different criteria: it could refer to the protection of the environment,

24. Fanette Akoka, *Contrats de la commande publique et environnement*, Presses universitaires d'Aix-Marseille, 2020, p. 272.

25. Rép. min. no. 21301: JOAN 15 oct. 2019, p. 9240 (Q. 9 juill. 2019, M. Michel Larive) (free translation).

26. Guylain Clamour, “Annexes du Code de la commande publique,” *Contrats et Marchés publics*, no. 5, 2019, comm. 147.

27. Green Law Avocat, “Le nouveau code de la commande publique s'étoffe d'annexes environnementales !,” *Green Law Avocat*, 2019, <<https://green-law-avocat.fr/le-nouveau-code-de-la-commande-publique-setoffe-dannexes-environnementales/>>.

28. Fanette Akoka, *Contrats de la commande publique et environnement*, Presses universitaires d'Aix-Marseille, 2020, p. 274.

such as a carbon emissions threshold, or it could refer to the energy performance of equipment.

Administrative courts in France set limits to the environmentalization of criteria, first by embracing the case law of the ECJ and second by considering that it is compulsory to consider sustainable development objectives, but that it is not compulsory for public buyers to decree environmental award criteria to choose the most economically advantageous tender.²⁹ Moreover, economic operators cannot drive the integration of the objectives of sustainable development by presenting variants that include environmental considerations.³⁰ In this case, buyers are not required to accept this variant. Furthermore, environmental criteria or sub-criteria must be linked to the subject matter of the contract.³¹ Thus, the assessment of this criterion must also cover products that will be used to carry out the contract, for example the vehicles that will be used to carry out a public transportation contract.³²

The conditions of execution provided by the clauses of the contract

On the combined reading of Articles L. 2112-1 to L.2112-4 of the *Code de la commande publique*, contract clauses are the conditions under which contractual obligations are met. They may take into account environmental considerations, and in particular they can relate to a specific process of production.

An environmental clause can be defined as a “stipulation by which the contracting authority requires the bidder of a public procurement contract to comply with a certain number of environmental requirements. They relate to product packaging conditions, delivery methods and the recycling of materials.”³³ The clauses of the contract specify the conditions of execution,

29. Quest. écrite, no. 25167: JO Sénat Q, 9 novembre 2006, p. 2793; Catherine Prebissy-Schnall, “Développement durable et marchés publics: CE, 23 nov. 2011, *Communauté urbaine de Nice-Côte d’Azur*, req. no. 351570,” *Contrats Concurrence Consommation*, no. 2, février 2012, comm. 52.

30. CE, 31 mars 2010, *Synd. mixte de la région d’Auray Belz-Quiberon*, req., no. 333970.

31. CAA de Paris, 6^e chambre, 14/03/2017, 16PA02230, Inédit au recueil Lebon.

32. CAA, Lyon 3 oct. 2013, *Société Faure Vercors*, no. 12LY02248.

33. Stéphane de La Rosa, “Droit européen de la commande publique,” *Bruylant*, 2017, cited by Fanette Akoka, *Contrats de la commande publique et environnement*, Presses universitaires d’Aix-Marseille, 2020, p. 297.

which must be linked to its object,³⁴ which excludes, for example, the fact of referring to the general policy of a company.³⁵ The Ministry of Economy recommends combining an environmental criterion with an environmental clause.³⁶ Nevertheless, the risk of litigation can be increased by the presence of an environmental criterion.³⁷

The new wording of Article L. 2112-2 of the *Code de la commande publique* resulting from the *Climate and Resilience* law of 2021 provides that the conditions of execution take into account environmental considerations no later than August 22, 2026. We can infer from this an obligation starting no later than 2026 for the clause to take into account environmental considerations. Besides, the conditions of execution can refer to the life cycle of a product, understood as the set of successive or interdependent stages from the acquisition of raw materials or the production of resources to the disposal, restoration and end of use of the product, the work or end of service.³⁸

In France, the Ministry of Economy provides a book of general administrative clauses for public contracts.³⁹ It can be seen as an administrative act which is binding for economic operators and administrations.⁴⁰ It provides standard environmental clauses including a general environmental clause and specific clauses concerning packaging, deliveries, waste management, etc.

34. *Code de la commande publique*, article L. 2112-2; CJCE 20 septembre 1988, *Beentjes BV c/ État des Pays-Bas*, aff. 31/87; JUE 10 mai 2012, *Commission c/ Pays-Bas*, aff. C-368/10; CE, 25 mai 2018, *Nantes Métropole*, no. 417580.

35. European Union law, "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 Text with EEA relevance," *Official Journal of the European Union*, 2014, paragraph 97.

36. Rép. du Min. de l'économie, de l'industrie et de l'emploi, *JO Sénat* Q, 21 janvier 2010, p. 130 à la question écrite no. 10874 de M. Gérard Bailly, *JO Sénat*, 12 novembre 2009, p. 2612.

37. Fanette Akoka, *Contrats de la commande publique et environnement*, Presses universitaires d'Aix-Marseille, 2020, p. 305.

38. *Code de la commande publique*, article L. 2112-3.

39. Ministère de l'Économie, des Finances et de la Relance, "Les clauses environnementales," *Direction des affaires juridiques*, <https://www.economie.gouv.fr/files/files/directions_services/daj/marches_publics/textes/guideCCAG/Fiche1_9_Clauses-environnementales.pdf?v=1642772917>.

40. Fanette Akoka, *Contrats de la commande publique et environnement*, Presses universitaires d'Aix-Marseille, 2020, p. 300.

Termination or coercive measures may be applied in the event of poor performance,⁴¹ but we will see in Part 2 that, in practice, monitoring and sanctioning non-compliance with environmental clauses is difficult for buyers.

Eco-labels and environmental standards

Traditionally, labels are presented in the definition of the need. However, it is possible to see a “criterization” of the use of labels by the new directives,⁴² which can be extended to environmental standards and performance. These standards and eco-labels can be used in technical specifications, tender selection criteria and contract clauses.

Labels are information systems. They are a tool for communicating information on the environmental characteristics of products and services. They reduce the asymmetry of information regarding specific products.⁴³

In the *Code de la commande publique*, labels are “any document, certificate or attestation which proves that the works, products, services, processes or procedures related to the subject matter of the contract fulfil certain characteristics. The requirements for a label are those which the works, products, services, processes or procedures must fulfil in order to obtain the label.”⁴⁴

Also, the label used must have the following characteristics:

- 1) It is established following an open and transparent procedure.
- 2) It is based on objectively verifiable and non-discriminatory criteria.
- 3) The conditions for obtaining the label are set by a third party over whom the economic operator applying for the label cannot exercise decisive influence and are accessible to any interested person.⁴⁵

Moreover, there are conditions for a buyer to require economic operators to obtain a particular label. In addition,⁴⁶ a buyer who requires a particular

41. Fanette Akoka, *Contrats de la commande publique et environnement*, Presses universitaires d'Aix-Marseille, 2020, p. 302.

42. Guillaume Cantillon, “Fasc. 57: Marchés publics et développement durable,” *JurisClasseur Contrats et Marchés Publics*, 2016.

43. Bogdana Neamtu and Dacian C. Dragos, “Sustainable Public Procurement: The Use of Eco-Labels,” *European Procurement & Public Private Partnership Law Review*, 2015, vol. 10, no. 2, p. 92-101.

44. *Code de la commande publique*, article R. 2111-12.

45. *Code de la commande publique*, article R. 2111-14.

46. *Code de la commande publique*, article R. 2111-13.

label accepts all labels which confirm that the characteristics required under the contract are fulfilled.⁴⁷

According to Bogdana Neamtu and Dacian C. Dragos, in general, eco-labels meet certain characteristics:⁴⁸

- Participation in the labelling scheme is voluntary.
- The label must indicate that the product is different in its environmental performance from ordinary products in the same category.
- The scheme is based on sound scientific evidence.
- Labels are based on life cycle considerations.
- Certification is carried out by a third party and is independent of the company seeking certification.
- The objectivity of the scheme is ensured by broad participation of relevant stakeholders in the process of environmental criteria/performance.

In general, public procurers can use eco-labels to:

- express the environmental criteria of the labels in technical specifications
- verify compliance with the technical specifications
- compare tenders at the award stage and award points for meeting additional environmental criteria
- include environmental criteria
- use performance labels⁴⁹

The procedure for awarding a public contract is unlawful if the tender documents require candidates to present eco-labels whose existence has not been verified beforehand by the contracting authority.⁵⁰

47. *Code de la commande publique*, article R. 2111-16.

48. Bogdana Neamtu and Dacian C. Dragos, "Sustainable Public Procurement: The Use of Eco-Labels," *European Procurement & Public Private Partnership Law Review*, 2015, vol. 10, no. 2, p. 92-101.

49. *Idem*.

50. Guillaume Llorens, "Écolabels et marchés publics," *Environnement*, no. 5, 2011, comm. 63; TA Montreuil, ord., 17 nov. 2010, no. 1011171, *Sté Direct Impression*: JurisData, no. 2010-029470.

Sector-specific sustainable procurement obligations

In French law, it is mandatory for public purchasers in specific sectors to implement environmental criteria. For example, the vehicle,⁵¹ catering⁵² and renovation sectors⁵³ recently incorporated environmental concerns. In the hospital sector, the Hospital Performance for Responsible Purchasing program is a multi-year strategy launched in 2011 to encourage sustainable public purchasing in the hospital sector.

In addition, the anti-waste law for a circular economy (AGEC)⁵⁴ and its 2021 decree,⁵⁵ accompanied by an explanatory note,⁵⁶ set out obligations to acquire goods from reuse or recycling or containing recycled materials according to proportions fixed by categories of product. The 2021 decree varies these proportions from 20% to 40% depending on the product.

Specific forms of contracts: Energy performance contracts

Energy performance contractings (EPC)⁵⁷ are defined by their specific purpose, which is to improve the energy performance of an existing building, as the central object of the contract. They were created by directive 2006/32/EC.⁵⁸ In France, an order of 2020 defines them as “a contract concluded

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51. *Décret relatif aux marchés publics*, 2016, no. 2016-360, article 96; *Loi relative à la transition énergétique pour la croissance verte*, no. 2015-992, article 37.
 52. *Loi pour l'équilibre des relations commerciales dans le secteur agricole et alimentaire et une alimentation saine, durable et accessible à tous*, no. 2018-938, article 24.
 53. *Loi portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets*, no. 2021-1104, article 39.
 54. *Loi relative à la lutte contre le gaspillage et à l'économie circulaire*, no. 2020-105, article 58.
 55. *Décret relatif à l'obligation d'acquisition par la commande publique de biens issus du réemploi ou de la réutilisation ou intégrant des matières recyclées*, no. 2021-254.
 56. *Notice explicative du décret relatif à l'obligation d'acquisition par la commande publique de biens issus du réemploi ou de la réutilisation ou intégrant des matières recyclées*, no. 2021-254, updated on January 1, 2022.
 57. Sophie Nicinski, “VII. Les contrats de performance énergétique,” in “Collectivités territoriales et énergie : ambitions et contradictions,” *Droit et gestion des collectivités territoriales*, vol. 33, 2013, p.147-154.
 58. European Union law, “Directive 2006/32/ec of the European parliament and of the council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC Text with EEA relevance,” *Official Journal of the European Union*, 2016, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0032>>.

between a client and an energy efficiency services company with the aim of guaranteeing a reduction in the client's energy consumption, verified and measured against a contractual reference situation, over a given period thanks to an investment in works, supplies or services. If the objectives of the contract are not achieved, the contract provides for financial penalties."⁵⁹ The French Ministry of the Economy provides a standard contract document.⁶⁰

EPCs include an overall commitment to results, meaning that the energy savings to be achieved are defined contractually. For the Observatoire des contrats de performance énergétiques (energy performance contract observatory), these are "contracts with guaranteed energy results."⁶¹ Firstly, this involves establishing a baseline situation, i.e. a history of energy consumption over at least three consecutive and recent years. Energy audits are used to establish energy consumption in the case of buildings. This audit gives rise to a performance-based program for improving energy efficiency, with targets expressed as percentages of energy savings.⁶² An order from 2020 defines what constitutes a reference situation. It specifies that energy saving targets must be expressed as a percentage and sets out the method for calculating financial penalties if the target is not achieved.

In France, there are several forms of energy performance contract, which can be grouped into two categories: traditional public contracts, i.e. for supplies and services, or for works and services, and global contracts. These global contracts consist of energy performance partnership contracts (MPPE: *marché de partenariat de performance énergétique*) and global energy performance contracts (MGPE: *marché global de performance énergétique*). They differ in terms of how they are implemented, how they are financed and the status of the project owner.

59. *Arrêté relatif aux contrats de performance énergétique*, 2020, JORF no. 0187.

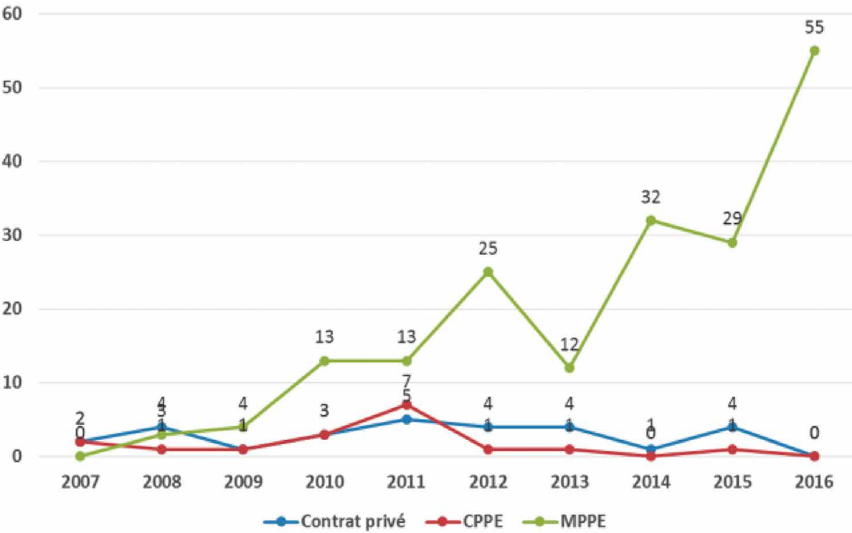
60. Ministère de la Transition écologique et de la Cohésion des territoires, "Contrat de performance énergétique pour les collectivités territoriales," *Politiques publiques*, 2020, <<https://www.ecologie.gouv.fr/contrat-performance-energetique-collectivites-territoriales-0>>.

61. ONCPE, "Les premiers résultats de l'Observatoire des contrats de performance énergétique," *ONCPE*, 2017, p. 3, <<https://www.cerema.fr/fr/actualites/resultats-observatoire-national-contrats-performance>>.

62. François Tenailleaud, "Fasc. 650: Contrats de performance énergétique," *JurisClasseur Contrats et Marchés Publics*, 2020.

The Observatoire des contrats de performance énergétique has compiled a list of these contracts and notes a sharp rise in their adoption since 2012, as shown in the graph below.⁶³

F1: Evolution of the number of EPCs launched depending on the legal nature



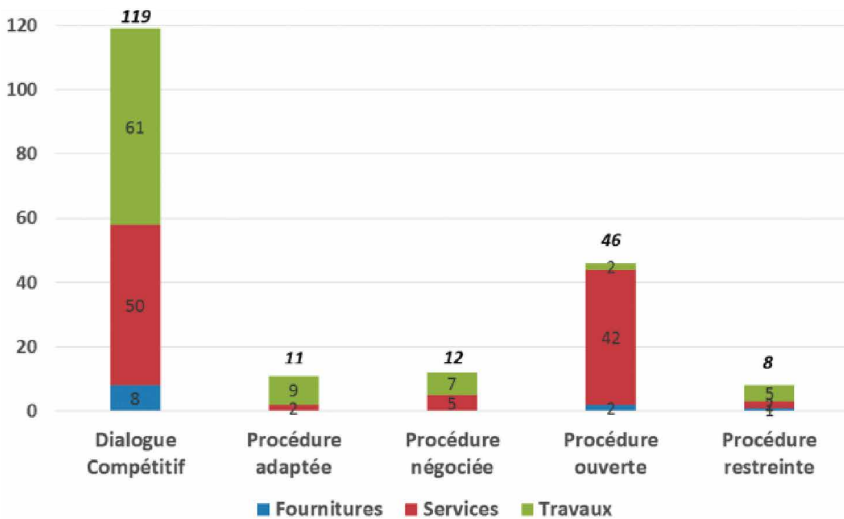
Source: Ademe, Cerema, Centre scientifique et technique du bâtiment, "Les premiers résultats de l'Observatoire des contrats de performance énergétique," *ONCPE*, 2017, <<https://www.cerema.fr/fr/actualites/resultats-observatoire-national-contrats-performance>>.

The procedure for adopting these contracts is mainly the competitive dialogue procedure, as shown in the graph F2.⁶⁴

63. ONCPE, "Les premiers résultats de l'Observatoire des contrats de performance énergétique," *ONCPE*, 2017, p. 5, <<https://www.cerema.fr/fr/actualites/resultats-observatoire-national-contrats-performance>>.

64. ONCPE, "Les premiers résultats de l'Observatoire des contrats de performance énergétique," *ONCPE*, 2017, p. 5, <<https://www.cerema.fr/fr/actualites/resultats-observatoire-national-contrats-performance>>.

F2: Distribution of EPCs launched according to the type of contract award procedure with breakdown by type of market



Source: Ademe, Cerema, Centre scientifique et technique du bâtiment, "Les premiers résultats de l'Observatoire des contrats de performance énergétique," *ONCPE*, 2017, <<https://www.cerema.fr/fr/actualites/contrats-performance-energetique-rapport-analyse-premiers?folder=9732>>.

Thus, local authorities are by far the biggest users of partnership contracts,⁶⁵ and the building and public lighting sectors are seeing the emergence of energy performance partnership contracts.⁶⁶

An uncertain contract form: The innovation partnership

Innovation partnerships are used to stimulate research and innovation when a buyer's needs cannot be met by existing solutions on the market.⁶⁷ These innovation partnerships are the result of a specific definition of the buyer's needs, which expresses the need for a solution.⁶⁸ The rhythm of the contract follows the progress of the research, which defines the successive

65. Frédéric Marty and Stéphane Saussier, "Le Phénix renaîtra-t-il de ses cendres? Réflexions sur le recours des collectivités territoriales aux marchés de partenariats public-privé," *Revue d'économie financière*, vol. 132, no. 4, 2018, p.132.

66. ONCPE, "Les premiers résultats de l'Observatoire des contrats de performance énergétique," *ONCPE*, 2017, p. 5, <<https://www.cerema.fr/fr/actualites/resultats-observatoire-national-contrats-performance>>.

67. Sébastien Hourson, "Fasc. 65-12: Partenariat d'innovation," *JurisClasseur Contrats et Marchés Publics*, 2017.

68. *Code de la commande publique*, article R. 2172-22.

phases of acquisition of the products, services or work and their respective remuneration. They therefore comprise at least two phases: a research phase and an acquisition phase.⁶⁹

Implementation of the innovation partnership remains highly complex, both at the award stage and at the execution stage.⁷⁰ The complexity and uncertainties surrounding innovation partnerships have not led to widespread adoption of this type of contracts. The few examples where they have been used have focused on the needs of purchasers in terms of reducing energy consumption and energy recovery. For example, SNCF Mobilité purchased trains from Alstom, Rennes Métropole purchased buses, and CNRS purchased low-voltage equipment.⁷¹

THE ADOPTION OF INCENTIVE INSTRUMENTS AT THE NATIONAL LEVEL

In France, some incentive instruments are part of the legal framework of green public procurement. They constitute soft law that is crucial for the actors to implement their procurement policies. Therefore, we will introduce the national plan for sustainable procurement (A), and the proliferation of purchasing guidelines (B). It is also important to remember that the fact sheets produced by the Ministry of Economy are essential (C). At the local level, we will explain the role of SPASERs, sustainable procurement plans that some local authorities have to design and implement (D).

The National Plan for Sustainable Procurement (PNAD)

Three national sustainable procurement plans have been adopted over the past 20 years (2007-2009, 2015-2020, 2022-2025) after public consultation. The National Sustainable Procurement Plan 2022-2025⁷² was the subject of a consultation in the summer of 2021. Its targets include ensuring that,

69. *Code de la commande publique*, article R. 2172-33.

70. Karine Henette-Jaen, "Le partenariat d'innovation, modes d'emploi," *Revue – Contrats publics*, 2018; Sébastien Hourson, "Fasc. 65-12: Partenariat d'innovation," *JurisClasseur Contrats et Marchés Publics*, 2017.

71. Camille Mialot and Thomas Poulard, "Les partenariats d'innovation, retours d'expérience," *Cahiers de droit de l'entreprise*, no. 6, 2016, case 49.

72. French Republic, "Plan national pour des achats durables – 2022-2025," *Commisariat général au développement durable*, 2022, <<https://www.ecologie.gouv.fr/sites/default/files/PNAD-PAGEPAGE-SCREEN%283%29.pdf>>.

by 2025, 100% of contracts notified during the year contain at least one environmental consideration. At the same time, it points out that “in 2019, the proportion of annual public contracts incorporating an environmental provision represented 15.8% of the number of contracts notified, a result below the 30% target set by the previous PNAD.”⁷³

The proliferation of environmental public purchasing guidelines

The Ministry of the Economy’s legal affairs department has compiled a number of guidelines,⁷⁴ some of which are directly related to environmental public purchasing: a guide to public purchasing in response to climate change written by ADEME,⁷⁵ a guide to taking life cycle costs into account in a consultation,⁷⁶ a practical guide to innovative purchasing,⁷⁷ a guide to bio-sourced materials⁷⁸ and a guide to using European eco-labels.⁷⁹

Sectoral guides to sustainable public purchasing have also been published. For example, there is a guide on environmental quality in the

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- 73. French Republic, “Plan national pour des achats durables – 2022-2025,” *Commissariat général au développement durable*, 2022, <<https://www.ecologie.gouv.fr/sites/default/files/PNAD-PAGEAPAGE-SCREEN%283%29.pdf>> (free translation).
 - 74. Ministère de l’Économie, des Finances et de la Souveraineté industrielle et économique, “Guides de l’achat public,” *Direction des Achats de l’État*, 2019-2023, <<https://www.economie.gouv.fr/dae/guides-lachat-public>>.
 - 75. Ministère de l’Économie et des Finances, “L’achat public : une réponse aux enjeux climatiques,” *ADEME*, 2016, <https://www.economie.gouv.fr/files/files/directions_services/daj/guide-climat.pdf>.
 - 76. French Republic, “Notice introductive : prise en compte du coût de cycle de vie dans une consultation,” *GEM-DD*, 2016, <https://www.economie.gouv.fr/files/files/directions_services/daj/cout-cycle-vie-consultation.pdf>.
 - 77. Ministère de l’Économie et des Finances, “Guide pratique – Achat public innovant,” *OECP*, 2019, <https://www.economie.gouv.fr/files/files/directions_services/daj/marches_publics/conseil_acheteurs/guides/guide-pratique-achat-public-innovant.pdf>.
 - 78. French Republic, “Les matériaux de construction biosourcés dans la commande publique,” *DGALN*, 2020, <http://caue28.org/sites/default/files/pages-fichiers/2020_guide_mbs_et_commande_publique_dgaln_0.pdf>.
 - 79. French Republic, “Guide de l’achat public durable – Qualité environnementale dans la construction et la réhabilitation des bâtiments publics,” *GEM-DDEN*, 2008, <https://www.economie.gouv.fr/files/directions_services/daj/marches_publics/oeap/gem/qualite_environnementale_dans_construction_etc/qualite_environnementale.pdf>.

construction and renovation of public buildings.⁸⁰ Local authorities also produce guides. For example, the Auvergne-Rhône-Alpes Region produced a sustainable purchasing guide in 2016.⁸¹

These guides are drawn up by the Ministry and public authorities, sometimes with the support of private stakeholders, such as law firms or consultants. The guidelines generally take one of two following forms: they may set out the stages in drawing up a contract, describing the purpose of the contract, the technical specifications, the award criteria and the contract clauses when they concern a sector. Alternatively, they may focus on the subject of the contract and, for each type of contract, look at ways of integrating environmental considerations.

Fact sheets from the Legal Affairs Department of the Ministry of the Economy (DAJ fact sheets)

The DAJ's fact sheets help those involved in public procurement to clarify the applicable legal framework. With regard to environmental public procurement, the Ministry of the Economy's website details the possibilities offered by the legal framework to help public purchasers move towards sustainable public procurement. For example, the DAJ recently published a fact sheet on environmental clauses in the General Conditions of Contract (CCAG) designed by the Ministry of Economy.

The adoption of incentive instruments at local level: SPASER

Within the French *Public Procurement Code*, the *Scheme for the Promotion of Socially and Environmentally Responsible Public Purchasing* (SPASER) is a document that defines purchasers' sustainable procurement policy.⁸² SPASERs are compulsory for local authorities and purchasers who are subject to them, i.e. those who have a total annual value of purchases exceeding €100 million excluding VAT (soon €50 million).

80. French Republic, "Guide de l'achat public durable – Qualité environnementale dans la construction et la réhabilitation des bâtiments publics," *GEM-DDEN*, 2008, <https://www.economie.gouv.fr/files/directions_services/daj/marches_publics/oeap/gem/qualite_environnementale_dans_construction_etc/qualite_environnementale.pdf>.

81. Réseau régional sur l'éco-responsabilité et le développement durable, "Commande publique durable – Guide méthodologique et fiches pratiques 2016," *RREDD*, 2016, <<https://territoire-environnement-sante.fr/espace-documentaire/commande-publique-durable-guide-methodologique-et-fiches-pratiques>>.

82. *Code de la commande publique*, 2019, article L. 2111-3.

However, they are not very effective, in particular because the law does not provide for any penalties for not adopting them. In fact, the 2021 parliamentary report *Pour une commande publique sociale et environnementale* notes that, of the 160 entities that were obliged to adopt a SPASER, only 34 have complied with this obligation, which is not accompanied by any binding measures.⁸³ We will therefore treat them as an incentive instrument that forms part of the logic of local development.⁸⁴

The SPASER is therefore a document that aims to explain the purchaser's objectives regarding sustainable development. In addition, there are mandatory themes that the plan must address: social, ecological and circular economy issues. The document must explain how the objectives of the SPASER are to be implemented and monitored on an annual basis. We will see in Part 2 how this policy and monitoring are implemented.

However, it seems to us that the SPASER deserves a broader definition: it is a tool for public purchasers to define and display an environmental purchasing policy. It is also a means for the State to encourage local authorities and public establishments to develop a public procurement policy that focuses on sustainable development.

The *Code de la commande publique* lays down an obligation to adopt and publish a SPASER when the total annual value of purchases exceeds €100 million excluding VAT. The *Climate and Resilience Act and Decree* lower the threshold for SPASERs to €50 million, thereby increasing the number of purchasers required to draw one up.⁸⁵

CONCLUSION

The timid inclusion of environmental considerations in French public procurement law was introduced through the transposition of European law and the adoption of the *Public Procurement Code* in 2019. At this stage, there were only possibilities for purchasers. The only obligation was to take the environment into account when defining requirements, and local authorities and other purchasers were required to adopt a SPASER.

83. Sophie Beaudouin-Hubière and Nadège Havet, "Pour une commande publique sociale et environnementale: État des lieux et préconisations," *République Française*, 2021, <<https://www.vie-publique.fr/files/rapport/pdf/282039.pdf>>.

84. Sylvie Ollitrault, "Développement durable," in Romain Pasquier, Sébastien Guigner and Alistair Cole, *Dictionnaire des politiques territoriales*, Presses de Sciences Po, 2020, p.153-157.

85. *Loi portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets*, no. 2021-1104, art. 35.

Moreover, the *Climat et Résilience* law of 2021 will make it compulsory to include environmental requirements in the selection criteria, which from 2026 will have to take into account the environmental characteristics of the offer.

So, at every stage of the procurement process, there are opportunities for purchasers to include environmental considerations. This can be done when defining requirements, by setting out technical specifications. The same applies to the drafting of environmental criteria for selecting tenders, which will become compulsory starting in 2016. In this context, purchasers may also refer to characteristics contained in eco-labels. Purchasers may also draft clauses containing environmental performance conditions. In addition, sectoral purchasing obligations are an instrument that is gaining in importance, while at the same time raising questions about the reality of its application by public purchasers. This questions their ability to implement it. It must be remembered that purchasers must respect impartiality and equality in public procurement. In addition, the criteria and clauses must relate to the subject of the contract.

This is why environmental public procurement law is a set of legal provisions creating a framework for action in which binding and non-binding acts come together to form a set of resources that can be mobilized by the stakeholders involved. The intensity of their implementation will therefore depend on the legal activities deployed to implement public purchasing. In the second part of this chapter, we will look at how this legal framework is used in practice and at the justifications given by public purchasers for using—or not using—the possibilities offered by environmental public procurement law in France.

Buying Green: The Integration of Environmental Considerations in the Practice of Procurement

In this section, we look at how public purchasers implement the legal framework. We focused our attention on metropolises and regions, since the literature shows that local authorities account for 55% of public procurement in France⁸⁶ and that they are in the most advanced position to implement environmental considerations in public procurement.⁸⁷ Indeed, in order to understand legal activities in this field, we had to look at actors likely to have experience in this area. In addition, studies on *decentralization* and local authorities highlight the importance of the intersecting dynamics of metropolization and regionalization in understanding local policies in France.⁸⁸

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86. Caisse des Dépôts, “Baromètre de la commande publique 2020: du rôle de la crise Covid-19,” 2021, <<https://www.caissedesdepots.fr/actualites/barometre-de-la-commande-publique-2020-et-crise-covid-19>>.
 87. Stephen Brammer and Helen Walker, “Sustainable procurement in the public sector: An international comparative study,” *International Journal of Operations & Production Management*, 2011; Diego Badell and Jordi Rosell, “Are EU Institutions Still Green Actors? An Empirical Study of Green Public Procurement,” *Journal of Common Market Studies*, 2021.
 88. Martin Vanier, “Régulation, métropoles, régions: l’état de l’Europe,” *Revue Interventions économiques*, no. 28, 2002; Villes et régions dans une Europe en mutation, *Revue d’économie régionale & urbaine*, 2019-4, 2019, <<https://www.cairn.info/revue-d-economie-regionale-et-urbaine-2019-4.htm>>; Gilles Pinson and Deborah Galimberti, “Métropoles franches et régions agencifiées,” *Pouvoirs locaux: les cahiers de la décentralisation / Institut de la décentralisation*, 2013, no. 96, p. 48-55; Daniel Behar and Philippe Estebe, “Paris, Lyon, Marseille, les Régions, face aux Métropoles ou tout contre l’État,” *Revue Urbanisme*, vol. 49, 2014, p. 19-21; Marco Cremaschi, Aurélien Delpirou, Dominique Riviere and Carlo Salone, *Métropoles et régions entre concurrences et complémentarités: regards croisés France / Italie*, Planum Publisher, 2015; Romain Pasquier, “Crise économique et différenciation territoriale. Les régions et les métropoles dans la décentralisation française,” *Revue internationale de politique comparée*, vol. 23, no. 3, 2016, p. 327-353; Pascal Chauchefoin, *Nouvelles régions*

We therefore conducted a field study of the implementation of the legal framework of green public procurement by region and metropolitan area. There are many quantitative surveys on this issue.⁸⁹ Here, we wanted to carry out a qualitative survey that would enable us to understand the legal activities of the actors involved. In order to investigate the practices of local buyers, we sent interview proposals to the public procurement departments of France's 22 metropolises and 13 regions. Following an initial email and several reminders between March and April 2022, the agents responsible for the public procurement departments of 9 metropolises and 4 regions replied. Our survey also enabled us to identify two consulting agencies that advise local authorities. In addition, public purchasers who are partners of the Chaire de droit des contrats publics responded to our requests, leading us to conduct 20 interviews between April and May 2022.

et métropoles – La grande transformation ?, Presses universitaires de Rennes, 2020; Dominique Riviere and Brice Lamenie, "Métropoles vs régions? Une approche de la politique de cohésion à partir de deux régions métropolitaines, le Latium et l'Île-de-France," *Géocarrefour*, vol. 94, no. 94/3, 2020.

89. For example, in 2020 and 2021: Diego Badell and Jordi Rosell, "Are EU institutions still green actors? An empirical study of Green Public Procurement," *Journal of Common Market Studies*, 2021, <<https://doi.org/10.1111/jcms.13204>>; Jolien J. Grandia and Peter M. Kruijven, "Assessing the implementation of sustainable public procurement using quantitative text-analysis tools: A large-scale analysis of Belgian public procurement notices," *Journal of Purchasing and Supply Management*, vol. 26, no. 4, p. 100627; Ralph Hansmann and Claudia R. Binder, "Determinants of different types of positive environmental behaviors: An analysis of public and private sphere actions," *Sustainability*, vol. 12, no. 20, 2020; George Lăzăroiu, Luminița Ionescu, Cristian Uță, Iulian Hurloiu, Mihai Andronie and Irina Dijmărescu, "Environmentally Responsible behavior and sustainability policy adoption in Green Public Procurement," *Sustainability*, vol. 12, no. 5, 2020; Axel Lindfors and Jonas Ammenberg, "Using national environmental objectives in green public procurement: Method development and application on transport procurement in Sweden," *Journal of Cleaner Production*, vol. 280, Part 2, 2021, <<https://doi.org/10.1016/j.jclepro.2020.124821>>; Hanna Lindström, Sofia Lundberg and Per-Olov Marklund, "How Green Public Procurement can drive conversion of farmland: An empirical analysis of an organic food policy," *Ecological Economics*, vol. 172, 2020, <<https://doi.org/10.1016/j.ecolecon.2020.106622>>; Belmira Neto, "Analysis of sustainability criteria from European public procurement schemes for food services," *Science of the Total Environment*, vol. 704, 2020; Jordi Rosell, "Getting the green light on green public procurement: Macro and meso determinants," *Journal of Cleaner Production*, vol. 279, 2021; Conghu Wang, Yuhua Qiao and Xiaoming Li, "A systems approach for green public procurement implementation," *Journal of Public Procurement*, 2020, vol. 20, no. 3, p. 287-311; Chunling Yu, Toru Morotomi and Haiping Yu, "What influences adoption of green award criteria in a public contract? An empirical analysis of 2018 European public procurement contract award notices," *Sustainability*, 2020, vol. 12, no. 3, p. 1261.

Our survey reports on exploratory fieldwork on this subject, paying particular attention to how actors implement the legal framework. This work points out the emergence of an environmental public procurement policy for public purchasers (I). The implementation of these policies is experiencing difficulties in the various phases of awarding and executing public contracts (II). The result is the existence of obstacles and incentives to the environmentalization of public purchasing (III).

DEFINING AN ENVIRONMENTAL PURCHASING POLICY: FROM SUPPORT MISSION TO PUBLIC POLICY

Although public purchasers are constrained by the legal framework, they have made it their own. In this context, local procurement policies are marked by what Olivier Bouba-Olga and Michel Grossetti analyze as the *CAME mythology* for “competitiveness, attractiveness, metropolization and excellence”⁹⁰ with regard to metropolises. In this respect, the discourse on public commissioning tends to be part of this CAME mythology and to form part of the “metropolitan narrative”⁹¹ or even the “urban project,”⁹² thus feeding into the discourse on attractiveness, both in the metropolises and in the regions. Under the terms of this section, the definition of a purchasing policy will be identified (A). This is reflected in the organization of the purchasing function (B), but also in the adoption of a SPASER (C).

Is there a public policy on green public procurement?

Is there a public policy on sustainable procurement? While it’s difficult to provide a definitive answer to this question, we can certainly offer some points for consideration. As Patrick Hassenteufel explains, “The expression ‘public policy’ is based on two fundamental notions: action program and public authority. An action program is a set of actions (of various kinds) that present a certain coherence (in terms of aims in particular) and are designed to last. . . . Consequently, a public policy can be defined as the implementation of an action program built collectively by public and private players to

90. Romain Gaspar, “L’attractivité territoriale est un mythe,” *Gazette des communes*, 2022, p. 22.

91. Olivier Bouba-Olga and Michel Grossetti, “Le récit métropolitain: une légende urbaine,” *L’Information géographique*, vol. 83, no. 2, 2019, p. 72-84.

92. Gilles Pinson, *Gouverner la ville par projet. Urbanisme et gouvernance des villes européennes*, Presses de Sciences Po, 2009.

respond to one or more collective problems.”⁹³ In the realm of environmental public procurement, we can observe the formulation of national and local action programs by public actors in collaboration with private stakeholders. These programs aim to address the crucial question of how to incorporate environmental considerations into public procurement contracts.

Thus, where public authorities have action programs in this area, there are indications that a public policy on sustainable purchasing exists. It is at the crossroads of purchasing policies and the environmental policies pursued by local authorities. Moreover, green public procurement policy has its own instruments,⁹⁴ such as the National Sustainable Procurement Plan (PNAD 2021-2025) at the national level, but also the SPASER at the local level. The *Public Procurement Code* has also been enriched with provisions in this area. In addition to these instruments, local authorities are linking this ambition with their environmental policy.

Furthermore, public policies are designed to reach a specific audience through specific mechanisms.⁹⁵ In this case, the public is made up of both public purchasers and economic operators, who are adapting to the new legal framework for environmental public procurement and are responsible for implementing it. In this respect, the public procurement departments of local authorities play a key role, and it is worth looking at how they are structured and what their role is.

Organizing a local authority's public procurement department

In local authorities, public procurement departments carry out six general tasks: legal control of contracts, monitoring of award procedures, legal monitoring, organization of tender selection committees, training, litigation and pre-litigation monitoring.

In local authorities, the structuring of centralized departments dedicated to public procurement has followed the evolution of this function. Initially envisaged as a simple support function for operational departments, it is now seen as a separate department. This centralized public procurement department is staffed primarily by lawyers specializing in public procurement law.

93. Patrick Hassenteufel, *Sociologie politique de l'action publique*, Armand Colin, 2021, p. 10-11 (free translation).

94. Pierre Lascoumes and Patrick Le Galès (Eds.), *Gouverner par les instruments*, Presses de Sciences Po, 2005.

95. Philippe Zittoun, *La fabrique politique des politiques publiques. Une approche pragmatique de l'action publique*, Presses de Sciences Po, 2013; Patrick Hassenteufel, *Sociologie politique de l'action publique*, Armand Colin, 2021.

Nevertheless, purchasing expertise is dispersed among operational technicians in diverse departments of local authorities. As a result, public procurement encompasses a multitude of professions, which means lawyers responsible for ensuring adherence to the public procurement code, and buyers and technicians familiar with the specific needs and technical aspects of products. Firstly, the dissemination of environmental requirements to purchasers and technicians, and their ability to incorporate them into contracts are both challenging. Secondly, it raises the issue of the impossibility of standardization for purchasers who face a wide range of purchase categories, including foodstuffs and roadworks. Thirdly, a crucial aspect in formulating a procurement policy is to actively involve these buyers in the process of its creation and the implementation of the legal framework.

The SPASER: A tool for local public action on sustainable procurement

Drawing up a SPASER (sustainable public procurement action plan) provides an opportune moment to reflect upon and establish a sustainable purchasing policy. The SPASER outlines the objectives of the purchasing policy, encompassing social, ecological and circular economy considerations. It describes the methods for implementing and monitoring sustainable development objectives on an annual basis. Consequently, our survey aimed to examine the extent to which these provisions are put into practice by purchasers. Notably, cities and regions have adopted this tool in varied ways. For instance, out of the 160 public bodies subject to a SPASER, only 34 have actually adopted one.⁹⁶ To analyze the production of these SPASERs, we will delve into the often arduous process involved in their creation, resulting in divergent drafting and governance strategies. Additionally, we will explore the content of these SPASERs. Ultimately, these SPASERs often reveal a purchasing policy that is designed to support the local economic landscape.

Our survey shows different stages in the life of the SPASER. Some local authorities were developing their first SPASER, others were developing the second version of this document, while others were keeping the recent first version of this document alive.

96. Réseau des collectivités territoriales pour une économie solidaire, “Les SPASER Schémas de promotion des achats socialement et écologiquement responsables,” *RTES*, 2021, <https://www.rtes.fr/system/files/inline-files/PtdeRep_SPASER_O921.pdf>; Sophie Beaudouin-Hubière and Nadège Havet, “Pour une commande publique sociale et environnementale : état des lieux et préconisations,” *République Française*, 2021, <<https://www.vie-publique.fr/files/rapport/pdf/282039.pdf>>.

The legal provisions regarding SPASERs do not provide specific guidelines for their drafting procedure. As a result, local authorities have significant discretion in determining the approach to be taken. The interviews conducted revealed diverse strategies for developing SPASERs, involving various public and private stakeholders. The interviews also highlighted the potential collaboration between economic operators and local authorities in the drafting process. Moreover, they emphasized the significance of knowledge-sharing within the *France Urbaine* association, which brings together elected representatives and officials from metropolitan areas.

Furthermore, the process of developing the SPASER itself is considered a significant project, typically led by the public procurement department of local authorities. Some local authorities have chosen to adopt a project-based approach, establishing dedicated steering committees and working groups that include both local authority staff and elected representatives. The drafting of the SPASER reflects the concept of governance in local policies, where public entities collaborate with various stakeholders, including economic operators and the general public, to formulate and implement action plans. This governance involves the participation of multiple actors beyond the state in defining public programs.⁹⁷ Therefore, when a local authority adopts a SPASER, it transcends a mere technical document. It is perceived as a comprehensive project supported by the local authority.

SPASERs are structured around major thematic areas that correspond to social, environmental and economic concerns, expressed as objectives, sometimes accompanied by corresponding actions and indicators. In addition to the three basic themes, SPASERs show that local authorities are pursuing multiple objectives, such as the development of VSEs and SMEs, with greater attention paid to the local economic fabric, particularly when it comes to food issues. The environmental content of the SPASER reflects a profusion of measures in this area, which, as we shall see, are difficult to assess.

The content of the SPASER also reflects the concern of local authorities for local business. In fact, the discourse of sustainable public procurement often intertwines with a narrative of localism, where procurement is seen as a means to promote local development. An examination of the SPASER content provides tangible evidence supporting this discourse.

97. David Harvey, *Villes rebelles, du droit à la ville à la révolution urbaine*, Buchet Chastel, 2015; Cécile Gintrac and Matthieu Giroud, *Villes contestées : pour une géographie critique de l'urbain*, Les Prairies ordinaires, 2014.

As such, SPASERs serve as local planning documents that focus on the local economic landscape. This includes considerations for social economy enterprises and local food circuits, as well as small and medium-sized enterprises (SMEs) operating within the local area. The reference to the local area and businesses is used to justify the need for SPASERs. Consequently, beyond its legal requirement, this document becomes part of metropolitan areas' strategies to enhance local attractiveness and bolster the local economic fabric.

Thus, the establishment of an environmental purchasing policy is a crucial requirement for the effective implementation of the legal framework. This entails defining appropriate objectives and strategies. The involvement of the public procurement department and its staff is essential in the implementation and promotion of these objectives and strategies. Moreover, once the SPASER has been formulated, it serves as a valuable tool that purchasers adapt to local business issues.

IMPLEMENTING THE PURCHASING POLICY

The implementation of environmental considerations in public procurement will be analyzed from the angle of its appropriation by public purchasers.⁹⁸ To this end, different stages are necessary. We will therefore see the different strategies for defining the need (A), training public agents in sustainable procurement (B), the awarding procedure (C), defining the criteria for selecting bids (D), drafting clauses and monitoring contract performance (E).

The greening of the definition of needs

Public procurement is a way of meeting the needs expressed by buyers. In order to express these needs, purchasers in France must now take sustainable development objectives into account. When it comes to environmental considerations, the expression of needs is constrained in a number of ways. Firstly, changes in the legal framework, recently enhanced by the AGECE, EGALIM and Climate and Resilience laws, impose a certain percentage of recycled or organic products (see Part 1). Secondly, national and local documents such as the PNAD and SPASER provide a framework for expressing this need. Thirdly, the willingness of local authorities to implement

98. Bruno Villalba, *Appropriations du développement durable – Émergences, diffusions, traductions*, Presses universitaires du Septentrion, 2009.

environmental public procurement tools varies, as demonstrated by the adoption of the SPASER.

The role of public procurement departments then becomes mediating the disparate legal framework for local authority staff who award and monitor public contracts. The decentralization of the purchasing function within local authorities therefore requires dialogue and consultation. Thus, at least two dynamics are at work to environmentalize the definition of public procurement needs: acculturating elected representatives and departments to the new legal framework and having the capacity to carry out sourcing that takes the environment into account. We will also see that training staff is important. The interviews we conducted revealed a wide range of practices. Nevertheless, two themes came up several times in the discourse of our interviewees, relating to the need for political support from elected representatives and the “acculturation” of departments.

Defining requirements in the light of environmental considerations is therefore a task shared between elected representatives, public procurement departments and operational purchasing departments.

Training in sustainable public purchasing

Training courses in sustainable public purchasing are still few and far between. They are often provided in-house because of the lack of a coordinated national approach to the subject.

Sometimes the training initiative is part of the SPASER dynamic, as at Métropole 3, where “training is one of the components of our SPASER. We have internal training components, and we are developing our training courses for responsible purchasing on the key principles, drafting model clauses and criteria. The idea is that each team should be able to use them. We continue to provide support and advice, providing them with templates and legal reviews.”⁹⁹ In Métropole 6, too, where the SPASER is disseminated as part of training courses, “as part of the SPASER, we identify the link between internal and external communication of the SPASER. This document must be a training tool.”¹⁰⁰

The training of local authority staff is a key issue in the environmentalization of public procurement. They are still groping their way through

99. Semi-direct interview with an agent of Métropole 3, May 4, 2022 (free translation).

100. Semi-direct interview with an agent of Métropole 6, April 6, 2022 (free translation).

the process. Public procurement advisory bodies therefore seem to have an essential role to play in assisting public authorities.

Advising public purchasers

In recent years, parapublic bodies have been providing guidance to local authorities regarding the environmental aspects of public procurement. The PNAD 2021-2025 and the *Climate and Resilience Act* have increased the demand for advice, as illustrated by Consulting agency 1. One of the employees of this agency explains that “the law sets a target of 100% ecological and environmental criteria. The legislator has not said how this objective is to be achieved. That’s the difficulty that buyers have. We have a huge number of requests. We’ve had a boom in our business, and we can’t keep up with the demand. So we’re trying to network even more. In fact, the aim of the PNAD is to make purchasing greener in less than three years: we know that there will be greenwashing, clauses that will have no impact and clauses that will have an impact.”¹⁰¹

We conducted two interviews with agents from two different consulting agencies. They gave us details of their tasks and the type of response they provide to requests from public purchasers.

One of their main responsibilities is to promote the integration of environmental considerations into the contracts of local authorities. In this way, “the local aspects of public procurement support local areas. We’re not allowed to impose local requirements, but it’s a way of greening public procurement. You can’t write it, but given the context, local has never been so popular.”¹⁰² As a matter of fact, “it’s really the last argument we give to local authorities: we tell them they can do it. In fact, working with local businesses, even if you don’t have to write it like that, it can be done: organized internally, sourcing. Local purchasing is a question that comes up in 90% to 100% of requests for sustainable purchasing.”¹⁰³ Moreover, the same agent emphasizes the international dimension of this concern: “this same question comes up with agencies in other countries with which we work, and which are promoting sustainable public procurement in other European countries. We’re not saying we’re being local. We’re sharing tools and methods. We’re

101. Semi-direct interview with an agent of Métropole 6, April 6, 2022 (free translation).

102. Semi-direct interview with an agent of Consulting agency 1, April 27, 2022 (free translation).

103. Semi-direct interview with an agent of Consulting agency 1, April 27, 2022 (free translation).

more about sharing tools, approaches and procedures. And feedback, examples of specifications.”¹⁰⁴ Consequently, providing advice to public purchasers on environmental issues is a key factor in structuring local supply chains.

Choice of contract form and award procedures

In the course of the interviews that we conducted, there was no claim that one award procedure allowed the inclusion of environmental considerations in public contracts more than another. It is the usual thresholds that define this procedure. This is confirmed by the questionnaire.

In addition, energy performance contracting (MGPE) and energy performance partnership contracts (MPPE) are sometimes used by the purchasers. The experiences are varied, and mainly concern contracts for the energy renovation of public buildings. The following table summarizes the different types of contracts mentioned in the interviews we conducted.

F3: Types of contracts mentioned in the interviews

LOCAL AUTHORITY	TYPE OF GLOBAL CONTRACT
Métropole 2	MGPE for building and swimming pool renovations
Métropole 3	MGPE for public lighting MGPE for the renovation of the city's headquarters MGPE for a waste treatment plant
Métropole 5	MGPE for the construction of a secondary school
Métropole 8	MGPE for the thermal renovation of city and Eurométropole buildings MGPE for the renovation of schools
Région 3	MGPE for the renovation of secondary schools
Région 4	MGPE for the renovation of two secondary schools

Source: François Lichère, Valentin Lamy, Adeline Meynier-Pozzi and Oriance Sulpice, “Environnementalisation des marchés publics,” *Chaire de droit des contrats publics*, Université Jean Moulin Lyon III, 2022, p. 102, <<https://chairedcp.univ-lyon3.fr/rapport-environnementalisation-des-marches-publics>>.

Consulting agencies recommend these contracts, while stressing the risks of additional costs, according to their experience: “The disadvantage is that there is an additional cost, which makes local authorities pay for the

104. Semi-direct interview with an agent of Consulting agency 1, April 27, 2022 (free translation).

risk. It's variable and hard to put a figure on it, but I estimate that there's between 20% and 30% extra cost."¹⁰⁵ Another consulting agency wants to be proactive on this subject: "We try to get together regularly, we set up meetings if we feel there are needs. We're organizing a meeting in the near future on taking the environment into account in public construction contracts, with our colleagues from the construction division. We'll be talking about organization and sourcing for construction and renovation projects. This is a webinar for all regional players, and we have 132 registrations. We held a similar meeting on energy performance contracts."¹⁰⁶

Defining environmental award criteria for selecting tenders

The existence of environmental award criteria is marked by a genuine concern for the environment, as well as a desire to make a political statement for local authorities (1). In order to carry out a concrete study of the content of these criteria, we looked at the works contracts of the metropolises undergoing public consultation in April 2022 (2).

The environmental criterion between ecological concerns, display policy and legal constraints

The environmental award criterion is seen by local authorities as a way of making the selection of candidates greener, without necessarily guaranteeing that the contract will be carried out with due regard for environmental considerations. In this way, the inclusion of an environmental criterion serves both public procurement policy and the desire to display the environmental measures taken by local authorities. An employee of a metropolitan authority clearly expressed this idea: "I prefer to have ambitious performance conditions rather than criteria that are a surgical sprinkling. We do it like everyone else to show off, at 15% or 20%. Sometimes we don't have any criteria, but we do have environmental implementation conditions. We limit the criteria: they have to be linked to the subject of the contract, and they have to be monitored by our colleagues."¹⁰⁷

In addition, some local authorities acknowledge that the low weighting of environmental criteria has more than concrete display aspects, for

105. Semi-direct interview with an agent of Consulting agency 1, April 27, 2022 (free translation).

106. Semi-direct interview with an agent of Consulting agency 2, April 15, 2022 (free translation).

107. Semi-direct interview with an agent of Métropole 1, March 30, 2022 (free translation).

example “the noise and dust criterion is no fool, the companies’ answers are stereotyped and the weighting is rarely more than 10%, which makes no sense and is of no interest.”¹⁰⁸

The case involving *Nantes Métropole* is interesting in this respect. In a famous case, *Nantes Métropole* suffered a cancellation of one of its contracts based on the fact that the environmental award criteria were not linked to the subject matter.¹⁰⁹ Actually, the local authority had decided to draft an environmental criterion that was not strictly linked to the subject of the contract, but to the company’s general environmental policy. They wanted to test the legal limits in a situation where a purchaser has a long-term contractual relationship with an economic operator. *Nantes Métropole*’s reasoning was as follows: a company’s environmental policy had to be linked to the subject matter of the contract once a close contractual relationship had been established in which numerous orders were placed over several years.

Following this lawsuit, the litigation process began for *Nantes Métropole*, causing repercussions within its legal department as a result of the disappointment of having to abandon this criterion. This dispute therefore arose from the voluntary introduction of a criterion relating to the company’s general environmental policy, which the French courts did not accept in the light of European case law.

Other local authorities face lawsuits against the introduction of environmental criteria. For example, in Région 1, an agent explained to us that the environmental criteria “is included in the technical value, and sometimes it carries a lot of weight. In the case of transport, it’s 30%, and when the departments are on board, we give the environmental criterion the weight it deserves. So, on transport we’ve had five lawsuits. Companies are complaining. They were companies that were cheaper. We favour the latest buses because they produce less CO₂. This has led to litigation. These disputes have not demotivated us.”¹¹⁰ Thus, the definition of green public procurement is framed by the multiple litigations arising from the practices of local authorities.

Furthermore, the use of eco-labels is also subject to debate and remains limited in practice. The reason given by local authorities is that they do not want to restrict market access for local companies. What’s more, some buyers

108. Semi-direct interview with an agent of Métropole 1, March 30, 2022, (free translation).

109. CE, 25 mai 2018, *Nantes Métropole*, req. no. 417580.

110. Semi-direct interview with an agent of Région 1, April 20, 2022 (free translation).

are wary of labels, which are sometimes awarded by bodies they don't trust: "We're careful not to overload ourselves with labels and the like, because when it comes to access for SMEs, the idea is to encourage companies with fewer resources."¹¹¹

In this respect, the statements made by the public procurement staff of various purchasers help us to understand the ambivalence surrounding the inclusion of an environmental award criterion. We will now turn to a more detailed study of the content and weighting of this criterion in the specific case of works contracts.

Criteria contained in consultation documents: Focus on the case of works contracts

We studied the implementation of environmental award criteria. To do this, we surveyed the work contracts under public consultation in April 2022 in 18 of France's 22 metropolises (we did not survey the Grand Paris or Clermont-Ferrand, Nice and Metz, where we had difficulty accessing the data). A total of 180 contracts and work contract lots were studied. Of these, 92 (51%) included an environmental criterion. In 36 contracts, this criterion was included in the technical value and, in 56 contracts, this criterion was the subject of an independent environmental criterion. This investigation enabled us to carry out a detailed analysis. We were able to identify the wording of these criteria, as well as their use as a sub-criterion of the technical value or as an independent criterion. The results of this survey show the three main questions around environmental criteria: their content, their weighting, and the difficulties in assessing companies' bids.

The content of the environmental criteria

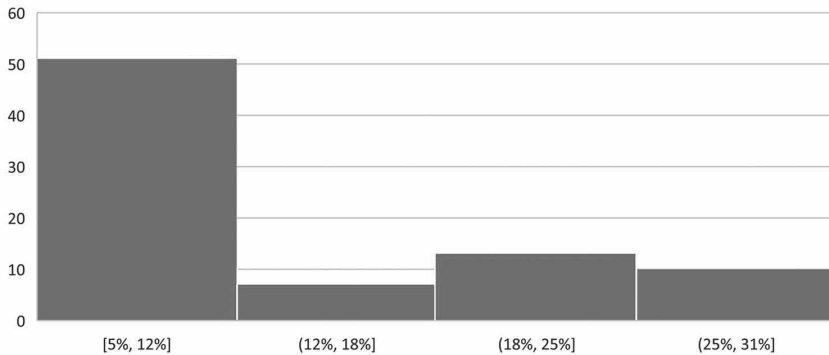
The content of environmental criteria in works contracts may seem disappointing to those who were pinning hopes on them for the environmentalization of contracts. In fact, this type of environmental consideration in the wording of the criteria tells us something about the desire for political display. Indeed, we have seen that very often the public purchaser defers to the measures proposed by the company. To this end, we conducted a study of the concrete content of several environmental criteria.

111. Semi-direct interview with an agent of Métropole 4, April 11, 2022 (free translation).

The weighting of the environmental criteria

The weighting of the environmental criterion and its use appear to be quite inconsistent. Of the 180 contracts, 92 included an environmental criterion. In 36 contracts, this criterion was included in the technical value and, in 56 contracts, this criterion was the subject of an independent environmental criterion. Each metropolis had at least one contract with an environmental criterion over the period, with the exception of Toulon (0/8 contracts recorded). The weighting of the environmental criterion varied between 5% and 30%.

F4: Weighting of the environmental criteria



Source: François Lichère, Valentin Lamy, Adeline Meynier-Pozzi and Oriance Sulpice, "Environnementalisation des marchés publics," *Chaire de droit des contrats publics*, Université Jean Moulin Lyon III, 2022, p. 111, <<https://chairedcp.univ-lyon3.fr/rapport-environnementalisation-des-marches-publics>>.

One peculiar case is the *Eurométropole de Strasbourg*, which stands out for its independent environmental criteria, which are systematically higher than 20% and can be as high as 30%.

The difficulties in assessing companies' bids

The interviews we conducted showed that agents were skeptical about the practical application of environmental award criteria. Do they really make it possible to distinguish between companies, or is it just a display? There are two possible scenarios in which this criterion is not useful: it may be simply a reproduction of what companies are already capable of doing and are already incorporating into their production processes. Considering its weighting and the scoring method, this criterion does not appear to be very discriminating. In this respect, one agent explained the difficulties of this rating system to us, "what concerns me is the way in which ratings are

given, which regularly makes me tense, particularly when they give 15 points to everyone because no one knows how to rate the company. They assume that, as soon as they have their bundles of documents on the company's environmental policies, the criteria have been met."¹¹² As a result, environmental criteria have become part of the practice of public purchasers. But their effectiveness in ensuring that the environment is properly taken into account in public procurement remains highly uncertain.

Using environmental criteria to select local companies

The literature on green public procurement has repeatedly highlighted the link between environmental considerations and localism.¹¹³ As we know, an environmental criterion should not give an advantage to local companies.¹¹⁴ Nevertheless, the origin of products and their carbon footprint can be criteria.¹¹⁵ When it comes to agricultural products, local concerns are very important to purchasers and can be met by using labels and awarding contracts. In addition, the EGALIM law of 2018 requires public catering to serve at least 50% sustainable quality products, including at least 20% organic products, starting on January 1, 2022.¹¹⁶

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112. Semi-direct interview with an agent of Métropole 6, April 6, 2022 (free translation).
 113. Ronan Le Velly, "La relocalisation des approvisionnements de la restauration collective et le code des marchés publics," *Pour*, vol. 215-216, no. 3-4, 2012, p. 269-274; Pascal Cadieu, "La tentation du « localisme » dans la commande publique," *RLCT*, no. 93, 2013; Laurent Richer and Guillaume Cantillon, *Achat public et économie des territoires*, LGDJ, 2017; Cynthia Ghorra-Gobin, "Villes et transition écologique: l'affirmation du niveau local," *Tous urbains*, vol. 29, no. 1, 2020, p. 58-60; Mathias Amilhat, "Le retour au local, le rôle de la commande publique," *Droit et Ville*, vol. 91, no. 1, 2021, p. 159-175; Bruno Koebel, "Critères environnementaux et production locale," *Contrats et marchés publics*, no. 12, 2021, comm. 361; Bruno Koebel, "Critère géographique et empreinte environnementale," *Contrats et marchés publics*, no. 11, 2021, comm. 332; Pierre Bourdon, "Chapitre 12 Commande publique et environnement: point de vue local," in Laetitia Janicot (Ed.), *Les collectivités territoriales et la protection de l'environnement*, Boulogne Billancourt, Berger Levrault, 2021, p. 181-197; Jean-François Giacuzzo and Carole Hermon, "Chapitre 11: Agriculture et environnement," in Laetitia Janicot (Ed.), *Les collectivités territoriales et la protection de l'environnement*, Boulogne Billancourt, Berger Levrault, 2021, p. 181-197.
 114. CE, 12 septembre 2018, *Département de la Haute-Garonne*, no. 420585.
 115. Pierre Bourdon, "Chapitre 12 Commande publique et environnement: point de vue local," in Laetitia Janicot (Ed.), *Les collectivités territoriales et la protection de l'environnement*, Boulogne Billancourt, Berger Levrault, 2021, p. 181-197. See CE, 15 février 2013, *Société Derichebourg polyurbaine*, no. 363921; TA Caen, 5 janvier 2010, *Société Les Champs Jouault* no. 0902741.
 116. Jean-François Giacuzzo and Carole Hermon, "Chapitre 11: Agriculture et environnement," in Laetitia Janicot (Ed.), *Les collectivités territoriales et la protection de l'environnement*, Boulogne Billancourt, Berger Levrault, 2021, p. 181-197.

During our survey, we observed the concern for local issues in the practices of public purchasers: firstly in the SPASER, and secondly in the choice of co-contractors. In addition, local authorities and advisory bodies such as consulting agencies are working to create local networks capable of responding to public procurement contracts. These local practices are strongly linked to the establishment of environmental criteria in the selection of tenders.

A number of practices exist in this area, such as the creation of local networks of social and solidarity economy (SSE) companies, meetings with local companies, or the desire to structure local sectors. In one metropolis, for example, “we’re thinking about a real SSE database to publicize all the SSE companies and their areas of activity, and to keep the database up to date. We are working with SSE companies. There’s also a local network, an association that facilitates certain buyers in the field of sustainable development. We work with them quite a lot, for example, they give us an up-to-date list of eco-labels.”¹¹⁷ In another metropole, meetings with companies are organized on environmental issues: “Every year, we try to organize meetings with companies, the aim of which is to develop competition in our markets, to inform them of the programming of our contracts and major projects, so that they can identify the players in the city. This is the context in which we can discuss environmental clauses.”¹¹⁸ These exchanges can also form part of the SPASER’s communication strategy, which is also publicized in the local media. One agent explained to us that “we are in the process of defining a communication strategy to reach out to economic and private operators and trade federations.”¹¹⁹ These practices can also involve setting up a network for discussion with the local community, for example an agent explains: “We have a CSR platform that brings together the local business ecosystem. The initial purpose of this CSR platform was to help us draw up the SPASER.”¹²⁰

117. Semi-direct interview with an agent of Métropole 1, March 30, 2022 (free translation).

118. Semi-direct interview with an agent of Métropole 2, April 21, 2022 (free translation).

119. Semi-direct interview with an agent of Métropole 3, May 4, 2022 (free translation).

120. Semi-direct interview with an agent of Metropole 4, April 11, 2022 (free translation).

Establishing environmental criteria is therefore a way of selecting bids from local companies. This process goes hand in hand with practices aimed at structuring local supply chains, even involving local businesses in the process.

The AGECE and EGALIM laws therefore give impetus to this desire to use local businesses. The AGECE law, with its reuse and re-employment aspects, is the basis for local authorities' orientation towards the local economic fabric. For example,

under the AGECE law, we launched a contract for IT equipment, but we realized that companies weren't ready, and we don't know how to meet the AGECE law criteria. We'd like to structure the re-use and recycling sector locally. This poses problems in terms of coordinating services. The implementation of these provisions is left to the companies. We have a negotiated procedure because nobody knows what to do.¹²¹

In another metropolis, the legal difficulties involved in using local companies are an obstacle to green public procurement, particularly when it comes to foodstuffs:

One of the main obstacles we face is how to promote local agricultural sectors. When it comes to food, we're going to have local companies, but we'd also like to have local products. We have elected representatives who want the money they spend on public procurement to benefit the local area. So how do we do that? I'm not advocating challenging the principle of competition at the European level, but we could work on sectors where the local economic logic is predominant.¹²²

Therefore, the use of environmental considerations by local authorities can sometimes be a tool to address local business issues.

Drafting and monitoring contract clauses

The inclusion of environmental clauses makes it possible to set conditions for the environmental performance of contracts and penalties for non-compliance. However, the drafting and monitoring of clauses in public contracts is undoubtedly the trickiest aspect of public procurement in environmental terms. Our interviews revealed that it is difficult for purchasers to monitor these contracts.

121. Semi-direct interview with an agent of Metropole 5, May 3, 2022 (free translation).

122. Semi-direct interview with an agent of Metropole 6, April 6, 2022 (free translation).

The first difficulty relates to the organization of public procurement departments in local authorities. Several departments are involved in drawing up and monitoring a contract. The central public procurement department concentrates on preparing the contract and monitoring disputes. When monitoring, the execution of the clauses is mainly the responsibility of the operational technical departments, i.e. the departments for which the contract is executed (public works department, roads department, etc.). In addition, the local authority's environment or energy transition department, if it exists, can be called upon to monitor these clauses. In addition, some local authorities have reported that they sometimes call on outside assistance to monitor the implementation of the clauses.

The willingness to promote environmental criteria can be put to the test by the existence of environmental clauses, without which these criteria have little effect in this area. The question of using standard clauses was raised. One tool offering standard clauses came up several times in the interviews: *La Clause Verte*. It is being developed by the one of the consulting agencies which advises local authorities on green public procurement.¹²³ Nevertheless, it emerged from the interviews that local authorities are reluctant to use standard clauses, since they would rather adapt the clauses to each type of contract.

Moreover, the complexity of drafting clauses is accompanied by difficulties in monitoring the implementation of the clauses. It is difficult to know whether a company will actually implement the provisions of the contract. There are a number of ways of doing this, such as using monitoring sheets and specific clauses. Similarly, some local authorities have tried to offer contract lots dedicated to monitoring the implementation of clauses. For example, one of the consulting agencies advises and offers performance monitoring sheets and specific clauses through *La Clause Verte*.

The question of applying penalties in this area is a delicate one for public purchasers. The view that seems to be shared is that penalties should not be applied, for two reasons. The first is linked to the novelty of this system, and the second is to avoid entering into conflict with economic operators.

In conclusion, it is above all the environmental clauses that constitute real performance conditions, and which are subject to penalties in the event of non-compliance. Our study reveals that, even when these clauses exist, buyers have little capacity to monitor them.

123. Ministère de la Transition écologique et de la Cohésion des territoires, "Vous êtes acheteur et souhaitez intégrer le développement durable dans vos achats ?" *La clause verte*, n.d., <<https://laclauseverte.fr/>>.

Barriers to and Incentives for Green Public Procurement From the Point of View of Stakeholders

The discourse of public purchasers reveals a number of obstacles and incentives to green public procurement, which are nonetheless known from the literature. We will look at the obstacles that have been identified (I), followed by the incentives (II).

PURCHASERS' VIEWS ON THE OBSTACLES TO ENVIRONMENTAL PUBLIC PURCHASING

We analyzed extra-legal obstacles through questionnaires (A), and legal and extra-legal obstacles through semi-direct interviews (B).

Questionnaire analysis: Identifying extra-legal obstacles

The literature identifies obstacles to environmental public procurement. They are mainly extra-legal. The interviews we conducted highlight obstacles that are already known. To illustrate these, refer to the graph F5, which relates to a study in Germany published in 2019.

The results of our survey questionnaire complete this overview of the obstacles. They show that the lack of expertise or training is seen as a major obstacle. The same goes for the lack of working time to incorporate environmental considerations. What's more, environmental compliance is difficult to verify at the contract award and execution stages.

F5: Main barriers to the inclusion of environmental considerations in public procurement in Germany



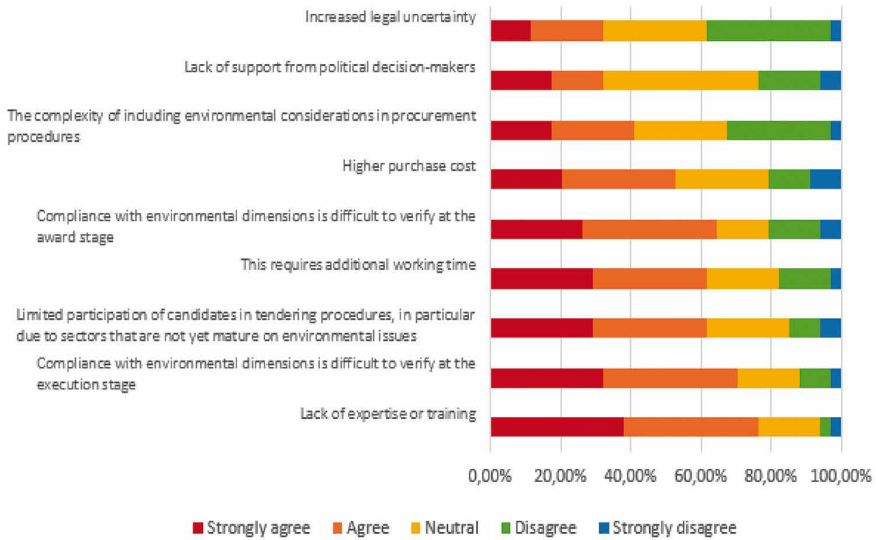
Note: Answers to the question: "What do you see at the main reasons why you do not include/ include to a larger extent environmental aspects in tenders?"

Source: Olga Chiappinelli, Friedemann Gruner and Gustav Weber, "Green Public Procurement: Climate provisions in public tenders can help reduce German carbon emissions," *DIW Weekly Report*, vol. 9, no. 51/52, 2019, p. 439.

Analysis based on interviews: Identification of legal and extra-legal obstacles

The interviews enabled us to identify the legal and extra-legal obstacles to the environmentalization of public procurement. The legal obstacles are mainly linked to the risk of legal action and the obligation to lay down criteria in line with the purpose of the contract. They are therefore linked either to the legal provisions themselves or to the risk of litigation.

F6: Barriers to the inclusion of green consideration in public procurement contracts



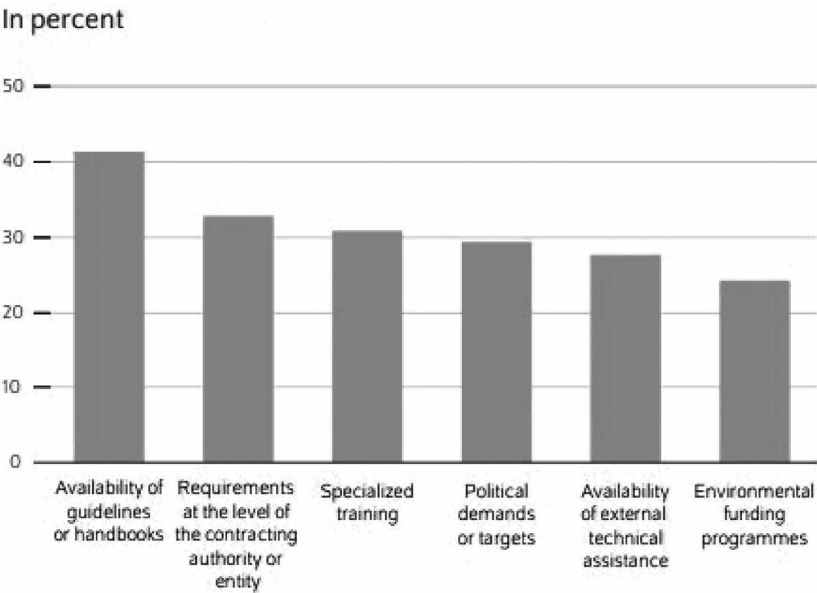
Source: François Lichère, Valentin Lamy, Adeline Meynier-Pozzi and Oriance Sulpice, "Environnementalisation des marchés publics," *Chaire de droit des contrats publics, Université Jean Moulin Lyon III*, 2022, p. 126, <<https://chairedcp.univ-lyon3.fr/rapport-environnementalisation-des-marches-publics>>.

The lack of political support from elected representatives is an obstacle identified by administrative staff, so there is a need for political support for operational departments. The cost of environmentally friendly public procurement is also cited as an obstacle. Moreover, human resources are also central, in particular the skills and training of employees. There is also the issue of structuring public procurement departments. Furthermore, these environmental procurement activities are also time consuming for departments. In addition, the ability of companies to meet the requirements of local authorities is also an obstacle, which is why local authorities sometimes try to ensure that local companies can compete for contracts.

INCENTIVES FOR GREEN PUBLIC PROCUREMENT IN THE DISCOURSE OF PUBLIC PURCHASERS

Recent research has shown incentives for public procurement in quantitative surveys. Here, we can compare these known elements with those drawn from the interviews we conducted.

F7: Barriers to the inclusion of green consideration in public procurement contracts



Note: Answers to the question: "What has helped you in the past to integrate environmental aspects into tenders?" (Multiple selections possible).

Source: Olga Chiappinelli, Friedemann Gruner and Gustav Weber, "Green Public Procurement: Climate provisions in public tenders can help reduce German carbon emissions," *DIW Weekly Report*, vol. 9, no. 51/52, 2019, p. 440.

The various AGECE, EGALIM and Climate and Resilience laws provide a range of solutions that create incentives for players, with varying degrees of constraint. The latest legislative changes provide a strong incentive that is reflected in the discourse. The various laws, as well as the introduction of the SPASER, are creating an acculturation process. Furthermore, pooling through central purchasing bodies, whether national or local, is a form of incentive that seems to be becoming more widespread.

Thus, incentives for sustainable purchasing are based on known factors, such as political will, legal constraints and the pooling of purchases.

To conclude this section, our survey enabled us to identify the obstacles and incentives to environmental public purchasing.

The legal disincentives are mainly linked to the risk of legal action and the obligation to establish criteria in line with the purpose of the contract. These obstacles are therefore linked either to the legal provisions themselves or to the risk of litigation. The extra-legal obstacles are linked to the lack of political support, the cost of purchasing, the difficulties of carrying out a product life cycle analysis, and the lack of human resources and time in the procurement departments.

Incentives lie in changes to the legal framework that create obligations and opportunities for purchasers, such as sectoral obligations and SPASER. The political will of elected representatives is also important in promoting sustainable purchasing policies. In addition, the pooling of resources through central purchasing bodies is a common strength that makes it possible to develop environmental considerations and apply them to a wide range of purchases for many purchasers.

CONCLUSION

The greening of public procurement is spreading to local and regional authorities. This holds especially true for the metropolitan areas and regions we have been focusing on. Consequently, a public policy or set of policies regarding green procurement is emerging. However, it is still difficult to put a figure on the real impact of these purchases on greenhouse gas emissions and on the various forms of nuisance and pollution. It is only possible to identify the rhetoric, practices and objectives that aim to make public procurement greener, and which are accompanied by political rhetoric. This is where we can talk about environmentalization, in the sense that the use of environmental vocabulary justifies practices and influences the discourse of public purchasers.

THE PUBLIC PROCUREMENT LEGAL SYSTEM AND THE GREEN PUBLIC PROCUREMENT UPTAKE IN ITALY

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Introduction

Giulia Botta's report illustrates the uptake of green public procurement (GPP) in Italy. First the legislative framework is illustrated, then the results of the empirical analysis are shared and discussed.

Concerning the legislative framework, the first aspect rightly stressed is that, following a recent constitutional reform, “the protection of the environment, biodiversity and ecosystems, even in the interest of future generations” is an overarching value Italy must act on.

Concerning specifically public procurement and GPP, the chapter highlights the evolution of both the general legislative framework and the specific rules concerning GPP. Since 2017, Italy has been pioneering mandatory GPP. Building on the voluntary EU GPP criteria, the Italian government has developed and is developing requirements and criteria for numerous product and service categories.

Requirements concerning technical specifications and contract performance clauses thus spelt out are mandatory for all contracting authorities, independently from the value of the contract. A very important judgment of our highest administrative court, the *Consiglio di Stato*, last year held that contracts awarded based on a procedure failing to incorporate the mandatory technical specifications and/or contract performance clauses are ineffective. Award criteria in the Italian GPP criteria are instead non-mandatory.

The newest Italian public contracts Code approved with Decreto legislativo 31 marzo 2023, n. 36 has reiterated this approach, providing the possibility for the Ministry to differentiate the criteria depending on the value of the procurement.

The second part of the report is based on extensive interviews with public buyers at both the central and the local level. As a consequence of a well-established legislative framework, the report shows a well-grounded awareness of the existing policies and rules among public buyers.

Also, the interviews showed that the mandatory provisions of the CAMs are (almost) always applied, which is not surprising given the consequences attached to non-compliance. Non-mandatory provisions in the CAMs, such

as those concerning award criteria, are only occasionally applied. This is also true of the use of GPP in procurements falling outside the scope of the CAMs.

The latter data strongly points to the effectiveness of mandatory criteria which, unlike voluntary criteria, lead to a very strong uptake of GPP (and potentially of SPP).

The results do vindicate the current shift at the EU level towards more mandatory SPP as analyzed in the contribution collected by W. Janssen and R. Caranta (Eds.), *Mandatory Sustainability Requirements in EU Public Procurement Law* (Oxford, Hart, 2023). Provided, as is rightly argued in the report, that the market readies itself to accompany the heightened demand for sustainable products and services.

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General Aspects of the Italian Legal System

CORE CONSTITUTIONAL RULES

Italy is a regional state with a parliamentary system as its core form of governance. The Italian Constitution (1948) includes constitutional rules related to the environment on State competence (but not on substance). Notably, until 2001, there were no specific provisions in the Italian Constitution that mentioned the “environment” as an asset or as a value worthy of protection. Indeed, for long time, its legal protection was traced by way of interpretation of Articles 9 and 32, which concern the safeguard of the landscape and health, respectively. After the 2001 reform, Article 117 on state and regional jurisdictions clarified that the State has exclusive legislative powers in the following matters, among which the “protection of the environment, the ecosystem and cultural heritage” (art. 117.2 (s)).¹

Very recent constitutional developments suggest a way forward to increased environmental protection in the Constitution. An amendment,² through constitutional law A.C. 3156, elevated the protection of the environment and the ecosystem to primary constitutional values, provided by Article 9. The “protection of the environment, biodiversity and ecosystems, even in the interest of future generations” has been included in a new paragraph of Article 9 to better grasp the principle of sustainable development, intended not only as infra-generational but also as inter-generational duty.³ Furthermore, the principle of the “protection of animals” was also introduced for the first time in the Italian Constitution. Under the constitutional

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1. Andreina Degli Esposti, “The Environment and Climate Change Law Review: Italy,” *The Law Reviews*, 2022, p. 39-43.
 2. Italian Parliament, “Preparatory works for law project,” *Camera dei deputati*, 2022, <<https://www.camera.it/leg18/126?tab=1&leg=18&idDocumento=3156&sede=&tipo=>>>.
 3. Pasquale Pantalone, “Intergenerational Duties and Environmental Protection: Developments, Challenges and Perspectives for States, Business and Individuals,” *Economic Law*, 2022, <<https://www.ildirittodelleconomia.it/wp-content/uploads/2022/01/AttiPantaloneDEF.pdf>>.

economic rights and duties, Article 41 was amended, providing that private economic initiatives shall not be carried out “in such a way as to damage health and the environment,” adding these two limits to those already in force, “security, freedom and human dignity.” An amendment to Article 4.3 reserves to the law the possibility of directing and coordinating economic activity, both public and private, for purposes that are not only social but also environmental. The amendments to the Italian Constitution represent a further step in the Green Revolution, suggesting the commitment to shift to a sustainable consumption and production⁴ paradigm.

In relation to public procurement, the Italian Constitution includes rules related to public procurement, such as the general principles of impartiality and efficiency, but not specific to it. Rather, the specific applicable law governing the regulation and awarding of public contracts related to goods, works and services in Italy is provided by the *Public Contracts Code* (*Codice dei Contratti Pubblici*), adopted with Legislative Decree 50/2016, transposing the supranational EU 2014 Directives package on Public Procurement. Considerations related to Green Public Procurement are missing at constitutional the level, but are contained in the Code.

THE JUDICIAL SYSTEM

The Italian judicial system is characterized by the existence of a Constitutional jurisdiction attributed to the Constitutional Court, composed of 15 judges (art. 135 Const.).⁵

The judicial system features duality of jurisdiction envisaging administrative courts and judicial courts. According to Article 103, Section 1, “The Council of State and the other bodies of judicial administration have jurisdiction over the protection of legitimate rights before the public administration and, in particular matters laid out by law, also of subjective rights.” Article 103 indicates the structure of the administrative courts, mentioning

4. The National Law Review, “Modification of Italian Constitution: Environment Elevated to Protected Primary Value,” *The National Law Review*, 2022, <<https://www.natlawreview.com/article/modification-italian-constitution-environment-elevated-to-protected-primary-value>>.

5. Art. 134: “The Constitutional Court judges a) on controversies relating to the constitutional legitimacy of laws and enactments having the force of law, of the State and the regions; b) on jurisdictional disputes between the powers of the State and those between the State and the regions and between the regions; c) on the accusations made against the President of the Republic, in accordance with the Constitution.” *Constitution of the Italian Republic*, 1948, title VI, art. 134 (updated edition 2023).

the Council of State and the Regional Administrative Tribunals (TAR), established in 1971 as administrative courts of first instance. The Council of State (sitting in Rome) acts as the appellate court for the judgments issued by the TARs based in each region. Therefore, the Council of State can be considered the supreme administrative judicature, even though it cannot be qualified as a supreme court in absolute terms.⁶ In fact, according to Article 111, Section 8 of the Constitution, “Appeals to the Court of Cassation against decisions of the Council of State and the Court of Accounts are permitted only for reasons of jurisdiction,” which means that against the judgments issued by the Council of State there is yet another avenue of appeal to the Court of Cassation. Article 103 contemplates another administrative court, the Court of Accounts, providing that it “has jurisdiction in matters of public accounts and in other matters laid out by law.”

In relation to the enforcement by Courts of Constitutional rules related to the environment, the Constitutional Court has played an important role. Referring to Article 117.2(s) on State jurisdiction concerning protection of the environment, it has been clarified that the protection of the environment does not constitute a substantial technical matter, rather a “transversal constitutional value.”⁷ In Constitutional case 26 July 2002, no. 407, environmental protection is not configurable to a strictly delimited sphere of state jurisdiction. Hence, “the environment as a constitutionally protected ‘value’ delineates a ‘transversal’ matter, in respect of which different competences are manifested, which may well be regional.” In further cases, as Constitutional case 20 May 2020, no. 88, the Court has provided that, although the State has exclusive jurisdiction on environmental matters, in deciding and applying general *standards* of protection that are not derogable, the regions also have jurisdiction on regulating environmental⁸ matters through legitimate regional laws,⁹ allowing them also to extend higher standards of protection. The Court has reiterated that the environment constitutes a “primary” (Case no. 151/1986) and “absolute” (Case no. 641/1987) constitutional value

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6. Elisabetta Silvestri, “Administrative justice in Italy,” *BRICS Law Journal*, vol. 3, no. 2, 2016, p. 67.
 7. Constitutional Court case law: *Constitutional Court*, no. 407/2022; *Constitutional Court*, no. 536/2002; *Constitutional Court*, no. 222/2003; *Constitutional Court*, no. 259/2004; *Constitutional Court*, no. 398/2006. For a full overview, see: <https://www.cortecostituzionale.it/documenti/convegni_seminari/stu_279.pdf>.
 8. The exclusive jurisdiction of the State does not limit the regional legislators from pursuing environmental objectives in the legitimate use of their constitutional jurisdictions. *Constitutional Court*, no. 307/2003.
 9. *Constitutional Court*, no. 307/2003; *Constitutional Court*, no. 214/2005; *Constitutional Court*, no. 232/2005; *Constitutional Court*, no. 246/2006; *Constitutional Court*, no. 199/2014.

involving a plurality of interests¹⁰ and a fundamental common good regulated by mandatory norms.¹¹

Finally, at an administrative law level, there is the Council of State, Section IV, 1 April 2020, no. 2195, which states that “the protection of the environment is recognised at a constitutional level on the basis of norms that are not merely programmatic, but perceptive, which consider any conduct that infringes the asset under protection as a legal offence, especially if the offence is carried out in the performance of activities that are intrinsically dangerous by their nature or in the context of a business initiative that is *inter alia* linked to safeguarding the environment.”

10. *Constitutional Court*, no. 12/2009; *Constitutional Court*, no. 226/2009; *Constitutional Court*, no. 278/2012; *Constitutional Court*, no. 145/2013; *Constitutional Court*, no. 246/2013.

11. *Constitutional Court*, no. 151/2012.

The Public Procurement Legal Framework at the Supranational Level

Italy has been a member state of the EEC—a predecessor to the EU as regional supranational organization—since January 1, 1958, and therefore its legislation is characterized by EU law transposition at the internal level. The applicable law governing the regulation and awarding of public contracts related to goods, works and services is provided by the *Public Contracts Code* (*Codice dei Contratti Pubblici*), adopted with Legislative Decree 50/2016, transposing the supranational EU 2014 Directives package on Public Procurement, repealing the previous 2004 Directives—the 2004/18/EC Public Sector Directive and 2004/17/EC Concessions Directive. The relevant EU Directives are: Directive 24/2014/EU on Public Sector, Directive 25/2014/EU on procurement by entities operating in the water, energy, transport, postal services sectors (the Utilities Directive), Directive 23/2014/EU on the award of concession contracts (Concessions Directive).

EU LAW AND GREEN PUBLIC PROCUREMENT

At the EU level, it is possible to track the existence of supranational hard and soft law provisions on green public procurement, defined by EU Commission Communication 400/2008 as a voluntary “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.”¹²

12. European Union Law, “Public procurement for a better environment,” *Commission of the European Communities*, 2008, <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0400:FIN:EN:PDF>>.

By 1996, the EU Commission Green Paper *Public Procurement in EU: Exploring the Way Forward*¹³ was focusing attention on GPP potentials, followed by the Green Paper on *Integrated Product Policy – IPP*¹⁴ and the related Communication 302/2003,¹⁵ inviting member states to adopt national GPP action plans. In particular, EU Directives 2004/18/CE and 2004/17/CE have provided significant juridical support to GPP. Other crucial EU communications have played a role in influencing member states, including Italy: Communication 400/2008 on *Public Procurement for a Better Environment*¹⁶ and Communication 397/2008 on the *Sustainable Consumption and Production and Sustainable Industrial Policy* proposing specific targets for all EU member states, particularly to reach 50% GPP by 2010. For this purpose, since 2008, the Commission has developed more than 20 common GPP criteria to facilitate the inclusion of green requirements in public tender documents. The EU Strategy *Europe 2020: A strategy for smart, sustainable and inclusive growth*¹⁷ outlined the urgency for an ecological transition and a green revolution where GPP is relevant. The Green Paper on the *Modernisation of EU Public Procurement Policy: Towards a More Efficient European Procurement Market*, and Communication no. 398/2014, *Towards a Circular Economy: A Zero Waste Programme for Europe*, have all played a role in reforming the Public Procurement Directives in the direction of GPP. For instance, in directives 2014/23/EU, 2014/24/EU and 2014/25/EU, a particular focus is on promoting the most economically advantageous tender (MEAT) criterion in contract awarding, to promote quality and innovation including environmental and social aspects.

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13. European Union Law, “Public Procurement in the European Union: Exploring the Way Forward,” *Commission of the European Communities*, 1996, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51996DC0583&from=NL>>.
 14. European Commission, “Green Business,” *Energy, Climate Change, Environment*, n.d., <https://green-business.ec.europa.eu/index_en>.
 15. European Union Law, “Integrated Product Policy – Building on Environmental Life-Cycle Thinking,” *Commission of the European Communities*, 2003, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52003DC0302&from=EN>>.
 16. European Union Law, “Public procurement for a better environment,” *Commission of the European Communities*, 2008, <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0400:FIN:EN:PDF>>.
 17. European Environment Agency, “Europe 2020: A strategy for smart, sustainable and inclusive growth,” *European Commission*, 2010, <<https://www.eea.europa.eu/policy-documents/com-2010-2020-europe-2020>>.

Regarding supranational soft law guidelines on GPP, the most relevant tool under EU Law is provided by the third edition of *EU Buying Green: A Handbook on Green Public Procurement* (2016) and, related to social criteria, the second edition of *EU Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement* (2021).

It is worth mentioning the *European Green Deal*,¹⁸ where PP is elevated to a pivotal policy instrument to orientate an ecological transition of the economy,¹⁹ suggesting a EU *momentum* towards green public purchasing. In Communication 2020/21, *Sustainable Europe Investment Plan – European Green Deal Investment Plan*,²⁰ the Commission aims to provide the public sector with guidance and appropriate means for making sustainable investments (par. 4.2), outlines the importance of proposing minimum mandatory green criteria or targets for public procurement in sectorial initiatives, aims to *de facto* set a common definition of what a “green purchase” is in order to provide the basis for assessing the impact of GPP, and encourages EU public authorities to integrate green criteria and use labels in their procurements. Communication 350/2021, *Updating the 2020 New Industrial Strategy: Building a Stronger Single Market for Europe’s Recovery*, has outlined that “public spending through procurement amounts to 14% of EU GDP each year. The European public procurement framework can help strengthen companies’ competitiveness, including through the use of strategic criteria notably for green, social and innovation procurement, while ensuring transparency and competition.”

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18. Climate change and environmental degradation are an existential threat to Europe and the world. To overcome these challenges, the European Green Deal will transform the EU into a modern, resource-efficient and competitive economy, ensuring: no net emissions of greenhouse gases by 2050 (i); economic growth decoupled from resource use (ii); no person and no place left behind (iii). 1/3 of the €1.8 trillion investment from the NextGenerationEU Recovery Plan, and the EU’s seven-year budget will finance the European Green Deal. European Union Law, “The European Green Deal,” *European Commission*, 2019, <https://eur-lex.europa.eu/resource.html?uri=cellar:b828d165-1c22-11ea-8c1f-01aa75ed71a1.0002.02/DOC_1&format=PDF>.
 19. It is indeed recognized that “public authorities, including the EU institutions, should lead by example and ensure that their procurement is green.” The same idea is reiterated in Communication 2020/102, highlighting that GPP can help lead the shift towards sustainable consumption and production. European Union Law, “Sustainable Europe Investment Plan – European Green Deal Investment Plan,” *European Commission*, 2020, p. 8, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0021&from=IT>>.
 20. European Union Law, “Sustainable Europe Investment Plan – European Green Deal Investment Plan,” *European Commission*, 2020, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0021&from=IT>>.

THE UN 21 AGENDA AND 2030 AGENDA IMPLEMENTATION

The UN Agenda 2021 is a comprehensive plan of action to be taken globally, nationally and locally by organizations of the United Nations System, governments, and major groups in every area in which humans impact the environment. The Agenda 21, together with the Rio Declaration on Environment and Development, were adopted by more than 178 governments at the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro in 1992. To implement Agenda 21, the Italian Ministry of the Environment set up a specific National Strategy on Adaptation to Climate Change – “Strategia Nazionale di Adattamento ai Cambiamenti Climatici” (SNACC),²¹ also in line with the EU-led initiatives leading to the “EU Strategy on Climate Change” launched in 2013.

Efforts at the policy level also regard the implementation of the Transforming Our World – The UN 2030 Agenda for Sustainable Development, adopted in 2015, a plan of action for people, planet, peace, prosperity and partnership (5Ps), and based on the realization of 17 sustainable development goals (SDGs) and 169 targets. At the national level, the 2030 Agenda has not been implemented in the national legislation, although the recent constitutional amendments introducing the “protection of the environment, biodiversity and ecosystems, even in the interest of future generations” as primary constitutional values suggest the prominent importance given not only to infra-generational but also to inter-generational development. At the policy level, CIPE (Comitato Interministeriale per la Programmazione Economica) issued in 2017 with Resolution No. 108/2017, the *National Strategy on Sustainable Development*,²² the national action plan 2017-2030 for the implementation of the 2030 Agenda. It “defines the national reference framework for planning, programming and evaluation processes at environmental and territorial level to implement the sustainable development goals set by the UN Agenda 2030.” The implementation of the strategy is linked to the National Reform Programme (NRP) and the Economic and Financial Document (DEF).

The plan is broken down into five areas of intervention, corresponding to the 5Ps of sustainable development, each one laying down Italy’s strategic choices and strategic objectives related to the Agenda 2030 SDGs and

21. Ministry of the Environment, *National Strategy on Climate Change Adaptation*, Italian government, 2016.

22. Ministry of Environment, “National strategy for sustainable development,” 2017, <https://www.mase.gov.it/sites/default/files/archivio_immagini/Galletti/Comunicati/snsvs_ottobre2017.pdf>.

recalling the deep interconnection between economic dynamics, social growth and environmental quality. In relation to environmental aspects, the Planet intervention area aims to ensure sustainable management of natural resources, countering biodiversity loss, and protecting environmental and cultural assets.

The Italian Alliance for Sustainable Development (ASviS) aims to raise awareness and disseminate knowledge about SDGs at the social and institutional levels. It publishes an annual report to illustrate an analysis of Italy's progress as to the UN Agenda 2030 and its SDGs, and sets forth proposals for developing ad-hoc strategies to ensure the Country's economic and social development.

Italy: The Public Procurement Legal Framework and GPP

SUBNATIONAL ENTITIES AND PUBLIC PROCUREMENT

Public procurement in Italy constitutes an important share of the GDP, with €170 billion spent annually by over 22,000 public agencies at the central, regional and local levels, a considerable amount to orientate the market towards more sustainable consumption and production.²³

The applicable law governing the regulation and awarding of public contracts related to goods, works and services is provided by the *Public Contracts Code* (*Codice dei Contratti Pubblici*), adopted with Legislative Decree 50/2016, modified by Legislative Decree 57/2017 (the “Corrective Legislative Decree”) and, lastly, updated by Legislative Decree 76/2020 converted into Law 120/2020 (Decreto Semplificazioni) and Legislative Decree 77/2021 (Decreto Semplificazioni-Bis).

Regarding the attribution of jurisdiction for public procurement, according to Article 2 of the 2016 *Public Contracts Code*, the State owns exclusive jurisdiction in regulating competition on the procurement markets. Italy’s process of gradual devolution of jurisdictions to the regional and local levels²⁴ had no impact in this area, and the regions are able to enact public procurement legislation only with “indirect and negligible effects.” Usually, regional laws deal with internal organizational matters, like the organization of regional departments for public works, or the attribution of jurisdictions to regional officers (art. 117, Constitution).

23. Observatory on Green Public Procurement, “The Numbers of Green Public Procurement in Italy,” *OGPP*, 2021.

24. Roberto Caranta and Sara Richetto, “Sustainable procurements in Italy: Of light and some shadows,” in Roberto Caranta and Martin Trybus, *The Law of Green and Social Procurement in Europe*, DJØF Publishing Copenhagen, 2010, <https://eplgroup.eu/wp-content/uploads/2016/06/EPLSVol2_.GreenSocialProcurement.pdf>.

Although the applicable law is the same all over Italy, the management of procurement procedures is mostly decentralized, with most public law entities managing their procurement themselves. Subnational entities are, indeed, authorized to award public contracts, ranging from the State, regions, counties, municipalities and other subnational entities, including in-house entities and utilities entities. The primary contracting authorities include the regions (20), provinces (107), metropolitan areas (14 Città Metropolitane), municipalities (7904)²⁵ and their subentities, including local health-care authorities, all autonomously procuring what they need.²⁶

Legislators have tried to enhance centralization, providing that the contracting authorities may award public works contracts under €150,000 and public supply and services contracts under €40,000 directly or through a State central purchasing body. In this regard, CONSIP S.p.a. acts as central purchasing entity for serial supplies and services.²⁷ The Code prescribes that contracting authorities must have a specific qualification to manage awarding procedures for public contracts above those thresholds, otherwise they will award public contracts through CONSIP or other regional or central purchasing bodies, or in group with other contracting authorities having the required qualification.

THE ITALIAN PUBLIC PROCUREMENT LEGAL SYSTEM AND THE ROAD TOWARDS GPP

The 2016 *Public Contracts Code* applies to all types of public procurement contracts related to goods, works and services, and it envisages different types of procedures: open, restricted, competitive dialogue, competitive procedure with negotiations, negotiated procedure without a prior notice, innovation partnership.

25. National Institute of Statistics, “Statistical codes of territorial administrative units: Municipalities, metropolitan cities, provinces and regions,” *Istat*, 2024, <<https://www.istat.it/it/archivio/6789#:~:text=Dal%2020%20febbraio%202021%2C%20con,%C3%A8%20pari%20a%207.904%20unit%C3%A0>>.

26. However, few Italian regions have created centralized purchasing bodies managing e-procurements. Gian Luigi Albano and Caroline Nicholas, *The Law and Economics of Framework Agreements: Designing Flexible Solutions for Public Procurement*, Cambridge University Press, 2016.

27. CONSIP signed 703,854 public contracts for goods, works and services for a value of €14 billion in 2021, leading the Rationalization Program of Public Administration Procurement with the Ministry of Economy and Finance. Ministry of Economy and Finance of Italy, “How it works,” *AcquistinRetePA*, n.d., <https://www.acquistinretepa.it/opencms/opencms/english/program_how_itWorks.html>.

The general principles inspiring the conduct of public procurement procedures are listed under Article 30 on principles for the award and execution of procurements, including budget savings, effectiveness, timeliness, fairness, free competition, non-discrimination, transparency, proportionality and publicity. However, budget savings may be derogated, when so provided, by social, health, environmental and cultural heritage protection considerations, as well as the promotion of sustainable development, also from an energy standpoint.

Under the 2016 *Public Contracts Code*, room for environmental and social considerations²⁸ suggests an increased interest of the Italian legislators for GPP. Before scrutinizing in depth the key provisions of the current legislative framework, it is necessary to recall some previous steps paving the way for an increased inclusion of GPP in the Italian law, referring to the previous 2006 *Code of Public Contracts*, the National Action Plan on GPP and the Collegato Ambientale.

THE 2006 PUBLIC CONTRACTS CODE

Within the Italian normative context, the previous *Code of Public Contracts* for Works, Services and Supplies approved by Legislative Decree April 163/2006²⁹ legitimized the use of sustainable considerations in procurement in specific provisions as early as 2006. Indeed, it transposed the normative prescriptions related to environmental considerations contained in Directive 2004/18.³⁰ In some articles, more vigorous inputs emerged from Italian legislators. In particular, Article 2 on procurement principles introduced the possibility of making the principle of the most economically advantageous tender subordinate to criteria inspired by social demands,

28. References to social and environmental considerations in: European Union law, "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 Text with EEA relevance," *Official Journal of the European Union*, 2014, art. 18(2), 20, 42, 43, 47, 67, 68 and 69.

29. Legislative Decree no. 163/2006, "Public Contracts Code related to goods, works, services," implementing Directive 2004/17/EC and Directive 2004/18/EC.

30. The sections of the Directive related to environmental protection cover in particular: technical specifications; conditions of performance of the contract; environmental protection obligations; technical and professional ability; environmental management standards; and contract award criteria. See recitals 1, 5, 6, 27, 29, 33, 43, 44 and 46 and art. 23, 26, 27, 48 and 53. European Union law, "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 Text with EEA relevance," *Official Journal of the European Union*, 2014.

environmental and health protection and the promotion of sustainable development, and Article 68 on technical specifications explicitly requires that technical specifications “shall, wherever possible, be defined in such a way as to take account of the criteria of accessibility for persons with a disability, adequate design for all users, and environmental protection.” Other provisions allowing for the inclusion of environmental considerations in awarding are related to Article 42.1.f on the technical and professional ability of suppliers and services providers; Article 44 on labels and environmental management systems; Article 69 on the conditions for the performance of the contract and Article 83.1.e on the MEAT.

THE NATIONAL ACTION PLAN ON GPP

A milestone towards GPP implementation in Italy is the National Action Plan on Green Public Procurement (PAN GPP) or Action Plan for the Environmental Sustainability of Consumption in the Public Administration Sector,³¹ adopted by the Ministry of the Environment and the Protection of Natural Resources (now called Ministry of Ecological Transition) first in 2008, then updated in 2013. Member states have, indeed, been required to adopt specific NAPs on GPP in Communication 302/2003 on *Integrated Product Policy: Building on Environmental Life-Cycle Thinking*.³² Three main goals have been established for GPP in Italy: the efficient use and saving of natural resources, especially related to energy and GHG emissions limitation (1); waste reduction (2); and reduction in hazardous substances use (3). The Plan requires that at least 30% of goods purchased by public administration comply with ecological criteria by 2009. In this regard, the Ministry of Environment committed to define minimum environmental criteria (Criteri Ambientali Minimi – CAM) applicable to purchasing procedures above and below the Community reference threshold, for 11 commodity categories³³ identified by the *Finance Act* 2007, in

31. Piano d'azione per la sostenibilità ambientale dei consumi nel settore della Pubblica amministrazione, 2023, <https://gpp.mase.gov.it/sites/default/files/2023-08/PAN_GPP.pdf>.

32. European Union Law, “Integrated Product Policy Building on Environmental Life-Cycle Thinking,” *Commission of the European Communities*, 2003, <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0302:FIN:en:PDF>>.

33. The categories were identified as priority sectors of intervention for GPP, according to two parameters: environmental impact and volume of public spending. Identifying minimum environmental requirements for each category will set out the specific methodological guidelines and the sector targets. Ministry of the Environment, “National Action Plan on Green Public Procurement,” 2013, s. 6.

Article 1(1127) of Law 296/2006.³⁴ The PAN GPP was then revised in 2013, confirming the need to reinforce GPP commitment in Italy, and paying more attention to social considerations.³⁵

The adoption of *Law 221/2015³⁶ on Environmental provisions to promote green economy measures and to limit the excessive use of natural resources* (known as *Collegato Ambientale*) represents the turning point in GPP development in Italy, mandating the mandatory application of CAM (art. 18). The law introduced a new article in the 2006 *Public Contracts Code* (art. 68-bis), providing the obligation for all public administrations to include in the tender documents technical specifications and contract clauses based on CAM. The obligation was mandatory at 100% of the tender value above and below the EU threshold for a few specific product categories³⁷ and at 50% for others.³⁸

GPP IN THE 2016 PUBLIC CONTRACTS CODE

Going beyond the earlier efforts towards GPP, a fundamental shift was marked by the adoption of the new Code in 2016 transposing the 2014 Public Procurement Directives.³⁹ The enabling function of procurement in

34. Par. 1127 indicates environmental targets and objectives for the following product categories: a) furniture; b) construction materials; c) road maintenance; d) green areas; e) lighting and heating; j) electronics; g) textiles; h) stationery; i) catering and food; l) sanitation; m) transport. *Italian Parliament*, Financial Law, no. 062961, 2007.
35. The Guide on the inclusion of social aspects in public procurement (Guida per l'integrazione degli aspetti sociali negli appalti pubblici) was adopted in 2012, with DM Ambiente 6 giugno 2012, GURI n. 159 del 10.07.2012. Ministry of the Environment, "Guide for the Integration of social aspects in public procurement," *Ministerial Decree of June 6, 2012*, GURI no. 159/2012.
36. Law 221/2015 addresses issues related to the environment to promote a green economy and adoption by businesses of efficient energy production and usage management systems. Some of the most important innovations concern issues relating to reclamation, waste management and economic incentives to encourage the use of environmentally friendly products. *Law on Environmental provisions to promote green economy measures and to limit the excessive use of natural resources*, 2015, Law no. 221/2015.
37. Public lighting, electronics, energy services. Ministry of the Environment, "National Action Plan on Green Public Procurement," 2013.
38. Waste management, printing, public green areas, stationery, catering, cleaning services, textiles, office furniture. Ministry of the Environment, "National Action Plan on Green Public Procurement," 2013.
39. Directive 2014/24: Recitals nos. 37, 47, 75, 88, 93 and 97. Key art. 18.2, 42, 43, 67 and 68. See also Dir. 2014/23, art. 36. European Union law, "Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public

protecting the environment already emerges from Article 4,⁴⁰ where safeguarding the environment and energy transition are listed among the primary principles related to the awarding of public contracts.

The possibilities for contracting authorities and entities to impose GPP in their tenders and along all the procurement cycle are several. In particular, the minimum environmental criteria (Criteri Ambientali Minimi [CAM]) constitute mandatory sets of rules to be applied to 18 categories of goods/works/services (so far), setting up environmental criteria to be included along the different stages of the procurement cycle: the planning phase, the definition of the subject matter of the contract, the technical specifications, the selection of candidates, the contract award and the execution of the contract. CAMs are regulated by Article 34 on energy and environmental sustainability criteria, amended by Article 23 of Legislative Decree 56/2017. According to Article 34, all contracting authorities or entities shall contribute to the achievement of environmental goals provided for in the PAN GPP by means of inclusion, in the design and tender documents, *at least* of the technical specifications and contract clauses included in the minimum environmental criteria. The same provision applies to the purchase of goods and services in the sectors of collective catering and supply of foodstuffs, specifically provided for in Article 144. Furthermore, par. 2 states that CAMs shall be taken into consideration also when preparing tender documents for the application of MEAT (art. 95.6). Par. 3 specifies that the aforementioned obligations shall apply for awards of any amount, in relation to the categories of supplies and awards of services and works constituting the subject matter of the CAMs.

Among further provisions related to the environment, Article 68.5 on technical specifications explicitly mentions the possibility of including environmental characteristics. Also, Article 170 on technical and functional

procurement and repealing Directive 2004/18/EC Text with EEA relevance," *Official Journal of the European Union*, 2014. European Union law, "Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance," *Official Journal of the European Union*, 2014, art. 36.

40. According to Article 4 on principles relating to the award of public contracts, it shall take place in accordance with the safeguard of the environment and energy efficiency, together with more traditional cost-effectiveness, efficacy, impartiality, equal treatment, transparency, proportionality and publicity. *Public Contracts Code*, 2016, art. 4.

requirements states that the technical and functional characteristics may include *among others*⁴¹ environmental and climate performance levels.

Regarding contract awarding criteria, Article 95.2 states that, without prejudice to laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services, contracting authorities and entities shall, with respect to the principles of transparency, non-discrimination and equal treatment, award public contracts following the criterion of MEAT, identified on the basis of the best quality/price ratio or on the basis of price or cost following life cycle cost (LCC) considerations, regulated by Article 96.3. Further, as outlined in Article 34 (2), CAMs shall be taken into consideration in the application of MEAT award criterion (art. 95.6). Namely, additional points can be assigned to environmental criteria in the technical offer. Possible award criteria for a GPP tender may include energy efficiency in production; water saving; waste reduction; emission of organic volatile compounds; collection and reuse (both pre-existing and under the contract); and distance travelled (for fruit).

If using the lowest price criterion, respect of CAMs must be included as a mandatory requirement for the specific categories regulated by the CAMs.

In regard to the selection phase, it is possible to include general requirements linked to exclusion grounds related to professional misconduct (art. 80.5.c) or to serious violations in the field of workplace health and safety, as well as the obligations contained in Article 30(3), which include reference to compliance with environmental, social and labour law established by Union and national law, collective agreements or the international provisions listed in Annex X (art. 80.5.a). The contracting authority may also set technical capacity requirements related for environmentally friendly goods/works/services or require specific certificates and environmental management systems, clarifying that equivalent means of proof will be accepted.

Moreover, it is possible to exclude companies that have breached environmental law or have other serious defects in their environmental performance. In this regard, Article 80 on exclusion grounds⁴² provides that economic operators shall be excluded from the participation in an award

41. Quality levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, terminology, symbols, testing and test methods, marking and labelling, or user instructions. Ministry of the Environment, "Guide for the Integration of social aspects in public procurement," *Ministerial Decree of June 6, 2012*, GURI no. 159/2012.

42. Claudio Vivani, *Energy Efficiency and Transition in the Legislative Process*, in *Environment and Development*, 2020, p. 8-9 and 699.

procedure for having committed serious violations related to environmental pollution,⁴³ environmental disaster⁴⁴ or radioactive material trafficking.⁴⁵

Further, the past experience of a company and the professional qualifications of its personnel can be assessed with a view to environmental considerations according to Articles 30 and 80. Contracting authorities may ask companies to demonstrate their technical capacity to comply with the environmental management measures associated with a contract, according to Article 85(f). Article 86 on means of proof mandates that the economic operators' technical abilities may be demonstrated by one or more of the means listed in Annex XVII, Part II. In the Annex, an indication of environmental management systems to be used during the contract execution may be required (g), or an indication of management and tracking systems of the supply chains (d). Additionally, Article 93 on quality assurance standards also relates to environmental considerations.

Labels are another pivotal instrument to promote GPP. At the supranational level, the potential role of labels has been highlighted by supranational organization regulations such as the WTO GPA and the EU 2014 Public Sector Directive (art. 43). At the national level, Article 69 provides that contracting authorities intending to purchase works, supplies or services with specific environmental, social or other characteristics may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label as means of proof. Further, the article lists the specific conditions⁴⁶ for contracting authorities and entities using criteria and labels.

Finally, regarding contract performance clauses, Article 100 on requisites for tender execution provides that contracting entities may request specific requirements for the performance of the contract also related to social and

43. *Italian Penal Code*, art. 524-bis.

44. *Italian Penal Code*, art. 452-sexies.

45. *Italian Penal Code*, art. 452-septies.

46. Article 69 sets specific conditions for using labels: a) the label requirements concern only criteria which 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 the contract; b) the label requirements are based on objectively verifiable and non-discriminatory criteria; c) the labels are established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organizations may participate; d) the labels are accessible to all interested parties; e) the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence. *Public Contracts Code*, 2016, art. 69.

environmental requirements, provided they are compatible with EU law and the principles of equal treatment, non-discrimination, transparency, proportionality and innovation and are specified in the call for tenders.

GPP MONITORING AND TRAINING

Specific mechanisms to monitor and review public contracts are envisaged in Article 213, assigning the supervision and control of public contracts and their regulation to the National Anti-Corruption Authority (ANAC),⁴⁷ which also acts to prevent and counter illegality and corruption. According to Article 213, CAMs application monitoring is conducted by the Public Contracts Observatory of ANAC. The monitoring is also supported by a consortium of NGOs including Legambiente, conducting yearly monitoring through a GPP Observatory.⁴⁸

Training activities on GPP, considered crucial for the dissemination and effective application of CAMs and GPP, are developed by CONSIP⁴⁹ and by the national Project CreiamoPA and the organization Forum Compraverde Buy Green *among others*.

GPP SECTORAL APPROACH

In regard to key GPP sectors, EU sectoral legislation has been identified by EU supranational authorities, setting up GPP criteria for specific products/ services categories in the field of the Integrated Product Policy (IPP).⁵⁰

47. Art. 19 of the Decree Law of 24 June 2014, no. 90, converted, with modifications, by law 11 August 2014, no. 114.

48. Green Procurement Observatory, "Civic Monitoring," *Green Procurement Observatory*, <<https://www.appaltiverdi.net/category/monitoraggio/>>.

49. Training for professionals: CONSIP, "Green purchasing by the Public Administration (GPP): Theoretical aspects, practical examples and operational guidelines," *AcquistinRetePA*, 2021, <<https://www.acquistinretepa.it/opencms/opencms/english/GPP.html>>.

50. GPP criteria have been developed for cleaning products and services; computers, monitors, tablets and smartphones; data centres, server rooms and cloud services; electricity; food catering services and vending machines; furniture; imaging equipment, consumables, and print services; office building design, construction and management; paints, varnishes and road markings; public space maintenance; road design, construction and maintenance; road lighting and traffic signals; textiles; road transport. Two types of criteria have been proposed by the Commission for each sector covered: 1) 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

Sectoral regulatory frameworks related to GPP and foreseen under the Green Deal regard key sectors as transport, food and catering, and construction.

In Italy, key sectoral GPP regard the specific product categories identified by the PAN GPP for the mandatory application of CAMs⁵¹ and under periodical revision and expansion.

CAMs have been adopted for 18 purchasing categories, including office furniture (1), urban furniture (2), diapers (3), work shoes and leather-wear (4), paper (5), ink cartridges (6), public works (7), street lighting (maintenance and management) (8), street lighting (services) (9), indoor lighting, heating and air conditioning (10), cleaning services and rental and cleaning of linen (11), urban waste (12), food and catering (13), sanitization of hospitals (14), printers (15), textiles (16), vehicles (17) and green spaces (18). Existing CAMs are updated periodically according to technological and market developments, market segment maturity, the volume of public expenditure and potential environmental impacts. As specified in the revised PAN GPP 2013, a new set of rules can be defined for additional categories, when characterized by similar features. Therefore, a number of CAMs are currently under revision⁵² for adoption, with the text already validated by the PAN GPP Management Committee, while others are currently under definition for new sectors.⁵³ Finally, new proposed CAMs regard cultural events; food and beverage sales services (indoor bars and vending machines); design services and works for the new construction and maintenance of roads. According to the 2022 program, the next CAM in the pipeline is related to energy services for buildings.

or cost increases. 2) Comprehensive criteria are for those 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 with other products with the same functionality. European Commission, "Green Public Procurement Criteria and Requirements," *Energy, Climate Change, Environment*, n.d., <https://green-business.ec.europa.eu/green-public-procurement/gpp-criteria-and-requirements_en>.

51. Ministero dell'Ambiente e della Sicurezza Energetica, "Cosa sono i CAM," n.d., <<https://gpp.mase.gov.it/Cosa-sono-i-CAM>>.

52. Waste management and transport services and street sweeping (1) and supply of new interior furniture, interior furniture rental service, repair service for furniture in use, end-of-life management service for used furniture (2). Ministry of the Environment, "National Action Plan on Green Public Procurement," 2013.

53. Urban furniture, PCs and servers, design services and construction works, public transport services. Ministry of the Environment, "National Action Plan on Green Public Procurement," 2013.

THE WAY FORWARD: GPP AND PNRR

The post-pandemic recovery opens a window of opportunities suggesting a way forward for GPP in Italy, reinforcing the adoption of CAMs. In the National Recovery and Resilience Plan (PNRR⁵⁴), part of the Next Generation EU, the relevance of GPP and the importance of financing supporting and assistance activities for public administrations envisaging the simplification and rationalization of public contracts regulation and improvements in CAM application. Among six key missions inspiring the plan,⁵⁵ €68.6 billion (31.05% of the total PNRR value) is allocated to the Green Revolution and Ecological Transition mission (mission no. 2⁵⁶), in particular to activities and reforms improving the sustainability and resilience of the economic system and ensuring a fair and inclusive environmental transition. Under this mission, reforms aiming to provide technical support to local authorities⁵⁷ are foreseen, with the commitment of the Ministry of Ecological Transition (MITE) to develop a specific action plan to support procuring entities in the application of CAM provided by law for public tenders. Furthermore, efforts towards the extension of CAM currently in force to new sectors, such as in the field of cultural events are possible.

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54. Piano Nazionale di Ripresa e Resilienza (PNRR), managed by the Ministry of Economy and Finance, is part of the Next Generation EU (NGEU) program, namely the €750 billion package that the EU negotiated in response to the pandemic crisis. The Recovery and Resilience Facility (RRF) has a duration of six years—from 2021 to 2026—and a total value of €672.5 billion, 2021. <<https://italiadomani.gov.it/en/home.html>> is the official platform of PNRR, “Italia Domani.” Italian Government, “The National Recovery and Resilience Plan (NRRP),” Ministry of Economy and Finance, 2021, <<https://www.mef.gov.it/en/focus/The-National-Recovery-and-Resilience-Plan-NRRP/>>. Italia Domani, “Italia Domani, the National Recovery and Resilience Plan,” Italia Domani, 2021, <<https://www.italiadomani.gov.it/en/home.html>>.
 55. The Plan has three strategic focuses: digitization and innovation, ecological transition, and social inclusion. Ministry of the Environment, “National Action Plan on Green Public Procurement,” 2013.
 56. Mission 2: To promote a deep change to achieve Italy’s green and ecological transition by promoting investments in the circular economy and waste management, renewable energy sources, increasing Italy’s share of renewable energies, including the launch of hydrogen-based solutions. Ministry of the Economy and Finance, “National Plan of Reconstruction and Resilience (PNRR),” 2021.
 57. Ministry of the Environment and Energy Efficiency, “Create public administration project: Competencies and networks for environmental integration and improvement of public administration organisations,” 2024, <<https://www.mase.gov.it/pagina/creiamo-pa-competenze-e-reti-l-integrazione-ambientale-e-il-miglioramento-delle>>.

The opportunities provided by PNRR to foster GPP are several, considering the significant impact on the overall economy envisaging a 3.6% GDP rise by 2026, requiring direct responsibility of Italian Ministries and Local Authorities for carrying out the investments and reforms to be implemented within the agreed timeframe, and for the regular, proper and effective management of resources. Most interventions need to pass through public procurement, requiring public administrations to implement the environmental and social criteria envisaged by Article 34 of the *Public Contracts Code* to spend PNRR resources.

APPENDIX

CAM Currently in Force per Product Category

PRODUCT CATEGORY	NORMATIVE FRAMEWORK
Office Furniture	CAM ⁵⁸ approved by DM 23/2017 ⁵⁹ Updated by Decreto correttivo ⁶⁰ (DM 3 luglio 2019, in G.U. n. 167 del 18 luglio 2019)
Urban Furniture	CAM ⁶¹ approved by DM 50/2015 ⁶²
Diapers	CAM ⁶³ approved by DM 16/2015 ⁶⁴
Work Shoes and Leatherware	CAM ⁶⁵ approved by DM 125/2018 ⁶⁶
Paper	CAM ⁶⁷ approved by DM 102/2013 ⁶⁸

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58. Ministry of Environment, *Minimum Environmental Criteria on Office Furniture*, 2017.
59. Ministry of Environment, *Ministerial Decree* no. 23/2017.
60. Ministry of Environment, *Corrective Decree*, July 3, 2019, in the Official Gazette no. 167 of July 18, 2019.
61. Ministry of Environment, *Minimum Environmental Criteria on Urban Furniture*, 2015.
62. Ministry of Environment, *Ministerial Decree* no. 50/2015.
63. Ministry of Environment, *Minimum Environmental Criteria on Diapers*, 2015.
64. Ministry of Environment, *Ministerial Decree* no. 16/2015.
65. Ministry of Environment, *Minimum Environmental Criteria on Work Shoes and Leatherware*, 2018.
66. Ministry of Environment, *Ministerial Decree* no. 125/2018.
67. Ministry of Environment, *Minimum Environmental Criteria on Paper*, 2013.
68. Ministry of Environment, *Ministerial Decree* no. 102/2013.

PRODUCT CATEGORY	NORMATIVE FRAMEWORK
Ink Cartridges	CAM ⁶⁹ approved by DM 261/2019 ⁷⁰ Explanatory document: Circolare esplicativa (2019) ⁷¹
Public Works	CAM ⁷² approved by DM 259/2017 ⁷³
Street Lighting (maintenance and management)	CAM ⁷⁴ approved by DM 244/2017 ⁷⁵
Street Lighting (Service)	CAM ⁷⁶ approved by DM 98/2018 ⁷⁷
Indoor Lighting, Heating and Air Conditioning	CAM ⁷⁸ approved by DM 74/2012 ⁷⁹
Cleaning Services and Rental and Cleaning of Linen	CAM ⁸⁰ approved by DM 2/2021 ⁸¹
Urban Waste	CAM ⁸² approved by DM 58/2014 ⁸³

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69. Ministry of Environment, *Minimum Environmental Criteria on Ink Cartridges*, 2013.
70. Ministry of Environment, *Ministerial Decree* no. 261/2019.
71. Ministry of Environment, *Explanatory Circular on CAM Ink Cartridges*, 2019.
72. Ministry of Environment, *Minimum Environmental Criteria on Public works*, 2017.
73. Ministry of Environment, *Ministerial Decree* no. 259/2017.
74. Ministry of Environment, *Minimum Environmental Criteria on Street Lighting (maintenance and management)*, 2022.
75. Ministry of Environment, *Ministerial Decree* no. 244/2022.
76. Ministry of Environment, *Minimum Environmental Criteria on Street Lightning (service)*, 2017.
77. Ministry of Environment, *Ministerial Decree* no. 244/2017.
78. Ministry of Environment, *Minimum Environmental Criteria on Indoor Lighting, Heating and Air Conditioning*, 2022.
79. Ministry of Environment, *Ministerial Decree* no. 74/2022.
80. Ministry of Environment, *Minimum Environmental Criteria on Cleaning Services and Rental and Cleaning of Linen*, 2022.
81. Ministry of Environment, *Ministerial Decree* no. 251/2022.
82. Ministry of Environment, *Minimum Environmental Criteria on Urban Waste*, 2014.
83. Ministry of Environment, *Ministerial Decree* no. 58/2014.

PRODUCT CATEGORY	NORMATIVE FRAMEWORK
Food and Catering	CAM approved by DM n. 65/2020, ⁸⁴ in G.U. n. 90 del 4 aprile 2020) ⁸⁵ Supporting document: Relazione di accompagnamento ⁸⁶
Hospital Sanitization	CAM ⁸⁷ approved by DM 51/2021 ⁸⁸ Corrective Decree no. 24 September 2021 MITE, modified the DM of the Ministry of the Environment on "Criteri ambientali minimi per l'affidamento del servizio di pulizia e sanificazione di edifici e ambienti ad uso civile, sanitario e per i prodotti detergenti." Published in G.U.R.I. n. 236 del 2 ottobre 2021 ⁸⁹
Printers	CAM approved by DM 261/2019 ⁹⁰
Textiles	CAM, ⁹¹ including protective masks and personal protective equipment approved by DM 30 giugno 2021, in G.U.R.I. n. 167 del 14 luglio 2021 ⁹²
Vehicles	CAM ⁹³ approved by DM 157/2021 ⁹⁴
Green Spaces	CAM approved by DM n. 63 del 10 marzo 2020, in G.U. n. 90 del 4 aprile 2020 ⁹⁵

84. Ministry of Environment, *Minimum Environmental Criteria on Food and Catering*, 2020.

85. Ministry of Environment, *Ministerial Decree* no. 65/2020.

86. Ministry of Environment, *Accompanying Relation*, 2020.

87. Ministry of Environment, *Minimum Environmental Criteria on Hospitals Sanitization*, 2021.

88. Ministry of Environment, *Ministerial Decree* no. 51/2021.

89. Ministry of Environment, *Minimum Environmental Criteria for the Contracting of Cleaning and Sanitizing Services in Buildings and Environments for Civil and Sanitary Use and for Cleaning Products*, 2021.

90. Ministry of Environment, *Ministerial Decree* no. 261/2019.

91. Ministry of Environment, *Minimum Environmental Criteria on Textiles Including Protective Masks and Personal Protective Equipment*, 2021.

92. Ministry of Environment, *Ministerial Decree* no. 167/2021.

93. Ministry of Environment, *Minimum Environmental Criteria for Vehicles*, 2021.

94. Ministry of Environment, *Ministerial Decree* no. 157/2021.

95. Ministry of Environment, *Ministerial Decree* no. 63/2020.

Green Public Procurement in Italy: An Empirical Study

INTERVIEWS REPORT ON GREEN PUBLIC PROCUREMENT

After analyzing the Italian legal framework on public contracts and the core developments in the field of green public procurement (GPP), a qualitative research method based on semi-structured interviews was adopted. The rationale behind the choice to conduct interviews was to better grasp the practical application of GPP in a field under current consolidation. Indeed, the aim was to identify practices by public procurement actors, key advantages and disadvantages, actual and potential barriers, since it is useful to explore the effective (or ineffective) application and interpretation of legal provisions and policies on GPP. In the Italian legal context, one of the core developments was the recent adoption of mandatory minimum environmental criteria (CAMs) under the *Public Contracts Code*. CAMs constitute advanced technical requirements and powerful guidance tools for contracting authorities to shape their tender procedures in the direction of sustainable development. Notwithstanding their potential for transformation, conducting empirical research through qualitative research helps to shed light on possible barriers faced by procurement authorities in practice which may hinder their effective application. Qualitative data of this kind can, indeed, help to better understand and improve the current legislation for better implementation and better future results.

Methodology

A series of semi-structured interviews (eight in total) was employed as a qualitative research method to achieve an in-depth understanding of social phenomena and their subjective motivations, focusing on small selected samples rather than large probabilistic ones. The semi-structured nature of the interviews, based on a list of questions forming the “interview guide,” allowed for flexibility, leaving the interviewee a great deal of leeway in how to reply. A flexible approach especially allowed us to focus on interviewees’ views in explaining and understanding phenomena and patterns of GPP

development. As pointed out by Mazmanian et al.,⁹⁶ such an approach leads to “open-ended conversations covering a broad and evolving set of questions,” where the interview often takes its lead from participants following through their elaborations and digressions. Furthermore, such interviews are dynamic in nature, evolving as the research progresses, meaning that, most often, “interesting themes” that emerge in early interviews are introduced into later interviews.⁹⁷

The interviews were mainly conducted online (80%), and a few of them in person (20%), and lasted approximately one hour.

Participant selection and profile

A sample of eight targeted contracting authorities was selected at different governance levels to ensure as wide a variety of subjects as possible from national contracting bodies, regional agencies, provinces and municipalities. The interviewees were public officers in charge of public procurement of goods and services administrations, education and training, and green public procurement units. Half of the interviewees expressed their interest and involvement in GPP: they either work in the specific field of GPP application or training, some are part of specific working groups set up by the Ministry of the Environment and the NAP-GPP Management Committee to design CAMs, others are part of national and European networks on GPP and ethical public procurement.

An overview of the interviewees' profile and their entities is provided:

National level

- **CONSIP S.p.a.:**⁹⁸ among 32 qualified central purchasing entities, Consip is considered the most relevant at national level,⁹⁹ acting as

96. Mellisa Mazmanian, Wanda J. Orlikowski and JoAnne Yates, “The Autonomy Paradox: The Implications of Mobile Email Devices for Knowledge Professionals,” *Organization Science*, vol. 24, no. 5, p. 1337–1357, <<https://doi.org/10.1287/orsc.1120.0806>>.

97. Alan Bryman, *Social Research Methods* (5th ed.), Oxford University Press, 2016.

98. CONSIP Spa, *National central purchasing body*, n.d., <<https://www.consip.it/>>.

99. CONSIP signed 703,854 public contracts for goods, works and services for a value of €14 billion in 2021, leading the “Rationalization Program of Public Administration Procurement” with the Ministry of Economy and Finance. Valentina Guerrieri, “Centralization and Sustainability: CONSIP and other central purchasing bodies,” in L. Fiorentino, and A. LaChimia (Eds.), *The Procurement of Public Administrations, between Innovation and Sustainability*, Astrid, 2021.

the national central purchasing body for serial supplies and services through framework agreements.¹⁰⁰ The relevance of Consip is also outlined by an evident process of centralization in public procurement in Italy. The *Public Contracts Code* stipulates that contracting authorities must have specific qualifications to manage award procedures for public contracts above a specific threshold, otherwise they must award public contracts through CONSIP or other regional or central purchasing bodies, or in a group with other contracting authorities having the required qualifications.

The interviewee: Manager from the Department of Planning and Operational Support– Framework Agreements and Standard Bidding Documents

Regional level

- **SCR Piemonte S.p.a:**¹⁰¹ Regional central purchasing body of the Piemonte region, one of the 20 Italian regions

The interviewee: Officer from the Procurement Management and Innovative Procurement Office

- **Ente di supporto tecnico amministrativo regionale (ESTAR):**¹⁰² Regional agency supporting and managing healthcare procurement in the Toscana region

The interviewee: Director of the Public Procurement of Goods and Services Department

- **Agenzia Regionale Protezione Ambientale (ARPA) Toscana:**¹⁰³ Regional agency of environmental protection, Toscana region

The interviewee: Officer from the Public Procurement of Goods and Services Office; Member of the European Working Group for Ethical Public Procurement

100. Fabio Lenzi, 2021, "Reflections on the Experience of Central Purchasing Bodies (2015-2019)," in Luigi Fiorentino and Annamaria LaChimia (Eds.), *The Procurement of Public Administrations, between Innovation and Sustainability*, Astrid, 2021, chapter 5.

101. SCR Piemonte Spa, *Regional Central Purchasing Body*, n.d., <<https://www.scr.piemonte.it/>>.

102. ESTAR, *Regional Entity of Technical and Administrative Support*, n.d., <<https://www.estar.toscana.it/>>.

103. ARPAT, *Environmental Regional Agency of Tuscany*, n.d., <<https://www.arpat.toscana.it/>>.

- **Agenzia Regionale Protezione Ambientale (ARPA) Piemonte:**¹⁰⁴ Regional agency of environmental protection, Piemonte region
The interviewee: Officer from the Environmental Protection Education and Promotion Department
- **Agenzia Regionale Protezione Ambientale (ARPA) Emilia Romagna:**¹⁰⁵ Regional agency of environmental protection, Emilia Romagna region
The interviewee: Officer from the General Directorate of Quality Services, Ecomanagement and Training, Manager of sustainability instruments and green public procurement

Local level

- **Provincia Autonoma di Trento, Agenzia Provinciale per la Protezione dell'Ambiente:**¹⁰⁶ one of the 103 Italian provinces
The interviewee: Officer from the Department of Environmental Information, Training, Education and the 2030 Agenda
- **Città metropolitana di Torino:**¹⁰⁷ one of the 14 metropolitan areas in Italy
The interviewees: Officer from the Procurement Strategy, Public Procurement of Goods and Services Office; Officer from the Education, Training and Green Public Procurement Office

Research method limits

The intrinsic limits of the research method amount to risks of poor generalization and reproducibility of the study in different settings, affecting its reliability and replicability. In particular, inherent limits of generalization may arise from sampling cases, selecting organizations and conducting interviews, since it is difficult to generalize findings to other settings because of contextual factors and the uniqueness of interview models, despite following a semi-standardized procedure. In particular, the selection of

104. ARPA, *Regional Agency for Environmental Protection*, n.d., <<https://www.arpa.piemonte.it/>>.

105. ARPAE, *Environmental Regional Agency of Emilia Romagna*, n.d., <<https://www.arpae.it/it/arpae>>.

106. APPA, *Autonomy Province of Trento, Provincial Agency for the Protection of the Environment*, n.d., <<https://www.appa.provincia.tn.it/>>.

107. Torino Metropoli, *Metropolitan City of Torino*, n.d., <<http://www.cittametropolitana.torino.it/cms/>>.

targeted subjects from organizations sensitive to environmental protection, such as environmental regional agencies, and from departments interested in the application of GPP can produce skewed results. The risk of a biased approach may hinder the quality of the research, especially in terms of reliability and external validity, namely the possibility of generalizing the results of the study beyond the specific research context. Nonetheless, Williams¹⁰⁸ (2000) suggests that such method can produce “moderatum generalizations,” where aspects of the focus of inquiry “can be seen to be instances of a broader set of recognizable features.” Raising awareness of the core limitations of the study is necessary. Although the interview results provide a narrow picture of the GPP uptake at the national level, they make it possible to systematize seminal insights on GPP trends and to collect voices and understand practices from single organizations which are the real recipients of GPP duties and CAMs application.¹⁰⁹

Structure and interview guide

The semi-structured interviews were conducted conversationally with one respondent at a time, using pre-designed questions and employing a blend of closed and open-ended questions, often accompanied by follow-up why or how questions. The interview guide was designed based on seven core sections with the following purposes: to disentangle the interviewed subject and entity's profile (1), to identify the type of procurement by the organization (2), and the approach, strategies, policies on GPP adopted by the specific entity (3). A specific section of questions is devoted to exploring the practical application of environmental considerations in public contracts related to CAMs implementation applying to 18 procurement categories, with a focus on the implementation of mandatory technical specifications and contract clauses and voluntary awarding and selection criteria; furthermore, to expand the approach beyond CAM categories, the questions also focus on investigating the use of (non-mandatory) GPP provisions for purchasing categories falling outside CAMs (4). A further section regards monitoring mechanisms and evaluation of the environmental purchasing policies by the specific entity (5) and the use of energy performance contracting (6). Finally, a space for personal considerations and recommendations is provided, questioning the perceived level of importance

108. Malcolm Williams, “Interpretivism and Generalisation,” *Sociology*, vol. 34, no. 2, 2000, p. 209-224, JSTOR, <<http://www.jstor.org/stable/42858032>>.

109. Gilles Pinson and Valérie Sala Pala, “Peut-on vraiment se passer de l'entretien en sociologie de l'action publique ?,” *Revue française de science politique*, vol. 57, no. 5, 2007, p. 555-597.

given to GPP within the specific entity, the existence of actual and potential barriers to GPP and the core incentives to such policies that could be helpful to promote more GPP at the internal and national levels (7).

The table below illustrates the related objective and specific questions for each section.

T1: Interview questions

SECTION	OBJECTIVE	QUESTIONS
1. Profile of the interviewed subject and entity	Understanding the interviewee's job position and background	<ul style="list-style-type: none"> • Could you briefly introduce me to the organization where you work? • Could you give me details about the position you hold? • What was your academic background prior to beginning your career?
2. Procurement by the purchaser	Understanding what types of contracts and procurement procedures are regularly adopted by the contracting authority	<ul style="list-style-type: none"> • Could you briefly explain to me what type of contracts are awarded by your organization? Goods, works, services contracts? • Do you have an approximate estimate of the percentage of contracts signed each year? • What type of procurement procedures are regularly adopted by your organization?
3. GPP policies, strategies, projects	Understanding whether policies, strategies, trainings on GPP are adopted by the organization and what they are in particular	<ul style="list-style-type: none"> • Has your organization adopted specific policies or strategies on GPP, particularly after the adoption of the National Action Plan on Green Public Procurement (2008) and the introduction of CAMs as mandatory for all contracting authorities? • If so, can you describe in what such policies consist (content, structure and how often they are updated)? • Do you have any examples of relevant GPP initiatives or projects? • Does your organization provide training programs on GPP to employees?

SECTION	OBJECTIVE	QUESTIONS
4. GPP in practice (general environmental considerations + CAMs application)	Understanding how environmental considerations are or are not integrated into the organization's contracts in practice	<ul style="list-style-type: none"> • How are environmental considerations generally integrated into your public contracts? At what stage of the procurement cycle (procurement planning and strategy, subject matter of the contract definition, technical specifications, selection of candidates, contract award, performance of the contract)? • How are CAMs implemented, based on Article 34 of the <i>Public Contracts Code</i> on energy and environmental sustainability criteria? <ul style="list-style-type: none"> – Based on Article 34.1, does your organization contribute to the achievement of the environmental objectives set by the NAP GPP in procurement design and tender documentation through at least technical specifications and contractual clauses contained in the CAMs? – Are voluntary award criteria outlined in CAMs also taken into account when adopting the most economically advantageous tender criterion?
5. Monitoring and evaluation of the environmental purchasing policy	Understanding how public buyers assess the practical application of green purchasing policies	<ul style="list-style-type: none"> • Does your organization adopt specific monitoring and evaluation systems for green purchasing policies? What kind of methods and criteria are adopted?
6. Energy performance contracting	Understanding whether the entity adopts innovative contracts for energy efficiency such as energy performance contracts	<ul style="list-style-type: none"> • Does your organization have experience with the use of energy performance contracts?

(to be cont'd)

T1: Interview questions (*cont'd*)

SECTION	OBJECTIVE	QUESTIONS
7. Personal conclusions and opinions	Understanding how public buyers assess the practical application of green purchasing policies	<ul style="list-style-type: none"> • How would you assess the level of importance given to GPP in your organization? • In your opinion, what are the main obstacles to the effective implementation of GPP policies? • Do you have any suggestions and ideas about possible ways and initiatives to encourage GPP at your organization and at the national level in general?

Results and analysis

The interviewees' responses were analyzed by adopting a combined deductive and inductive method to extract analytical results on the level of appropriation of the GPP legal framework by public buyers.

Deductive analysis

Conducting a deductive analysis means deriving results following the core themes as they appear throughout the interview guide, adopting a top-down approach. The focus was on the following themes:

- Procurement by the public purchaser
- Green public procurement policy and strategies
- Green public procurement in practice
- Monitoring and evaluation
- Energy performance contracting
- Barriers to green public procurement
- Incentives

Regarding the **procurement by the public purchaser** (1), it emerged that most of the interviewees were employed in offices and departments dealing with goods and services procurement. Regarding the preferred procurement procedures, most contracting authorities employ open procedures and negotiated procedures and adopt the MEAT as the primary award criterion. Furthermore, the evidence of a process of increased centralization results from the fact that half of the organizations rely on

central purchasing bodies' framework agreements for many purchasing categories falling under CAMs.

Related to **green public procurement policy and strategies** (2), the interviews showed that the majority of entities (6) adopted at least a strategy and policy on GPP, particularly since the adoption of the National Action Plan on GPP (2008). Another aspect to highlight is the fact that different organizations, especially regional environmental agencies, set up internal minimum environmental criteria before 2008. For instance, the earliest was adopted by ARPA Piemonte in 2004. This portrays a gradual bottom-up process towards the development of sustainability criteria for procurement categories.

In terms of **green public procurement in practice** (3), it emerged that, overall, entities tend to comply with CAMs applying mandatory technical specifications and contract clauses in their tenders, although they face obstacles and difficulties in some instances, particularly when there is lack of suppliers meeting the specific requirements. Nonetheless, the efforts towards the application of voluntary award criteria recommended under CAMs results are still marginal. Interviewees pointed out that, in case of purchasing categories that fall outside CAMs, developments and efforts in adopting environmental considerations are even more limited. Examples regard specific tenders where the public buyer requires, for instance, eco-labels or sustainable management systems certifications (e.g. EMAS).

Under **monitoring and evaluation of the environmental purchasing policies** (4), it is important to point out that an official national monitoring system has not yet been set up by the National Anti-Corruption Agency (ANAC). Critical legal uncertainty due to lack of official national monitoring and supervision on the application of Article 34 is fostered, since the *Public Contracts Code* explicitly provides for it under Article 213.9. Therefore, official data collection and a database on GPP and CAMs' application is missing, although the intent is to promote it in the future. However, different annual surveys that evaluate the implementation of GPP at the national, regional and local levels can be mentioned. Among others, the GPP Observatory Survey under the CreiamoPA annual monitoring project is led by Legambiente and EcoSistemi.¹¹⁰ Regarding internal monitoring systems, some interviewed contracting agencies confirmed that there were internal monitoring systems in place, but not all of them. Indeed, the most structured

110. Observatory on Green Public Procurement, "The Numbers of Green Public Procurement in Italy," 2021, <<https://www.appaltiverdi.net/risultati-del-monitoraggio-civico-2021/>>.

organizations, such as CONSIP and the regional environmental agencies, have internal mechanisms, especially for tracking the annual application of CAMs out of the total purchasing expenditure to better clarify the internal impact and effective implementation of CAMs.

Responses on the **use of energy performance contracting** (5) as an innovative contracting method for energy saving, showed that its use is quite limited but under current development, having been adopted by three entities out of eight so far.

Concerning key **barriers to GPP** (6) that emerged during the interviews, core factors that were most often mentioned are the lack of technical expertise, training and capacity building of single organizations. Indeed, most mentioned the lack of specific skills and limited personnel and resources for the application of highly technical and detailed requirements from an environmental science point of view. Furthermore, monitoring and verification challenges were outlined, since CAMs require additional burden, time and costs for public authorities. For instance, GPP processes are often seen to be more costly in terms of complexity, also considering that not all entities are transitioning to a more extensive use of life-cycle costing (LCC) analysis for evaluating the long-term costs of externalities. Moreover, in terms of compliance with CAMs, another potential obstacle is the response of the market, which may be slow in certain sectors where economic operators are still behind in aligning with CAMs requirements or are lacking adequate means of proof and certifications to prove the respect of sustainability standards. Thus, the market is often not engaged enough and not ready to respond to CAMs requirements. The risk is that contracting authorities might have to make the tricky choice to buy without CAMs and so not comply with Article 34 or not to buy what they need. An interesting aspect pointed out by different interviewees is that it is essential not to reduce green procurement to CAMs application. Indeed, CAMs categories may constitute a limited portion of contracting authorities' purchasing considering the total spending of the different agencies. For instance, specialized agencies like the regional environmental agencies pointed out that, from the internal monitoring system on the application of CAMs, it has emerged that CAMs purchasing is quite limited out of the total procurement expenditure, since the highest volume of direct purchasing is linked to technical machinery and laboratory equipment that fall outside CAMs. The same is applicable to the healthcare system when purchasing highly technical diagnostic, electronic or complex surgical medical equipment, as pointed out by the regional agency supporting and managing healthcare procurement in the Toscana region. Such obstacles risk perpetuating a sectorial approach rather than a more comprehensive method for public

agencies. Indeed, different interviewees suggested streamlining a mandatory method—for instance setting up a mandatory environmental and social impact assessment—rather than setting specific requirements, enhancing a GPP process rather than taking a result and a sectorial approach.

Finally, concerning the main **incentives to GPP** (7), the interviewees pointed out the benefits of simplification provided by CAMs, which constitute an accessible and direct instrument available to the public authority for streamlining the application of GPP. The importance of CAMs' binding nature was highlighted as more effective than mere voluntary mechanisms to incentivize widespread implementation. Most interviewees pointed out the importance of expanding CAMs categories and their mandatory application. Suggested incentives also included increasing dialogue with the market for the mutual growth of both the public authority and the market. Moreover, from a capacity building perspective, different entities pointed out the crucial importance of having an internal organization to mainstream GPP application providing general and specialized training. Also, having specialized departments or working groups on GPP and fostering synergy between technical and administrative staff could be beneficial for the organization. As one interviewee outlined, sustainability raises several risks of complexity to which organizations need to adapt, to be more reactive in order to have control in the application of sustainable public procurement, avoiding legal risks. Furthermore, as a lesson learned, the importance of increasing LCC application emerged, highlighting in particular the need for a long-term vision by organizational management and the market. Finally, increasing audit and *ex-post* monitoring, not for sanctioning but for mutual growth, is a crucial step.

Inductive analysis

Inductive analysis implies focusing on every theme appearing in the interview through a bottom-up analysis. Core elements that emerged and that complement the deductive analysis include the need for a paradigm shift in consumption and production behaviour for both public buyers and suppliers, together with the importance of quantifying social value, although efforts to mainstream life cycle costing (LCC) still seem slow. Sustainability is, indeed, a complex process that must be rooted within the organization, taking into account costs and risks that require organizational restructuring and increased synergy. Many interviewees shed light on the importance of managers being aware of and inspired by the GPP mission. A further crucial aspect is the importance of closely involving the market, and increasing

dialogue in a dynamic process of mutual improvement between suppliers and buyers with a view to improve sustainability.

Focusing on CAMs, another emerging theme is the dynamic and evolutionary nature of minimum environmental requirements. Indeed, before adoption of CAMs, different organizations had started to develop internal minimum environmental criteria that partially inspired CAMs adoption, fostering an evolutionary process led by proactive contracting agencies. The evolutionary process is also fed by CAMs, which have inspired in some organizations a process towards the internal creation of additional criteria in categories that are different from CAMs categories. As evidenced in the deductive analysis, most interviewees pointed out the importance of a binding approach in the Italian legal system. Nonetheless, CAMs constitute only a small percentage of purchasing in some entities, raising questions of the real effectiveness of a sectorial approach. Some interviewees raised the point that CAMs were created with a top-down approach led by the Ministry of the Environment without taking into consideration the real obstacles of daily application from single public agencies, especially the smaller ones.

Furthermore, despite the fact that CAMs constitute an advanced legislation on GPP in the EU legal context, a crucial challenge to be addressed is the difficulty of monitoring, requiring increased allocation of resources and obligations of audit, not only *ex-ante* but also *ex-post* contract execution, outlining the importance of considering the particular role of *Responsabile Unico del Procedimento* (RUP) provided by the *Public Contracts Code*.

Concerning a different aspect, some interviewees also reflected on the effectiveness of framework agreements which include CAMs. Framework agreements are increasingly being used as provided by law, and they can be a helpful tool to streamline CAMs application in public contracts in specific categories. The role of central purchasing bodies and framework agreements is therefore recognized as crucial in supporting the implementation of CAMs, especially in the case of small contracting agencies and municipalities. Nonetheless, a potential risk is to foster too standardized an approach and a copy-paste exercise without the creation of a real impact and transformation within the organization.

To conclude, some interviewees also pointed out importance of the National Recovery Plan (PNRR)¹¹¹ part of the *Next Generation EU* in pushing

111. Recovery and Resilience Facility (RRF) has a duration of six years (2021-2026) for €672.5 billion. See Italia Domani, "Italia Domani, the National Recovery and Resilience Plan," Italia Domani, n.d., <<https://www.italiadomani.gov.it/en/home.html>>.

forward the GPP process. The relevance of GPP was highlighted under the Green Revolution and Ecological Transition mission,¹¹² envisaging reforms to rationalize public contracts regulations and to streamline CAMs¹¹³ implementation. Indeed, the Ministry of Environment has committed to developing a specific action plan to provide technical support to procuring entities and to expand requirements to new sectors, such as cultural events.¹¹⁴ The PNRR thus has significant potential not only for the overall economy (with a 3.4% increase in GDP expected by 2026) but also for GPP, considering that national and local authorities investing PNRR resources through public procurement procedures have to comply with Article 34 by implementing environmental criteria.

CONCLUSION

The results derived from the combined inductive and deductive analysis make it possible to generalize conclusions on GPP uptake in Italy, bearing in mind the inherent limits of the method adopted and the narrow sample, which may produce biased results. The analysis has helped to better grasp the level of appropriation or non-appropriation of the GPP legal framework from the public buyers' perspective. From the results, it emerged that the adoption of CAMs marked a turning point in the GPP legal framework development, pushing contracting authorities to include minimum sustainability requirements provided by law. The binding nature of the CAMs approach has been crucial in fostering higher appropriation by public buyers in practice. Further, a peculiar mutual evolving process with initial criteria developed internally by single organizations such as the regional environmental agencies and central purchasing bodies have fed a process of higher standardization led by the Ministry of Environment adopting CAMs, after the adoption of the National Action Plan. The fact that some organizations are using environmental criteria under technical specifications and contract clauses for categories outside CAMs shows that CAMs can function as drivers to foster transformation at the internal level. However, challenges and key barriers are still present, hindering transformational change and the paradigm shift needed. Many aspects of the Italian legislative approach may be

112. Of six key missions inspiring the plan, €68.6 billion (31.05%) are allocated to Mission 2. Ministry of the Economy and Finance, "National Plan of Reconstruction and Resilience (PNRR)," 2021.

113. Observatory on Green Public Procurement, "Report: Green public procurement (GPP) in the years of the Reconstruction and Resilience Plan. Green purchasing to promote environmental and social sustainability," 2021.

114. Reform 3.1 specific to the adoption of "CAMs for cultural events."

improved for more effective implementation and for creating higher impact at the environmental level. For instance, ensuring effective monitoring systems and requiring audits are fundamental, promoting more dialogue with the market is fundamental, as is promoting a comprehensive method for sustainable purchasing rather than sectorial requirements alone that may be a mere copy-paste exercise.

Survey Report on Green Public Procurement

Adopting a mixed method research, the qualitative analysis of the semi-structured interviews has been integrated by quantitative findings. A quantitative research approach has been employed, setting up a self-administered questionnaire including a mix of binary, multiple choice and limited open-ended questions, to be disseminated among public authorities and contracting agencies as respondents. The questionnaire purpose has been to complement the qualitative findings acquiring more quantitative data to understand whether they confirm (or not) the interviews' ones¹¹⁵ to capture in a comprehensive way the level of appropriation of GPP in Italy.

METHODOLOGY

A self-administered questionnaire in the form of a Web-survey has been designed on LimeSurvey software platform, which operates by inviting prospective respondents to visit the website and complete the questionnaire online. The survey has been launched in May 2022, and it was kept open until the end of June 2022, counting 28 respondents. The questionnaire has been disseminated massively through professional social media as LinkedIn, mailing lists and professional associations, direct contacts of procurement officers. Respondents' answers have been automatically programmed to download into a database, and the final data have been analyzed extracting statistics from the database and interpreting them. Regarding the main rationale behind such method, the questionnaire has been set up to complement the interviews data on the uptake of GPP at national level in practice. Peculiar advantages justifying the choice to employ a questionnaire are that, in general, they are quicker and cheaper to administer. Especially, when having a sample that is geographically dispersed, it can be sent out through via Web and distributed between a large sample of respondents. Since there

115. Wendy Olsen, *Triangulation in Social Research: Qualitative and Quantitative Methods Can Really Be Mixed*, Developments in Sociology Causeway Press Ltd, 2004.

is no interviewer present, an advantage is the absence of the interviewer's effects, indeed various studies have demonstrated that characteristics of interviewers (and respondents) may affect the answers that people give.¹¹⁶ Furthermore, questionnaires do not suffer from the problem of interviewers' variability, namely effects of asking questions in a different order or in different ways. They are, also, more convenient for respondents because they can be completed when they want and at the speed they want.

Limits

The main limits of the questionnaire as research method, in comparison to others as the semi-structured interviews, regard measurement, causality, generalization and replication challenges. Given the fairly low number of respondents (28) at national level, core limits of the study are envisaged in terms of low level of statistical relevance and poor possibility to generalize the results of the study. One of the most damaging limitation of surveys is that if the response rate is low, it is likely that the risk bias in the findings will be higher. The results may, thus, appear skewed. For instance, some respondents (30%) have indicated that they work as environmental and sustainability experts or that they come from Regional Environmental Agencies (20%). Therefore, some results may be biased given that a consistent group of respondents are highly interested in the protection of the environment and green procurement, risking to offer a skewed picture of the opinion of procurement officers at national level, which would require to collect additional data.

Further methodological challenges are fostered by peculiar disadvantages of surveys in comparison to other methods. For instance, differently from interviews, questionnaires cannot prompt, meaning that there is no one present to help and guide respondents if they are having difficulty in answering a question. Thus, there is a greater risk of missing data due to partially answered questionnaires, due to a lack of promoting or supervision in comparison to interviews. It is also easier for respondents actively to decide not to answer a question when on their own than then being asked by an interviewer. If questions are not answered this creates a problem of missing for the questionnaire's variables. Furthermore, surveys cannot

116. Alan Bryman, *Social Research Methods* (5th ed.), Oxford University Press, 2016, p. 240.

probe, namely there is no opportunity to probe respondents to elaborate an answer and to collect additional data, indeed open-ended questions are usually limited.

Nonetheless, always bearing in mind the aforementioned limitations, the study provides an experimental springboard to assess quantitatively and qualitatively the level of GPP uptake in Italy, with attention to the legal framework on public contracts, the most recent legal and policy developments including mandatory minimum environmental requirements (CAMs). Regardless of the still embryonal data, the study could be replicated to extract additional results to meet more statistical relevance and for broader generalizability.

SURVEY STRUCTURE

The survey structure envisages 19 questions, divided into 4 sections:

- 1) Public Buyer Profile
- 2) GPP policies, strategies and training
- 3) Application of environmental considerations in procurement planning and procedures
 - Application of CAM
 - Procurement outside CAM
- 4) Obstacles and incentives

The structure of the questions and survey has been inspired by the semi-structured interviews' guide. The decision to include questions distinguishing between ones on CAMs and others on the application outside CAMs has been inspired by the interviews responses, to better grasp a more comprehensive picture on the GPP uptake in Italy. 17 questions are multiple-choice questions and 2 are open-questions. The table T2 provides a snapshot of the survey questions for each section:

T2: Survey questions

SECTION	QUESTIONS
Public buyer profile	<p>1. What is the nature of the public body/contracting authority where you work?</p> <ul style="list-style-type: none">• State• Region and autonomous provinces of Trento and Bolzano• Province• Metropolitan City• Municipality / Union of Municipalities• Mountain communities – Island communities – Other local authorities• Chambers of Commerce, Industry, Crafts and Agriculture• Park authorities• National/regional central purchasing body• Environmental Protection Agency (ARPA, etc.)• Research institutions• Healthcare facilities• Local health authorities (ASL)• University• Publicly owned companies• Other (please specify) <hr/>
	<p>2. How many people work at your institution?</p> <ul style="list-style-type: none">• Less than 100 people• Between 101 and 499 people• More than 500 people
	<p>3. What position do you hold within your institution?</p> <ul style="list-style-type: none">• Official at the procurement office• Engineer• Lawyer• Economist• Environmental Specialist• Legal Expert• Other (please specify) <hr/>

SECTION	QUESTIONS
GPP policies, strategies and training	<p>4. At your organization, what is the level of awareness and interest in GPP?</p> <ul style="list-style-type: none"> • Scarce • Discreet • Middle • Advanced
	<p>5. Does your body adopt green procurement strategies/policies/guidelines? YES/NO (Specify)</p> <p>_____</p>
	<p>6. Does your organization have a Working Group or Department specialized in GPP? YES/NO (Specify)</p> <p>_____</p>
	<p>7. What sources of information on GPP are used to integrate environmental considerations into procurement in your entity? (multiple choice):</p> <ul style="list-style-type: none"> • The availability and use of GPP guidelines and manuals • Specific requirements set out within your institution • Specialized training • The presence of specific strategies, policies and targets on GPP • The availability of external technical assistance • Financing of environmental programs and projects • Other (please specify) <p>_____</p>
Application of environmental considerations in tender planning and procedure	<p>8. In which types of purchases are environmental considerations/criteria included? And how often?</p> <ul style="list-style-type: none"> • Goods: Never, rarely, occasionally, frequently, always • Services: Never, rarely, occasionally, frequently, always • Jobs: Never, rarely, occasionally, frequently, always
	<p>9. What procurement procedures do you think can best integrate environmental considerations (multiple choice)?</p> <ul style="list-style-type: none"> • Direct assignments • Open procedure • Negotiated procedure without notice • Restricted procedure • Competitive dialogue • Innovation Partnership • Dynamic acquisition system • None in particular

(to be cont'd)

T2: Survey questions (*cont'd*)

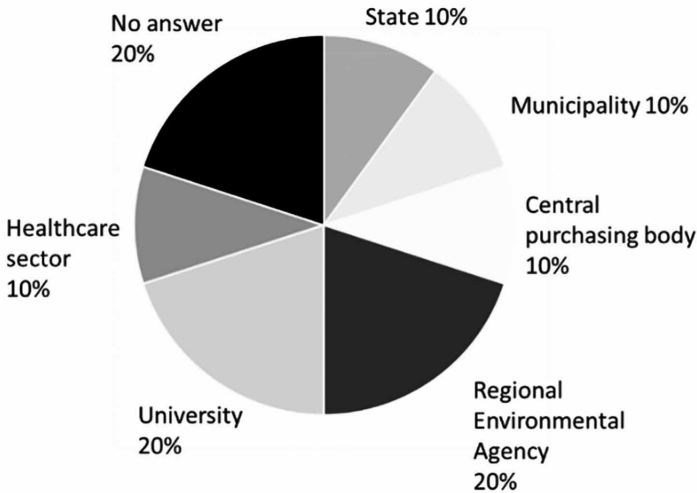
SECTION	QUESTIONS
Application of environmental considerations in tender planning and procedure <i>(cont'd)</i>	<p>10. Is your entity using framework conventions of regional or national central purchasing bodies that include environmental considerations? YES/NO Specify percentage</p> <ul style="list-style-type: none"> • 75-100% • 50-75% • 25-50% • 0-25%
	<p>Application of CAMs:</p> <p>11. On the total of your purchases, what is the percentage of CAM expense?</p> <ul style="list-style-type: none"> • 75-100% • 50-75% • 25-50% • 0-25% <p>12. In relation to the categories for which CAM is mandatory, at what stages are environmental considerations included?</p> <ul style="list-style-type: none"> • Specifications: Never, rarely, occasionally, frequently, always • Selection criteria: Never, rarely, occasionally, frequently, always • Contractual clauses: Never, rarely, occasionally, frequently, always • Award criteria: Never, rarely, occasionally, frequently, always
	<p>Categories outside CAMs:</p> <p>13. In addition to the CAMs categories, does your organization introduce environmental considerations and environmental criteria for product categories outside the CAM? YES/NO. For which categories? (please specify)</p> <hr/> <p>14. In categories outside CAMs, at what stages are environmental considerations included?</p> <ul style="list-style-type: none"> • Specifications: Never, rarely, occasionally, frequently, always • Selection criteria: Never, rarely, occasionally, frequently, always • Contractual clauses: Never, rarely, occasionally, frequently, always • Award criteria: Never, rarely, occasionally, frequently, always

SECTION	QUESTIONS
Application of environmental considerations in tender planning and procedure <i>(cont'd)</i>	<p>15. How are environmental criteria weighed in the choice of the economic operator?</p> <ul style="list-style-type: none"> • 0% • Between 1 and 5% • Between 6 and 10% • Between 11 and 20% • Between 21 and 30% • Between 31 and 40% • Between 41 and 50% • Other (please specify) <hr/> <p>16. Are labels, standards and environmental process certifications required in the technical specifications? YES / NO</p> <p>17. Which award criterion is used most often?</p> <ul style="list-style-type: none"> • Lowest price • Most economically advantageous offer (MEAT)
Obstacles and incentives	<p>18. What are, in your opinion, the biggest obstacles and the main reasons why not to include environmental aspects in tenders?</p> <ul style="list-style-type: none"> • It is complex to include environmental considerations in tenders, difficulties in drawing up call for tender: Never, rarely, occasionally, frequently, always • The inclusion of environmental considerations is difficult to verify: Never, rarely, occasionally, frequently, always • There is a lack of technical experience and training: Never, rarely, occasionally, frequently, always • The purchase cost is higher: Never, rarely, occasionally, frequently, always • Participation in tenders is reduced, lack of companies with the requirements of the CAMs: Never, rarely, occasionally, frequently, always • Requires more burden and time: Never, rarely, occasionally, frequently, always • Increases legal uncertainty: Never, rarely, occasionally, frequently, always • Other (specify additional obstacles) <hr/> <p>19. In your opinion, what could be ways and possible suggestions to encourage green purchases?</p>

THE RESPONDENTS PROFILE

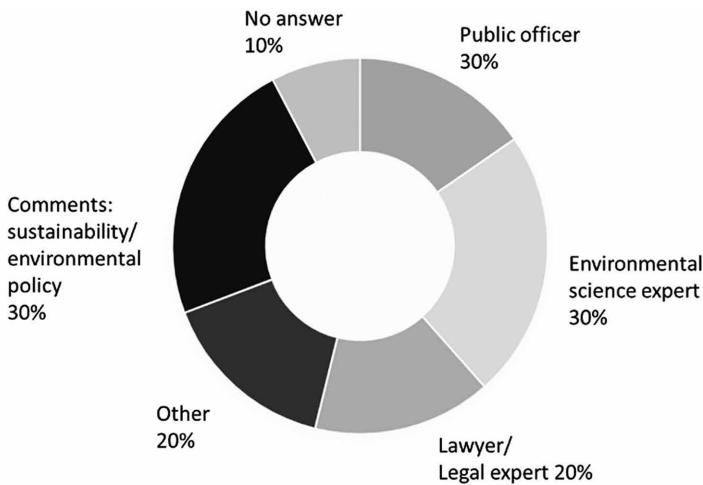
The total number of respondents is 28, with 10 completed answers and 18 incomplete ones received. Regarding the respondents' profile, a variety of public entities have replied to the questionnaire: University procurement offices (20%), Regional Environmental Agencies (20%), State public entities (10%), Municipalities (10%), central purchasing bodies (10%), healthcare sector agencies (10%). The size of the majority of entities, on average, is big, 60% of which has more than 500 employees, while 20% has less than 100 employees and 10% have between 101 and 499 employees.

F8: The respondents' profile no. 1



Source: Survey developed for the Chair of the CPEDD project, 2022.

Regarding the respondents' profile, most of them are public officers (30%), environmental science experts (30%), sustainability and environmental policy experts (30%), lawyers and legal experts (20%) and others (20%).

F9: The respondents' profile no. 2

Source: Survey developed for the Chair of the CPEDD project, 2022.

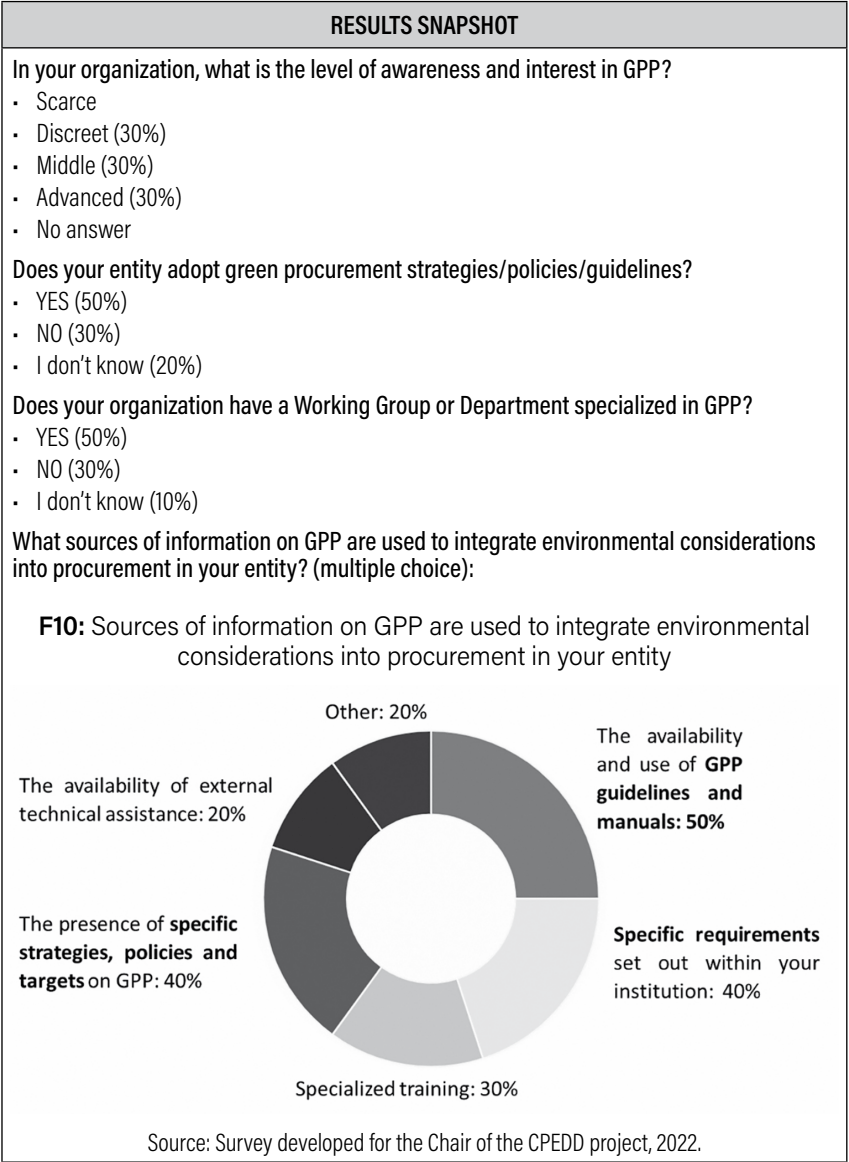
RESULTS AND ANALYSIS

GPP policies, strategies and training

Assessing the general level of policies and strategies on GPP adopted by the Italian contracting authorities, a general trend in the direction of increasing interest on GPP has emerged from the results. On average, the level of awareness of GPP within the respondents' organizations ranges between discreet and advanced (90%), while 0% has indicated to have a scarce level. Furthermore, 50% of respondents have replied that their entities have adopted a green procurement strategy/policy/guideline (whereas, 30% replied "no" and 20% are not aware of the answer). Moreover, 50% of organizations have indicated to have a working group, or a department specialized on GPP.

In terms of sources of information on GPP used to integrate environmental considerations into the public procurement process of an organization, half of the respondents have replied that they mainly rely on GPP guidelines and manuals (50%). A high percentage has selected specific strategies, policies and targets on GPP (40%) and specific requirements set out within their institutions (40%). A slightly lower number has selected specialized training (30%) and availability of external technical assistance (20%).

T3: Results snapshot



Application of environmental considerations

To explore the GPP practical application and the level of implementation, most respondents have outlined that they apply environmental considerations occasionally (25%), frequently (25%) or always (20%). According to the respondents, the procurement procedure that best integrate environmental considerations is the innovation partnership procedure¹¹⁷ and the competitive dialogue.¹¹⁸ Such data is interesting if compared to the interviews results, as most interviewees had highlighted that their entities instead adopt as usual procurement procedure the open procedure and the negotiated one. Furthermore, it has been indicated that the most adopted award criterion is the MEAT (60%), while 20% selected the lowest price. However, during the interviews few organizations, especially smaller ones, pointed out the difficulty in adopting only MEAT and their preference for the lowest price approach.

Furthermore, concerning centralization, most entities (100-75%) have replied that they usually use framework conventions of regional or national central purchasing bodies that include environmental considerations.

Data have been collected differentiating the application of CAMs—related to the 18 purchasing categories for which Ministerial Decrees provide specific mandatory and voluntary requirements—and the application of environmental considerations falling outside CAMs. The results have showed that the percentage of CAMs expense out of the total purchase of entities is, in most cases, below half (the most voted answers are between “0-25%” and “25-50%”) showing that CAMs do not cover in absolute way the procurement by the contracting authorities. While, to the question whether the entity has introduced environmental considerations and environmental criteria for product categories outside CAMs categories, around 50% have replied yes. Among categories added by the respondents there are, for instance: IT services, energy services, healthcare, transport service of lab tests to be analyzed, vending machines, renewable energy sources, waste management services, printed paper.

Referring to art. 34 application, to better understand at what stage environmental considerations are included, most respondents have replied that technical specifications and contractual clauses contained in CAMs are “always” included in bidding documents. Whereas, award criteria which are not mandatory but according to art. 34 wording “shall be taken into account”

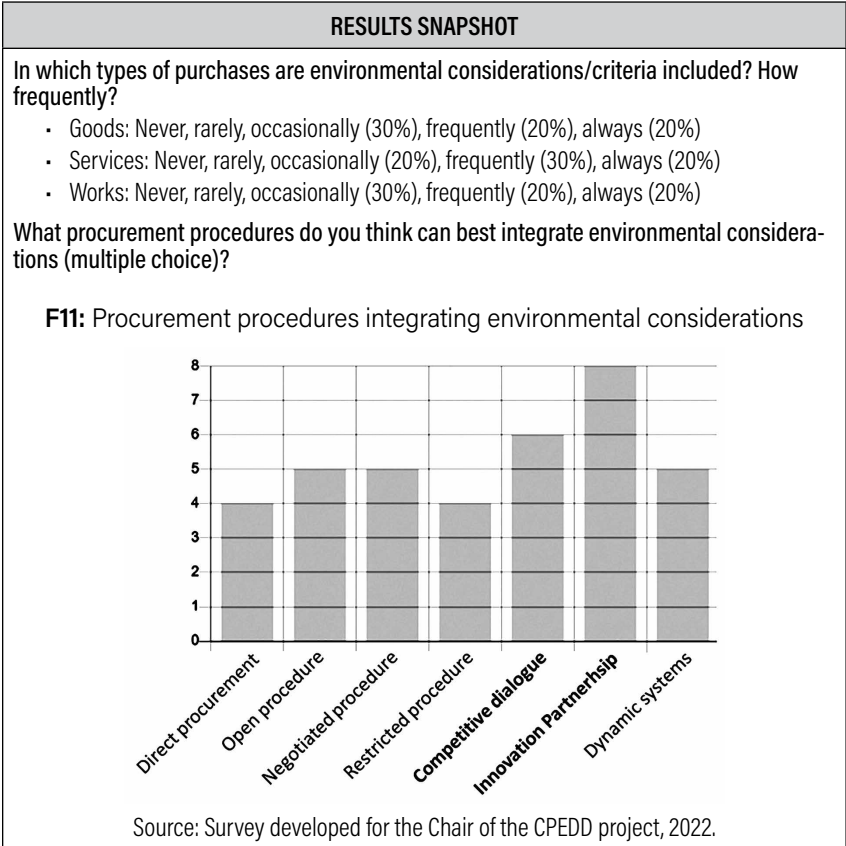
117. *Italian Public Contract Code*, art. 65.

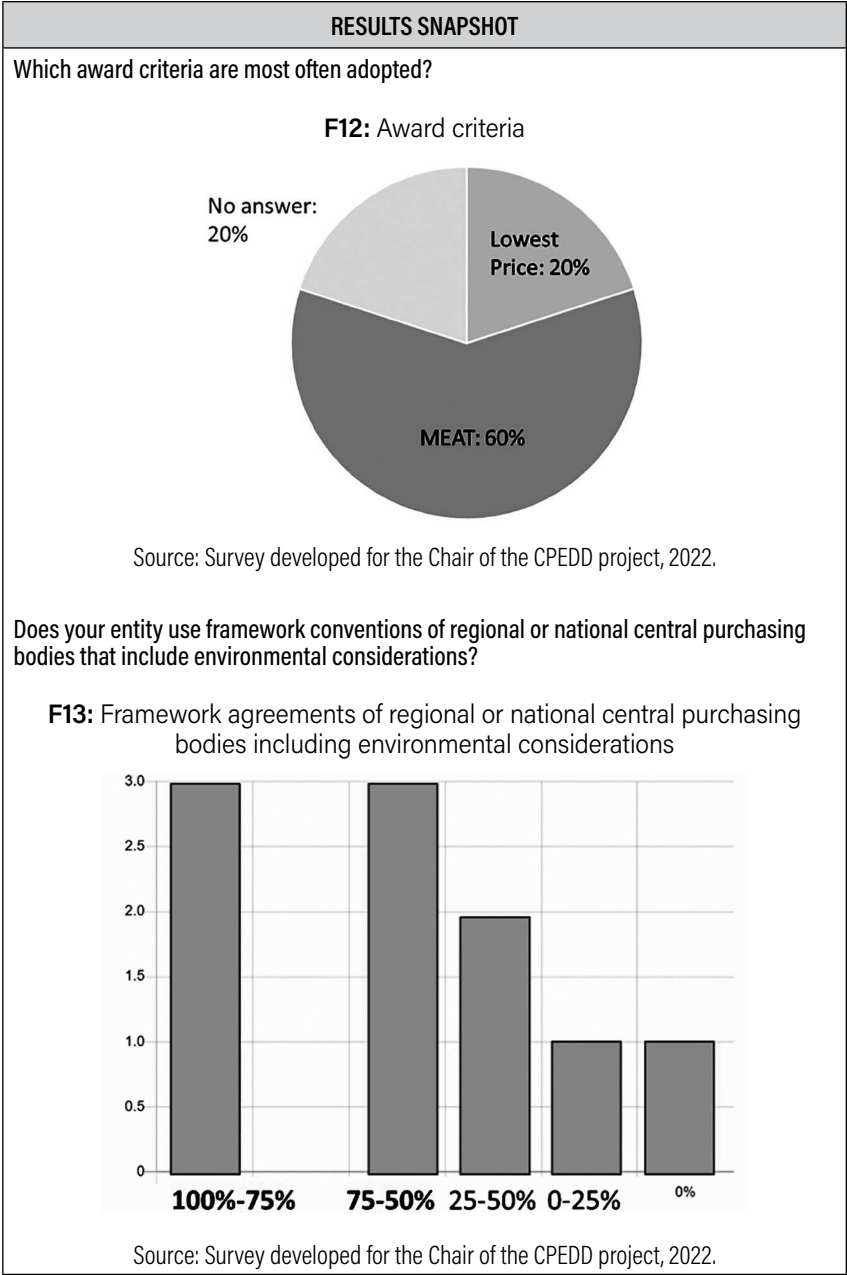
118. *Italian Public Contract Code*, art. 64.

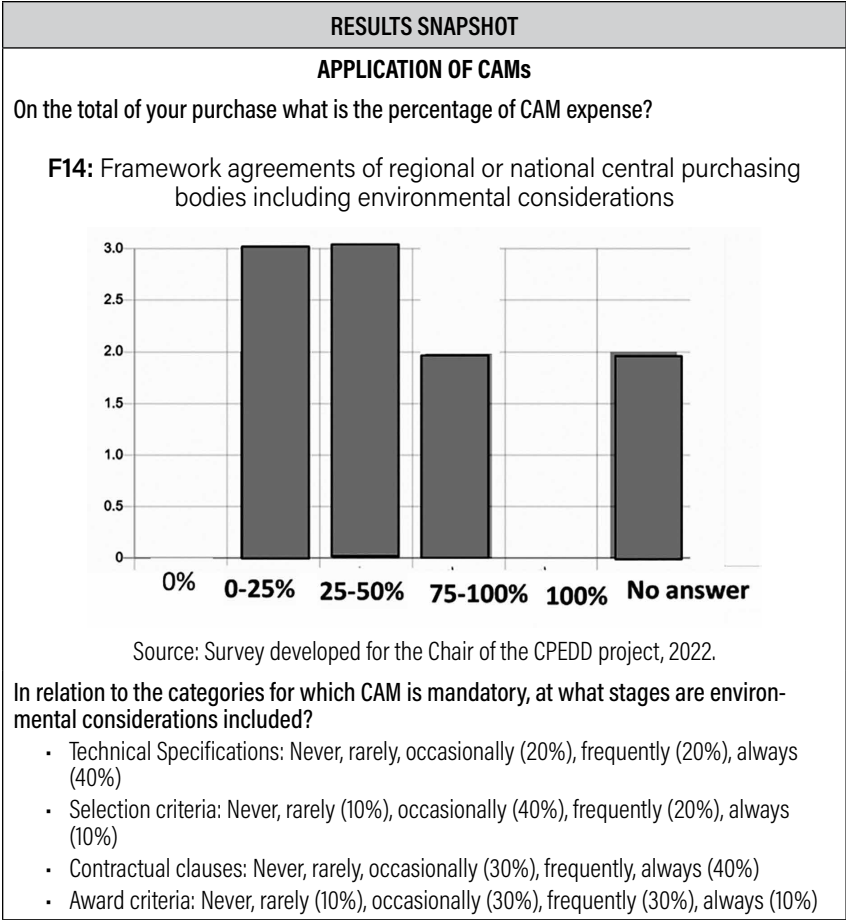
by the public purchaser, are adopted “occasionally” (30%) and “frequently” (30%). Further, selection criteria which are most often included as facultative ones are adopted occasionally (40%). Some discrepancies with the interviews’ results have emerged, especially since the interviewees revealed in a more direct way the difficulties and obstacles faced by the public purchasers to include mandatory technical specifications and contractual clauses. Difficulties in applying them regard particularly certain categories when the market is not very much responsive and suppliers with the required environmental requirements are missing.

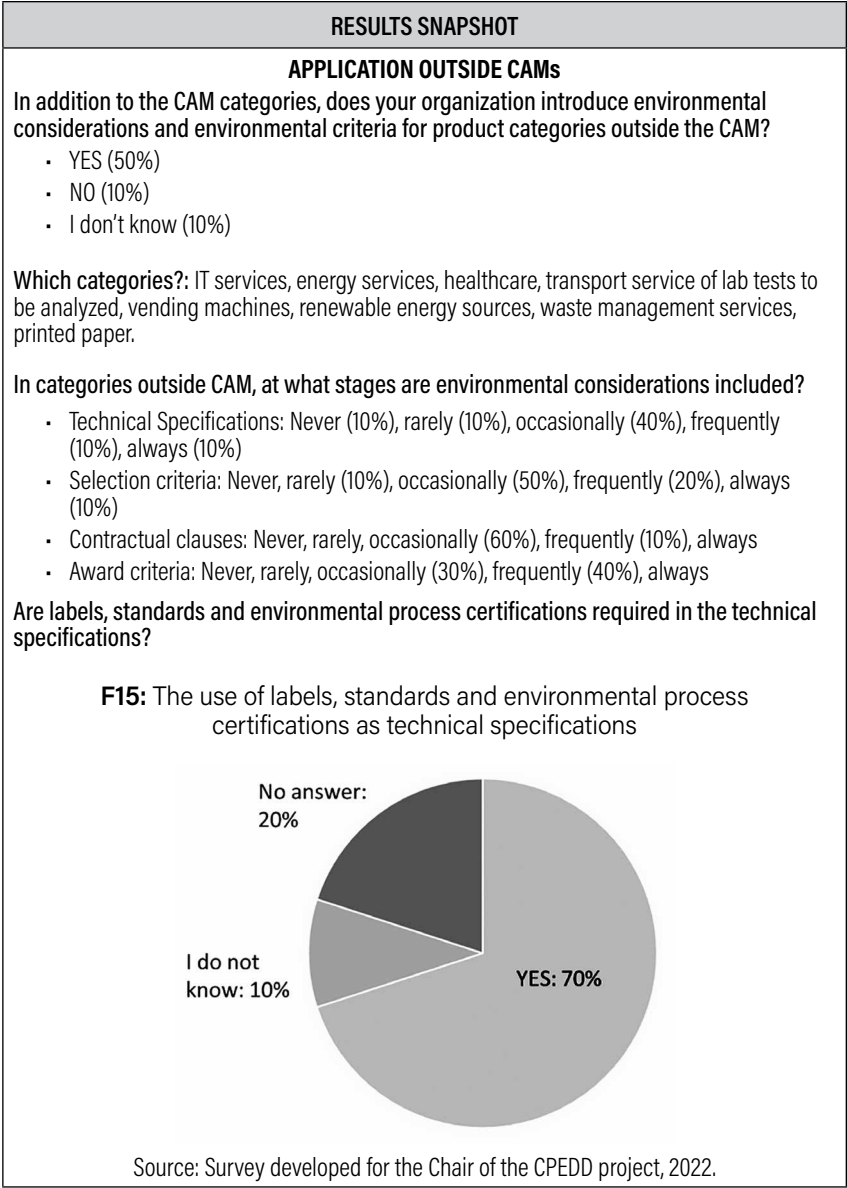
Instead, regarding categories outside CAMs, environmental considerations are included occasionally under technical specifications (40%), contractual clauses (60%), selection criteria (50%), while award criteria linked to MEAT criterion are applied more frequently. Particularly under technical specifications, the majority (70%) requires eco-labels, standards and environmental process and management systems certifications.

T4: Results snapshot









Obstacles and incentives

Reflecting on key obstacles to GPP development, the survey results have shed lights on different factors that may hinder the effective adoption of environmental considerations in tenders, often confirming the interviews' results. Overall, the majority of respondents has considered occasionally complex to include environmental criteria in tenders, especially outlining most challenges during the verification phase and contract execution. Most respondents also agree on the fact that GPP does not increase legal uncertainty. The lack of technical expertise and training has been outlined as one of the core obstacles. Whereas, most respondents have not perceived as problematic the fact that the purchase cost is higher when requiring sustainability criteria. This is a signal of increased awareness and adoption of a life-cycle costing (LCC) analysis in public procurement. Moreover, one of the most important obstacles outlined is the fact that GPP increases burden, costs and time on contracting agencies' shoulders. Linked to this point, a further factor added by the respondents is capacity building, including the importance of resources and expertise allocated to the GPP mission and the existence of management and working groups inspired by green procurement. Further most of respondents agree on the fact that GPP does not increase legal uncertainty.

Some discrepancies with the interviews have emerged in few cases. Differently from the interviews, most entities have focused on the fact that the lack of companies meeting advanced environmental requirements constitutes one of the most important obstacles. Thus, it can be noted that during the interviews most outlined obstacles related to the internal organization of the public authority and its procurement approach to GPP have been questioned more promptly than in the survey responses. The focus has been mainly on suppliers' behavior and organizational setting, pointing out reasons external to the contracting agencies.

Regarding core incentives suggested by the respondents as possible ways to encourage green public purchasing, there are: giving fiscal incentives for both contracting authorities in terms of sustainable purchasing and also for suppliers in terms of more benefits to the companies that adopt environmental certification systems and that strive for technological innovation; giving priority to environmental considerations in the tenders; providing more training for public bodies and suppliers for more technical expertise, especially for the verification phase: both for public buyers and suppliers; sharing good practices and promoting events to award entities that best apply CAMs.

T5: Obstacles and incentives – Results snapshot

RESULTS SNAPSHOT
<p>What are, in your opinion, the biggest obstacles and the main reasons for not including environmental aspects in tenders?</p> <ul style="list-style-type: none">• It is complex to include environmental considerations in tenders: Never (10%), rarely (10%), occasionally (30%), frequently (10%), always (10%)• The inclusion of environmental considerations is difficult to verify: Never (20%), rarely (20%), occasionally (10%), frequently (20%), always (10%)• There is a lack of technical experience and training: Never, rarely (20%), occasionally (20%), frequently (10%), always (10%)• The purchase cost is higher: Never, rarely (30%), occasionally (10%), frequently (20%), always• Participation in tenders is reduced, lack of companies with the requirements of the CAM: Never, rarely (10%), occasionally (20%), frequently (30%), always• Requires more burden and time: Never (10%), rarely (20%), occasionally (10%), frequently, always (20%)• Increases legal uncertainty: Never (10%), rarely (40%), occasionally (20%), frequently, always• Other (specify additional obstacles) ► capacity building <p>In your opinion, what could be ways and possible suggestions to encourage green purchases?</p> <ul style="list-style-type: none">• Fiscal incentives for sustainable purchasing• Provide more incentives and benefits to companies that adopt environmental certification systems and strive for technological innovation• Give priority to environmental considerations in the tenders• Provide more training for public bodies and suppliers for more technical expertise• Training and expertise especially for the verification phase: both for PA and suppliers/contractors/subcontractors• Sharing and promotion: award entities that best apply CAM

Source: Survey developed for the Chair of the CPEDD project, 2022.

CONCLUSION

In conclusion, interesting results have emerged from the questionnaire analysis on the level of appropriation of GPP in public contracts within the Italian legal context. The results have almost totally overlapped with the interviews answers, with few exceptions. The interviews have provided a springboard to test the guidance questions and to inspire the questionnaire structure, especially a different analysis concerning purchasing categories

under CAMs and outside CAMs. Despite the scarce statistic relevance of the responses, the survey has provided an exemplary method that is replicable to other settings to collect a larger number of data for more relevance and generalizability. Although the survey responses have only grasped a narrowed picture at national level due to the low number of respondents, the analysis suggests that the level of GPP appropriation, especially after the adoption of the National Action Plan on GPP and the amendment of art. 34, is under progressive development. Indeed, a high number of respondents have a GPP policy or strategy in place and apply CAMs. However, it must be considered that there are challenges which may create frictions in such progress hindering a faster appropriation of GPP by contracting authorities. Such obstacles, similarly to the interviews results, relate to the lack of expertise and technical knowledge in contracting agencies, especially related to the verification phase, which would require increased training, capacity building and ministerial support to root down GPP at organizational level. Furthermore, it is fundamental to understand the need for a parallel development of the market towards green production, requiring mutual dialogue and participation between buyers and suppliers and more incentives to companies to enhance effective results from the application of environmental considerations. The path towards a paradigm shift for more sustainable production and consumption is long and complex but progressing in the direction of transformational change, nonetheless requiring increased synergy between buyers, suppliers and the legislators.

As concluding remarks on the methodology based on initial contextual analysis on GPP uptake at national level, followed by semi-structured interviews and a questionnaire disseminated at national level, lessons learnt on the methods can be extracted. First of all, the step-by-step order “contextual analysis – interviews – questionnaire” has resulted to be effective to gradually shape and adapt the interviews and survey questions to the specific legal context and to collect realistic results on the practical application and effective impact of the legislation from the contracting authorities’ voice and opinion. At more technical level, lessons learnt relate to advantages of in-person interviews rather than online ones for more open and fluent conversation, the advantages of sharing the interview guidance in advance with interviewees who required it for better preparation and data collection, but keeping it as an approximate benchmark and semi-structured guidance, not fixed, to make the conversation flow as much as possible. In selecting the participants, it has been fundamental to rely on contacts provided by some of the interviewees for contacts interested on GPP and working for the progressive developments of CAMs with advantages from a “snow-ball” effect. For what regard the survey, a mix of multiple-choice questions (the

majority) with some open questions to collect more personal opinions has proved to be effective for a more realistic picture.

Regarding what has not worked, the selection of the sample of participants should have been less narrow and specific, but more randomized, to avoid biased and skewed selection. Concerning the survey, the low rate of survey respondents which was disseminated also among the interviewees may represent the risk to provide a limited picture of the national situation, mainly reinforcing the interviews rather than expand the view. Finally, sending the survey to direct contacts and their networks has resulted to be more effective rather than only disseminate it through mailing lists of professional associations and on social media.

GREEN PUBLIC PROCUREMENT IN THE NETHERLANDS

By **Sophie Prent**, Assistant Professor, Faculty of Law, Vrije Universiteit
of Amsterdam

The Public Procurement Legal System and Green Public Procurement in the Netherlands

This part of the report outlines the legal framework for green public procurement in the Netherlands. It first looks at the general aspects of the Dutch legal system, then discusses the supranational legislation and policies to which the Netherlands is bound in the area of public procurement law and green public procurement. Finally, the Dutch legal framework for public procurement will be discussed in more detail, before turning to green public procurement in the Netherlands. In this context, recent policy developments will be addressed and the current possibilities for contracting authorities to take green considerations into account when awarding a public contract will be discussed.

For the meaning of green public procurement (hereinafter referred to as “GPP”) in this report, the definition given by the European Commission (hereinafter referred to as “EC”) in its communication “Public procurement for a better environment”¹ is followed. It is a so-called process-oriented definition, and it states that GPP can be understood 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.”²

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1. European Union Law, “Public procurement for a better environment,” *Commission of the European Communities*, 2008, <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0400:FIN:EN:PDF>>.
 2. Of course, this report sometimes uses umbrella terms that transcend GPP, such as “sustainable procurement” or “sustainable and responsible procurement” because, as is well known, GPP is part of a broader theme of achieving sustainable and other societal goals through public procurement. Furthermore, in addition to GPP, this report also uses the (abbreviated) terms “green procurement” and “environmentally friendly procurement.” They all mean the same thing. European Union Law,

GENERAL ASPECTS OF THE DUTCH LEGAL FRAMEWORK

Core constitutional rules

Form of state and governance

The Netherlands is a constitutional monarchy, a parliamentary democracy and a decentralized unitary state in which provinces (12) and municipalities (344) have extensive powers in their own internal affairs. Furthermore, there are district water boards (21). District water boards ensure that the quality of surface water is good and that there is not too much or too little water in a particular area. They do this for example by maintaining dikes.³

The Constitution

The first constitution of the Netherlands as an independent country dates from 1815. Since then, there have been many revisions. The last major revision was in 1983, and several smaller changes were also made after that time.

The Constitution of the Kingdom of the Netherlands includes one article that deals with the environment. Article 21 states: “It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.” Insofar as this article is legally enforceable at all, with its indeterminate standard, it does not provide a testing framework, and no legal obligation can be derived from it. The fundamental right from this article is interpreted as an “instruction standard” aimed at the government, according to Procurators General Langemeijer and Wissink in their advisory opinion on the cassation appeal in Urgenda Climate Case against the State of the Netherlands.⁴ The Dutch constitution does not contain any rules on (green) public procurement.

“Public procurement for a better environment,” *Commission of the European Communities*, 2008, p. 4.

3. Water management has traditionally had a special place in the Dutch local government organization, which is not surprising given the Netherlands’ watery past and watery future, not least in connection with climate change.
4. Advisory opinion of Procurators General F. F. Langemeijer and M. H. Wissink, September 13, 2019, ECLI:NL:PHR:2019:887, with references therein. Article 21 therefore played a minor role in the famous Urgenda case, which I will discuss under (2). The English version of this advisory opinion can be accessed via this link: <<https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:PHR:2019:1026>>. *Supreme Court of the Netherlands*, 2019, no. 19/00135.

Judicial system in the Netherlands

No constitutional Court of Justice

The Netherlands currently has no constitutional review by the courts. Article 120 of the Constitution stipulates that the courts may not judge whether formal laws (i.e. legislation originating from the government and parliament) and treaties are in conflict with the constitution. The idea behind this is that the legislature determines whether formal laws and treaties are in accordance with the Constitution.⁵ Legislation from other legislators than the formal legislator, such as provinces, municipalities and the water district board, may be tested against the Constitution by the ordinary courts. However, the Constitution does provide for treaty review in Article 94. Dutch laws can thus be tested against the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as “ECHR”).

Duality of jurisdiction

In the Netherlands, there is a duality of jurisdiction in the sense that there are a number of highest courts in the field of administrative law on the one hand—the best known is the Administrative Jurisdiction Division of the Council of State—and appeals in cassation in civil, criminal and tax law cases on the other hand are lodged at The Supreme Court of the Netherlands (hereinafter referred to as “Supreme Court”), known in Dutch as the “Hoge Raad.” However, in the first and second instance, all cases are centred at the district courts and courts of appeal, with a distinction between sectors, so there is a sector for administrative law, criminal law, civil law, etc.

The Supreme Court is the highest court competent to adjudicate in public procurement law disputes. This can be explained by the fact that, in the Netherlands, tendering procedures generally lead to the conclusion of a contract governed by civil law. In other words, procurement law is embedded in civil law.⁶

5. In the *Harmonization Act Judgment*, Dutch Supreme Court, 14 April 1989, ECLI:NL:HR:1989:AD5725, the Supreme Court ruled that the prohibition on constitutional review contained in Article 120 of the Constitution also means that formal laws may not be tested against the Statute of the Kingdom of the Netherlands and general principles of law.

6. See on judicial protection regarding public contracts in the Netherlands: Frank J. van Ommeren and Pim J. Huisman, in Chris Jansen, “Judicial and extra-judicial protection regarding public contracts in the Netherlands,” in Laurence Folliot-Lalliot and Simone Torricelli (Eds.), *Contrôles et contentieux des contrats publics* =

Enforcement by courts of “constitutional” rules related to the environment

In the Netherlands, there have been two very well-known climate court cases. These cases did not involve the enforcement of provisions of the Constitution related to the environment (see my comments on Article 21 above) but rather, obligations relating to the environment were derived by the relevant judicial authorities, *inter alia*, from provisions of international human rights treaties such as the ECHR and unwritten law standards.

Firstly, let us take a look at the Urgenda Climate Case against the State of the Netherlands.⁷ In this case, the Supreme Court ruled that the court order for the Dutch State to reduce Dutch greenhouse gas emissions by 25% by the end of 2020 remains in force. The Supreme Court bases its judgment on the UN Climate Convention and on the Dutch State’s legal duties to protect the life and well-being of citizens in the Netherlands, which obligations are laid down in the ECHR. The positive obligation of the State to take appropriate measures to avert, as far as possible, the imminent danger of climate change is derived from Articles 2 and 8 of the ECHR.

The other well-known climate ruling is the judgement of the Amsterdam District Court in the case of Milieudefensie against Royal Dutch Shell.⁸ In this case, the Court upheld the claim of Milieudefensie (an environmental association) that a reduction obligation for Royal Dutch Shell can be derived from the unwritten standard of care to reduce the CO₂ emissions of the activities of the Shell group by a net 45% by the end of 2030 compared with 2019. In the interpretation of the standard of care, human rights (i.e. Articles 2 and 8 of the ECHR and Articles 6 and 17 of the International Covenant on Civil and Political Rights [ICCPR]) and the values embodied therein are taken into account, among other circumstances.⁹

Oversight and Challenges of Public Contracts, Bruylant (Droit administratif / Administrative Law; vol. 26), 2018, p. 173-197.

7. Supreme Court of the Netherlands – Civil Division, 2019, no. 19/00135, <<https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:HR:2019:2007>>.
8. The Hague District Court, C/09/571932 / HA ZA 19-379, 2021, <<https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBDHA:2021:5339>>.
9. The Hague District Court, C/09/571932 / HA ZA 19-379, 2021, recital 4.4.9.

THE SUPRANATIONAL PUBLIC PROCUREMENT FRAMEWORK AND GPP

The EU Public Procurement Legal Framework in general

The Netherlands is a member of the European Union. The provisions of the Treaty on the Functioning of the European Union (hereinafter referred to as “the Treaty”), the European Public Procurement Directives and their implementation in the *Dutch Public Procurement Act* are the main sources of public procurement law regulations as we know them in the Netherlands today. After all, public procurement law has largely come to maturity within the EU’s objective of creating an internal market within its borders in which free movement of people, goods, services and capital will be guaranteed. Regulating the public purchasing market and eliminating the—at the time existing—practice whereby government contracts were preferentially awarded to companies from its own member states was part of this.¹⁰

The EU Public Procurement Legal Framework on GPP

Growing focus on green public procurement within the EU

In recent decades, there has been an increasing focus in the EU on GPP. This development began roughly in 1996 when the EC noted in its Green Paper “Public Procurement in the EU: Exploring the Way Forward”¹¹ that environmental protection had become one of the most important areas of community policy, and pointed out the growing attention to environmentally friendly procurement both within the member states and the OECD (Organisation for Economic Co-operation and Development). In this same paper, the EC outlined ways in which environmental considerations could be taken into account when awarding public contracts through a tendering procedure.

10. Furthermore, the Netherlands is also a signatory to the Government Procurement Agreement (GPA), a treaty concluded within the framework of the WTO. The fundamental aim of the GPA is to mutually open government procurement markets among its parties. I leave regulations coming from the WTO unaddressed. World Trade Organization, “Agreement on Government Procurement 2012 and related WTO legal texts,” *WTO*, 2012, <https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf>.

11. European Union Law, “Public Procurement in the European Union: Exploring the Way Forward,” *Commission of the European Communities*, 1996, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51996DC0583&from=NL>>.

Since then, the EC has increasingly emphasized in its communications the importance of GPP in achieving environmental objectives on climate change, resource use and sustainable consumption and production.¹² Below, I highlight some of (what I consider to be) the key communication pieces.

To begin with, I refer to the EC Communication “Public procurement for a better environment.”¹³ The general objective of this communication is to provide guidance on how to reduce the environmental impact caused by public sector consumption and to use GPP to stimulate innovation in environmental technologies, products and services. One of the ways the EC intends to achieve this objective is by initiating processes for setting common GPP criteria. Other ways include providing information on life cycle costing of products, giving legal and operational guidance and giving political support through political targets,¹⁴ linked to indicators and future monitoring.¹⁵

I also mention “The Europe 2020 Strategy,”¹⁶ in which public procurement is seen as one of the tools for shifting to a smarter, knowledge-based, greener

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12. By this communication I also mean programs, proposals and green papers originating from the EC.
 13. European Union Law, “Public procurement for a better environment,” *Commission of the European Communities*, 2008, <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0400:FIN:EN:PDF>> (including the staff working documents that are part of this communication).
 14. The key political target in this context is that the then-renewed Sustainable Development Strategy had set as a formal policy objective that the average EU GPP level in 2010 should be the same as that of the best performing member states in 2006. The EC has carried out research into what this level was and, on that basis, proposed that “by the year 2010, 50% of all tendering procedures should be green, where ‘green’ means ‘compliant with endorsed common core’ GPP criteria as referred to in section 4.1.” (Clarification by the author: in section 4.1 of this communication, the process for setting common GPP criteria is described.) See Council of the European Union, “Renewed EU Strategy for Sustainable Development (2006),” European Environment Agency, 2006, p. 8, <<https://www.eea.europa.eu/policy-documents/renewed-eu-strategy-for-sustainable-development>>.
 15. This Communication is part of the Action Plan on Sustainable Consumption and Production and Sustainable Industrial Policy (SCP/SIP), which establishes a framework for the integrated implementation of a mix of instruments aimed at improving the energy and environmental performances of products. See European Union Law, “Communication on the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan,” *Commission of the European Communities*, 2008, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0397>>.
 16. European Union Law, “A strategy for smart, sustainable and inclusive growth,” *European Commission*, 2010, <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:en:PDF>>.

European economy that grows rapidly and sustainably and creates high levels of employment and social progress.

Furthermore, I would like to highlight the “Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market.”¹⁷ This Green Paper concerns the starting point of the modernization operation on the implementation of one of the levers of the *Single Market Act*,¹⁸ which should allow the single market to develop its full potential. Part of this is a reform of the European Public Procurement Directives currently in force. The precise objectives of the reform of the directives are to increase the efficiency of public spending and to enable purchasers to make better use of public procurement in order to achieve common societal goals, such as protecting the environment, increasing resource and energy efficiency and combating climate change, promoting innovation and social inclusion, and creating the best possible conditions for the provision of high-quality public services.¹⁹ This green paper looks in detail at how public procurement can play a role in achieving the goals of the Europe 2020 Strategy and discusses the two ways this can happen: by allowing contracting authorities, through the procedural rules on public procurement, to take those objectives into account (“how to buy”) on the one hand, and imposing rules or incentives on contracting authorities that guide their decision-making on which goods and services are procured (“what to buy”) on the other hand. The Green Paper also discusses what changes need to be made to EU public procurement rules in this respect.

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17. European Union Law, “Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market,” *European Commission*, 2011, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0015>>.
 18. European Union Law, “Single Market Act, Twelve levers to boost growth and strengthen confidence, Working together to create new growth,” *European Commission*, 2011, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0206>>.
 19. The corollary of this modernization exercise is the current versions of the procurement directives, i.e. Directive 2014/23/EU, Directive 2014/24/EU and Directive 2014/25/EU; European Union law, “Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance,” *Official Journal of the European Union*, 2014; European Union law, “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 Text with EEA relevance,” *Official Journal of the European Union*, 2014; European Union law, “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,” *Official Journal of the European Union*, 2014.

In the (EC) Communication “Closing the loop: An EU action plan for the Circular Economy,”²⁰ the EC identifies GPP as a key component of the circular economy and points out the need to address issues such as sustainability and reparability in the criteria for GPP and that the EC should support implementation of GPP.

Finally, I point out the “European Green Deal.”²¹ The overarching objective of the European Green Deal is to make the EU climate neutral by 2050. A variety of policy initiatives are proposed to this end. It also plans to assess all existing EU regulations on their climate merits and make new legislative proposals to contribute to achieving said overarching goal of a climate-neutral Europe by 2050. One of the objectives of the Green Deal is to mobilize business for a clean and circular economy. In this context, the EC considers that “public authorities, including the EU institutions, should lead by example and ensure that their procurement is green.”²² In the European Green Deal’s Investment Plan (the Sustainable Europe Investment Plan)²³ (the so-called investment pillar of the European Green Deal) is then being considered: “The Commission will propose minimum mandatory green criteria or targets for public procurements in sectorial initiatives, EU funding or product-specific legislation.”²⁴ In the Circular Economy Action Plan (also a corollary of the European Green Deal), the EC again mentions the plan to propose minimum mandatory requirements on GPP and targets in sectoral legislation, stating that there should also be mandatory reporting to monitor the implementation of GPP.²⁵

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20. European Union Law, “Closing the loop: An EU Action Plan for the Circular Economy COM/2015/0614,” *European Environment Agency*, 2015, <<https://www.eea.europa.eu/policy-documents/com-2015-0614-final>>.
 21. European Union Law, “The European Green Deal,” *European Commission*, 2019, <https://eur-lex.europa.eu/resource.html?uri=cellar:b828d165-1c22-11ea-8c1f-01aa75ed71a1.0002.02/DOC_1&format=PDF>.
 22. European Union Law, “The European Green Deal,” *European Commission*, 2019, p. 9.
 23. European Union Law, “Sustainable Europe Investment Plan – European Green Deal Investment Plan,” *European Commission*, 2020, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0021&from=IT>>.
 24. European Union Law, “Sustainable Europe Investment Plan – European Green Deal Investment Plan,” *European Commission*, 2020, p. 12.
 25. European Union Law, “A new Circular Economy Action Plan for a cleaner and more competitive Europe,” *European Commission*, 2020, p. 5, <https://eur-lex.europa.eu/resource.html?uri=cellar:9903b325-6388-11ea-b735-01aa75ed71a1.0017.02/DOC_1&format=PDF>.

As mentioned above, part of the developments is that the GPP criteria have been established on behalf of the EC.²⁶ In addition, the EC has published the book “Buying Green! A handbook on green public procurement.”²⁷ This handbook aims to help public authorities successfully plan and implement GPP. It explains in a practical way the possibilities offered by European Union Law to buy green and discusses simple and effective methods for greening public procurement.²⁸ Finally, I would like to refer to the EC brochure “Public Procurement for a Circular Economy,”²⁹ which also gives guidance in this respect.

EU “hard” law on GPP

As part of the evolution described above, the current and the penultimate version of the European Public Procurement Directives enables procurers to make better use of public procurement in order to achieve common societal goals, such as protecting the environment, increasing resource and energy efficiency and combating climate change, promoting innovation and

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26. More information can be found at: European Commission, “Green Public Procurement Criteria and Requirements,” *Energy, Climate Change, Environment*, <https://green-business.ec.europa.eu/green-public-procurement/gpp-criteria-and-requirements_en>.
 27. European Commission, “Buying green! – A handbook on green public procurement,” *Publications Office*, 2016, <<https://data.europa.eu/doi/10.2779/837689>>.
 28. For other EC communications reflecting green procurement, see also: European Union Law, “Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement,” *Official Journal of the European Union*, 2001, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0274>>; European Union Law, “Green Paper on Integrated Product Policy,” *Commission of the European Communities*, 2001, <https://aei.pitt.edu/42997/1/com2001_0068.pdf> (from this green paper came the idea of writing a handbook on green public procurement with examples on how to draw up green calls for tenders in conformity with EU law); European Union Law, “Integrated Product Policy Building on Environmental Life-Cycle Thinking,” *Commission of the European Communities*, 2003, <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0302:FI N:en:PDF>>, in which communication member states are encouraged to draw up national action plans for greening their procurement); European Union Law, “Towards a circular economy: A zero waste programme for Europe,” *European Commission*, 2014, <https://eur-lex.europa.eu/resource.html?uri=cellar:50edd1fd-01ec-11e4-831f-01aa75ed71a1.0001.01/DOC_1&format=PDF>; European Union Law, “Making Public Procurement work in and for Europe,” *European Commission*, 2017, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0572>>.
 29. European Commission, “Public Procurement for a Circular Economy – Good practice and guidance,” 2017, <https://www.zeeland.nl/sites/default/files/2022-01/public_procurement_circular_economy_brochure_2017.pdf>.

social inclusion, and creating the best possible conditions for the provision of high-quality public services. As an example of this evolution, the “most economically advantageous tender” criterion, used as an umbrella term in the current directives, allows public purchasers to make bidders focus more on quality and not just on the lowest price, where (among other things) environmental considerations can be taken into account in the context of quality. But there are several other provisions in the current version directives that also allow for GPP more explicitly, such as Article 43 (conditions for using labels) and Articles 67 and 68 (life-cycle costing) of Directive 2014/24/EU.³⁰

The most important European Public Procurement Directives are Directive 2014/23/EU, Directive 2014/24/EU and Directive 2014/25/EU. These directives regulate the public procurement market in the areas of concession contracts, “classic” public contracts and public contracts awarded in utility sectors, respectively.³¹

Another ongoing development, once again reinforced by the European Green Deal, is the emergence of sector-specific legislation that includes binding minimum criteria or targets (or percentages) for public procurement. Or to put it another way, there seems to be more regulation evolving in terms of “what to buy.” This is a development that has been going on for some time. I refer briefly to what I have already noted on this subject when discussing the “Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market.”

An example of sector-specific public procurement legislation (and this predates the European Green Deal) is the Clean Vehicles Directive.³² This

30. See again: European Commission, “Buying green! – A handbook on green public procurement,” *Publications Office*, 2016. This handbook explains the possibilities offered by European Union law in a practical way and looks at simple and effective approaches to greening contracts. The handbook follows the logic and structure of a tendering procedure.

31. European Union law, “Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC,” *Official Journal of the European Union*, 2009, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0081>>. Its Dutch implementation in the *Dutch Public Procurement Act* in the area of Defence and Security will not be considered in this report.

32. European Union Law, “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,” *Official Journal of the European Union*, 2009, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0033>>; European

directive specifically looks at green procurement in a particular sector and aims primarily at promoting the market for clean and energy-efficient road transport vehicles and at reducing emissions of greenhouse gases and pollutants. To this end, contracting authorities and bodies must take account of energy and environmental impacts throughout the lifecycle of vehicles when purchasing and tendering for certain road transport vehicles.³³ This includes energy consumption, CO₂ emissions and emissions of certain pollutants. Simply put, the Clean Vehicles Directive sets specific percentages of clean and zero-emission vehicles to be procured every time a (decentralized) government procures vehicles through a public contract.

Other examples of sector-specific legislation (and other legislation) located outside the European Public Procurement Directives but relevant to public procurement and in particular to “what to buy” include the Energy Efficiency Directive³⁴ and the Energy Performance of Buildings Directive – EPBD.³⁵ There are also developments in areas such as mandatory minimum

Union Law, “Directive (EU) 2019/1161 of the European Parliament and of the Council of 20 June 2019 amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles,” *Official Journal of the European Union*, 2019, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1161>>.

33. European Union Law, “Directive (EU) 2019/1161 of the European Parliament and of the Council of 20 June 2019 amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles,” *Official Journal of the European Union*, 2019, art. 1.
34. European Union Law, “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,” *Official Journal of the European Union*, 2012, <<https://eur-lex.europa.eu/eli/dir/2012/27/oj?locale=fr>>; European Union Law, “Directive (EU) 2018/2002 of the European Parliament and of the Council of 11 December 2018 amending Directive 2012/27/EU on energy efficiency,” *Official Journal of the European Union*, 2018, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L2002>>; European Union Law, “Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products,” *Official Journal of the European Union*, 2010, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0030>>; European Union Law, “Proposal for a Directive of the European Parliament and the Council on energy efficiency (recast),” *European Commission*, 2021, <https://eur-lex.europa.eu/resource.html?uri=cellar:a214c850-e574-11eb-a1a5-01aa75ed71a1.0001.02/DOC_1&format=PDF>.
35. European Union Law, “Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings (recast),” *Official Journal of the European Union*, 2010, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0031>>; European Union Law, “Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012

criteria for sustainable food procurement,³⁶ as well as in areas such as batteries³⁷ and textiles.³⁸ On this topic, more cross-sectoral is the “Proposal for a regulation of the European Parliament and the Council establishing a framework for setting eco-design requirements for sustainable products.”³⁹

In this context, Willem Jansen warns against fragmentation of procurement obligations, which could jeopardize the effectiveness of the rules.⁴⁰

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- on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC,” *Official Journal of the European Union*, 2012, <<https://eur-lex.europa.eu/eli/dir/2012/27/oj?locale=fr>>; European Commission, “Buying green! – A handbook on green public procurement,” *Publications Office*, 2016, <<https://data.europa.eu/doi/10.2779/837689>> (I also refer to the appendix of the handbook Buying Green! which lists relevant legislation and policies); European Commission, “Green Public Procurement,” *Energy, Climate Change, Environment*, n.d., <https://green-business.ec.europa.eu/green-public-procurement_en> (a total overview of information relevant to GPP [including GPP-related policies and regulations and case law of the COJ relevant to GPP]).
36. European Parliament, “Farm to Fork Strategy,” *Official Journal of the European Union*, 2021, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021IP0425>>; European Union Law, “Sustainable EU food system – new initiative,” *European Commission*, n.d., <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13174-Sustainable-EU-food-system-new-initiative_en>.
 37. European Union Law, “Proposal for a Regulation of the European Parliament and of the Council concerning batteries and waste batteries, repealing Directive 2006/66/EC and amending Regulation (EU) No. 2019/1020,” *European Commission*, 2020, <https://eur-lex.europa.eu/resource.html?uri=cellar:4b5d88a6-3ad8-11eb-b27b-01aa75ed71a1.0001.02/DOC_1&format=PDF>.
 38. European Union Law, “EU Strategy for sustainable and circular textiles,” *European Commission*, 2022, <https://eur-lex.europa.eu/resource.html?uri=cellar:9d2e47d1-b0f3-11ec-83e1-01aa75ed71a1.0001.02/DOC_1&format=PDF>.
 39. European Union Law, “Proposal for a Regulation of the European Parliament and of the Council establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC,” *European Commission*, 2022, <https://eur-lex.europa.eu/resource.html?uri=cellar:bb8539b7-b1b5-11ec-9d96-01aa75ed71a1.0001.02/DOC_1&format=PDF>. This development is, of course, part of the European trend where legislation is increasingly imposing sustainability requirements on products placed on the market, including those not publicly procured. European Union Law, “Commission on making sustainable products the norm,” *European Commission*, 2022, p. 7, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022DC0140>>. See on the role of green public procurement in this context, p. 7. The proposed regulation on eco-design for sustainable products is the cornerstone of the Commission’s approach.
 40. Willem Janssen, “A European sustainability minimum for clean vehicles, batteries and food. Fragmentation and a new role for the Commission on the horizon,” *TA*, vol. 6, no. 82, 2021, p. 4-6.

AGENDA 21 AND AGENDA 30 (SDGS)

General

Agenda 21 is a non-binding United Nations program for sustainable development. It is a comprehensive action plan adopted globally, nationally and locally by UN organizations, governments, and key organizations in every area where people affect the environment.⁴¹ In 2015, as part of this program, all United Nations member states adopted the 2030 Agenda for Sustainable Development – An action plan to help people and the planet, encompassing the 17 Sustainable Development Goals.⁴²

Inclusion Agenda 21 and Agenda 30 (SDGs) in Dutch legislation

The Netherlands did not include the UN's Agenda 21 and Agenda 30 (Sustainable Development Goals) in specific national legislation, but all kinds of laws, regulations, policies and programs are relevant to the achievement of the goals of Agenda 21 and the sustainable development goals (SDGs), such as the *Dutch Climate Act (Klimaatwet)* and the Climate Agreement (*Klimaatakkoord*), the *Nature Protection Act (Wet Natuurbescherming)*, the *Water Act (Waterwet)*, the *Environmental and Planning Act (Omgevingswet)*, the *Environmental Protection Act (Wet Milieubeheer)* and the Energy Agreement (*Energieakkoord*).

In addition, the Integral Assessment Framework for policy and regulation (*Integraal afwegingskader voor beleid en regelgeving, IAK*) includes an SDG test. This new assessment framework helps civil servants to make policy and regulations SDG-proof. The IAK is actually a kind of checklist that civil servants should observe when making policy and regulations.

41. United Nations, "Agenda 21," *Department of Economic and Social Affairs – Sustainable Development*, 1992, <<https://sdgs.un.org/publications/agenda21>>.

42. United Nations, "Transforming our world: The 2030 Agenda for Sustainable Development," *General Assembly A/RES/70/1*, 2015, <<https://www.pianoo.nl/sites/default/files/media/documents/2022-04/proportionality-guide-engels-3rd-revision-january2022.pdf>>.

THE DUTCH PUBLIC PROCUREMENT LEGAL FRAMEWORK AND GPP

The Dutch Public Procurement Legal Framework in general

In the Netherlands, as mentioned above, the European Public Procurement Directives were implemented by the *Dutch Public Procurement Act* and the *Dutch Public Procurement Decree*. The *Dutch Public Procurement Act* also contains rules for the award of public contracts with a value below the European public procurement thresholds.⁴³

The *Dutch Public Procurement Act* consists of four parts. The first part contains general provisions, such as a definition of the terms used in the Act, as well as the principles to be observed in European and national tenders. Directive 2014/24/EU (“Directive”), Directive 2014/23/EU (“Concessions Directive”) and Directive 2014/25/EU (“Utilities Sector Directive”) were implemented in parts 2, 2a and 3 of the Act, respectively. Here, the systematics of the *Dutch Public Procurement Act* is that, on a public contract falling within the scope of the European directives – the so-called supra-threshold or above-threshold contracts – parts 1 and 4 of the Act always apply and, depending on the type of contract, parts 2, 2a or 3 of the Act also apply. The fourth part of the Act consists of “other” provisions including a provision on the “Statement of Conduct on Procurement” and provisions on how the Act will be evaluated. Furthermore, for above-threshold contracts, the Proportionality Guide (*Gids Proportionaliteit*) was designated a mandatory guideline to be followed.⁴⁴ The Proportionality Guide gives substance to the principle of proportionality by providing “handles” “for a reasonable application” of this principle.⁴⁵ I will explain this in a little more detail below.

43. See for the thresholds of Directive 2014/24/EU (the so-called “Classical Directive”) in respect of the thresholds for public supply, service and works contracts, and design contests: European Union Law, “Commission Delegated Regulation (EU) 2021/1952 of 10 November 2021 amending Directive 2014/24/EU of the European Parliament and of the Council in respect of the thresholds for public supply, service and works contracts, and design contests,” *Official Journal of the European Union*, 2021, art. 4, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CEL:EX:32021R1952&qid=1709091213368>>.

44. *Dutch Public Procurement Act*, 2012, art. 1.10 (3); *Dutch Public Procurement Decree*, art. 10.

45. For an English translation of the Proportionality Guide (3rd revision, January 2022), see Dutch Public Procurement Expertise Centre, “Proportionality Guide,” *PIANOO*, 2022, <<https://www.pianoo.nl/sites/default/files/media/documents/2022-04/proportionality-guide-engels-3rd-revision-january2022.pdf>>. See also Chris Jansen,

In addition, a contracting authority placing a contract above the threshold on the market is subject to various additional policy rules and any additional provincial and municipal (procurement) regulations. And, of course, a contracting authority must also comply with its own procurement policy.

Finally, the contracting authority may choose to declare a procurement regulation applicable. Such regulations detail the steps to be taken during a tendering procedure. An example of a procurement regulation is the “ARW 2016” (*Works Procurement Regulation*), which describes procedures for the tendering of works contracts.⁴⁶

Apart from the regime that applies to so-called sub-threshold or below-threshold contracts with a clear cross-border interest (which I describe in more detail below under the heading “types of procedures”), under Dutch law a contracting authority is not obliged to call for competition when awarding a contract with a value below the applicable European public procurement thresholds.

However, the provisions of Section 1.4 of the *Dutch Public Procurement Act* always apply to any contracting authority that wishes to conclude a written contract for pecuniary interest for the provision of works, supplies or services. Pursuant to this article, the contracting authority is obliged to determine, on the basis of objective criteria, which procedure it chooses for awarding the contract and which entrepreneurs it admits to this procedure. Furthermore, the contracting authority must ensure that, when entering into such a written agreement, it provides the greatest possible social value for the public funds. It should also be able to justify the choices made in the process upon request.

General principles

First of all, above-threshold public contracts, and below-threshold public contracts with a cross-border interest, are always subject to the general principles of public procurement law. This follows from Section 1.2.2 of the *Dutch Public Procurement Act*, entitled Principles of European Public Procurement. The general principles of public procurement law are, as is well known, the

“Stretching the Proportionality Principle: How Dutch Law Facilitates the Participation of SMEs in Public Procurement,” *PPLR*, no. 4, 2022.

46. In the case of a sub-threshold works contract other than a utility contract, a contracting authority is incidentally obliged to declare the ARW 2016 applicable. See *Dutch Public Procurement Act*, 2012, art. 1.22; *Dutch Public Procurement Decree*, art. 11.

principle of non-discrimination, the principle of equal treatment, the principle of transparency and the principle of proportionality.

As mentioned above, in order to assist the contracting authorities in dealing with the principle of proportionality, the Proportionality Guide was published following the introduction of the *Dutch Public Procurement Act* in 2012. The Guide contains a detailed explanation of what the principle of proportionality means, or should mean, at all stages of the tendering procedure and in the contract conditions and terms. It also addresses the proportionality of sustainability requirements and criteria (including green requirements and criteria). I discuss this briefly under the heading “The Dutch Public Procurement Legal Framework on GPP”

In addition, the general principles of good governance apply to all private law acts of the government. The main principles that come into play in a tendering procedure include the (public law) principle of due care (standard of care) and the principle of legitimate expectations. And, of course, the principle of equal treatment, but compliance with this principle is already guaranteed by public procurement law.

I briefly note that an important legal development is under way in the Netherlands. At the end of 2021, the Supreme Court ruled in the *Didam* case⁴⁷ that, when the government sells land, it is obliged to give all potential bidders a chance to compete. This follows from the principle of equal treatment (as a general principle of good governance), which applies to all private law government acts. This means that, in such a case, the public authority must establish criteria on the basis of which the purchaser will be selected, taking into account the policy space available to it. These criteria must be objective, verifiable and proportional. The public authority must also ensure an appropriate level of publicity. Following this judgment, there was a flurry of case law raising questions such as: does this competition obligation apply to all private law government acts (such as renting, leasing and even share transactions), and what are the consequences of this obligation for contracts concluded without this scope for competition? In this judgment, the Supreme Court merely states that this obligation derives from the principle of equal treatment and has therefore always existed. Prior to this ruling, public authorities had assumed that land sales could be negotiated on a one-to-one basis with a party chosen by the government itself. For the subject of this report, this development is interesting because the government could perhaps apply green requirements and criteria not only in procurement,

47. *Didam*, Dutch Supreme Court, 2021, ECLI:NL:HR:2021:1778.

but also in sales (rent, lease, etc.) through a competitive process. Only time will tell.

Finally, private law principles are relevant. As mentioned above, a fair proportion of cases contracts governed by civil law are concluded after the successful completion of an EU tendering procedure. In the context of a tendering procedure, these private law principles include, in particular, principles of freedom of contract and reasonableness and fairness and the (private law) (unwritten) standard of care.

Contracting authorities

In addition to the State, the *Dutch Public Procurement Act* qualifies the provinces, municipalities and district water boards as contracting authorities. Bodies governed by public law as referred to in Article 2(1) of Directive 2014/24/EU and, of course, associations formed by one or more of the above-mentioned bodies or by one or more such bodies governed by public law are also qualified as contracting authorities under the above-mentioned Act.

Types of public procurement contracts

The types of public procurement contracts in the Netherlands are, first of all, public one-off contracts (on the one hand) and framework agreements and a dynamic purchasing system (on the other hand) for works, supplies and (social and other specific) services. Second, there are the utility one-off contracts (on the one hand) and framework agreements and a dynamic purchasing system (on the other hand) for works, supplies and (social and other specific) services.

Finally, there are concession contracts for works and services.

Types of procedures

As regards the procedures to be applied, three situations should be distinguished: firstly, the situation where the contract is above the European thresholds; secondly, the situation where the contract is below the European thresholds but has a cross-border interest; and finally, the situation where the contract is below the European thresholds but has no cross-border interest.

For contracts above the European thresholds, a distinction must be made between competitive and non-competitive procedures (the latter covering the exceptions where there is no obligation to compete in the case of a contract above the threshold).

Competitive procedures include the “open” procedure, the restricted procedure, the competitive procedure with negotiation, the competitive dialogue procedure, the innovation partnership procedure and the (design) contest procedure. The non-competitive procedures are the negotiated procedure without prior notice and the so-called “open house” procedure. This is a procedure for obtaining services which is open to any economic operator who satisfies the conditions laid down in advance.⁴⁸

In addition, when awarding a concession contract or a contract for a social or other specific service, the “light regime” applies. This means that the contracting authority is free to choose its procedure, but must respect the general principles of equal treatment, non-discrimination, transparency and proportionality. For contracts with a value below the European thresholds but with a cross-border interest, the following applies. Article 1.7 of the *Public Procurement Act* codifies the case law of the European Court of Justice, according to which the fundamental rules and general principles of the Treaty must be observed when a public contract below the thresholds is involved, but this contract has the special feature of having a clear cross-border interest. Article 1.7 makes Section 1.2.2 of the Act applicable to such contracts. This section formulates the principles to be observed in European public procurement procedures. It also stipulates that an appropriate degree of publicity must be given to the announcement of such a contract. This means that all national and foreign companies potentially interested in the contract must be able to take note of it. In practice, this often means using one of the European procedures with an element of competition described above. In this way, the contracting authority can be sure that the appropriate degree of publicity has been given.

As mentioned above, apart from the regime applicable to contracts below the threshold with a clear cross-border interest, Dutch law does not oblige a contracting authority to organize a competition procedure when awarding a contract with a value below the applicable European threshold. As also mentioned above, Section 1.4 (1) of the *Dutch Public Procurement Act* applies at all times to any contracting authority that wishes to conclude a written contract for pecuniary interest for the provision of works, supplies or services. Pursuant to this article, the contracting authority is obliged to determine, on the basis of objective criteria, which procedure it chooses for the award of the contract and which entrepreneurs it admits to this procedure. According to Article 1.4 (3), the contracting authority should also be able to justify, on request, the choices made in the procedure.

48. *Tirkkonen*, CJEU, 2018, Case C-9/17, ECLI:EU:C:2018:142 and *Falk Pharma/DAK*, CJEU, 2016, Case C-410/14, ECLI:EU:C:2016:399.

Finally, the *Dutch Public Procurement Act* provides for two procedures in the event that a contracting authority chooses (i.e. it is not obliged) to put out to tender a sub-threshold contract without cross-border interest, namely the national tendering procedure (Section 1.2.3 of the *Dutch Public Procurement Act*) and the multiple negotiated procedure (Section 1.2.4 of the *Dutch Public Procurement Act*). If the contracting authority chooses one of these procedures, the principles of public procurement law described in the relevant sections of the Act apply. These principles are the same as the principles of European public procurement law mentioned above (non-discrimination, equal treatment, transparency and proportionality). In addition, it is worth mentioning that ProRail (the railway manager) also has a Recognition Scheme. Works covered by the Recognition Scheme can only be carried out by recognized companies.

The Dutch Public Procurement Legal Framework on GPP

Growing focus on green public procurement in the Netherlands

As in Europe, GPP is gaining ground in the Netherlands. Below, I describe the most important developments in this area.

First of all, in the Dutch Climate Agreement (*Klimaatakkoord*),⁴⁹ the government makes a cross-sectoral effort to ensure that a contribution is made to social transitions from the entire government's purchasing power of €73 billion.⁵⁰ In addition, further agreements are made within the various sectors covered by the Climate Agreement on making procurement processes more sustainable.⁵¹ Even in the second-to-last coalition agreement, the government identifies public procurement as one of the means to be better used to accelerate sustainable transitions, among other things.⁵² Socially responsible public procurement is also addressed in the Government-wide

49. Government of the Netherlands, "National Climate Agreement," *The Hague*, 2019, <<https://www.klimaatakkoord.nl/documenten/publicaties/2019/06/28/national-climate-agreement-the-netherlands>>.

50. Government of the Netherlands, "National Climate Agreement," *The Hague*, 2019, p. 236-237.

51. For example, for further agreements made on making procurement within civil engineering more sustainable or greener, see Government of the Netherlands, "National Climate Agreement," *The Hague*, 2019, p. 68.

52. Government of the Netherlands, "Coalition Agreement – Confidence in the Future," 2017, <<https://www.government.nl/documents/publicaties/2017/10/10/coalition-agreement-confidence-in-the-future>>.

program Circular Economy – “The Netherlands circularly in 2050” (*Rijksbrede programma Circulaire Economie – ‘Nederland circulair in 2050’*).⁵³

Furthermore, since 2003, in its Communication “Integrated Product Policy, Building on Environmental Life-Cycle Thinking” the EC has been encouraging member states to draw up national action plans for greening their procurement.⁵⁴ The Netherlands initially implemented this (inter alia) in the “Action Plan for Responsible and Sustainable Procurement by Governments 2015-2020” (*Plan van Aanpak Maatschappelijk Verantwoord Inkopen 2015-2020*)⁵⁵ and the follow-up plan “National Action Plan for Responsible and Sustainable Procurement by Governments 2021-2025” (*Nationaal Plan Maatschappelijk Verantwoord Inkopen 2021-2025*).

The starting point for the aforementioned first Action Plan for the period 2015-2020 is the effective and efficient use of sustainable and responsible procurement (hereinafter referred to as SRP) as an instrument to contribute to the achievement of policy objectives (such as combating climate change, but also improving working conditions and stimulating innovation). The plan is therefore not about determining what the substantive policy objectives should be. Given the above, the Action Plan focuses, on the one hand, on making new and/or additional agreements between governments to strengthen uniformity and effectiveness in the field of SRP and, on the other hand, on improving implementation of SRP. To this end, a number of steps have been worked out. One such step concerns the further elaboration of common ambitions and objectives for the process and the application of SRP for the period 2016-2020, on which both central government, co-governments (umbrella organizations and/or individual governments), business and civil society parties can agree. This was done in the “Sustainable Procurement Manifesto 2016-2020 + 2021” (*Manifest Maatschappelijk Verantwoord Inkopen 2016-2020 + 2021*).⁵⁶ In this manifesto, governments set their own

53. Government of the Netherlands, “Updated Circular Economy Implementation Programme 2021-2023 (Summary),” 2021, <<https://www.government.nl/documents/reports/2021/10/21/updated-circular-economy-implementation-programme-2021-2023-summary>>.

54. European Union Law, “Integrated Product Policy Building on Environmental Life-Cycle Thinking,” *Commission of the European Communities*, 2003, <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0302:FIN:en:PDF>>.

55. An English version of this plan can be found in Dutch Public Procurement Expertise Centre, “Action Plan for Responsible and Sustainable Procurement by governments 2015-2020,” *PIANOO*, 2015, <<https://www.pianoo.nl/sites/default/files/documents/documents/netherlandsactionplanresponsibleandsustainableprocurement20152020.pdf>>.

56. The manifesto thus aims to increase the contribution of SRP to the achievement of policy goals. This manifesto builds on previous agreements, such as the *Professional*

targets, based on their own ambitions. Governments may join the manifesto voluntarily.⁵⁷ One of the outputs of this manifesto is the SRP criteria tool (*MVI-criteria tool*). Using this tool, contracting authorities can choose (the latest version of) concrete SRP criteria for various SRP product groups at three levels of ambition to apply in their tender documents. Government buyers can select both suitability requirements, selection criteria, requirements, award criteria and contract clauses within this tool.⁵⁸

Part of the above-mentioned first Action Plan is “Procurement with impact, Strategy for sustainable, social and innovative contracting by the national government” (*Inkopen met impact, Strategie voor duurzaam, sociaal en innovatief, opdrachtgeverschap door de rijksoverheid*). The strategy is thus a procurement strategy for the *central* government and describes, among other things, that, from now on, sustainable, social and innovative procurement will be the standard in the central government. The objectives of this procurement strategy are that the way in which the central government buys products and services will help to address the consequences of climate change, accelerate the move towards a circular (sustainable) economy and create employment opportunities for people who are less likely to enter the labour market.

The Action Plan for Responsible and Sustainable Procurement by Governments 2015-2020 was evaluated in 2015.⁵⁹ On the whole, the report concludes, on the one hand, that government departments have stepped up their efforts on SRP since 2015 and that this has also had an additional

Sustainable Procurement Manifesto in 2012. The manifesto sets out ambitions that go beyond applying minimum requirements and thus replaces previous agreements such as 100% sustainable procurement based on minimum requirements. For an English version of the initial manifesto see Ministry of Infrastructure and Water Management, “Sustainable Procurement Manifesto 2016 – 2020,” *PIANOo*, 2016, <[57. Sector specific Green Deals and ISCR \(International Corporate Social Responsibility\) covenants already concluded and yet to be concluded support the manifesto because in many cases they contain a specific implementation of SRP on a sub-topic as, for example, the Green Deal Circular Purchasing, the Green Deal Making Food Systems Sustainable and the Green Deal Sustainable GWW \(Civil Engineering\).
58. For further information about this tool in English, see Government of the Netherlands, “MVI criteria tool,” n.d., <<https://www.mvicriteria.nl/en/about-webtool>>.
59. For the results of this evaluation, see CE Delft, “Evaluation Action Plan SRP,” *PIANOo*, 2015, <<https://www.piano.nl/sites/default/files/media/documents/Evaluatie%20Plan%20van%20Aanpak%20MVI%202015-2020-april2020.pdf>>. An English summary is included on page 6 of the report.](https://www.piano.nl/en/sustainable-public-procurement/developments/sustainable-procurement-manifesto-2016-2020-text#:~:text=The%20manifesto%20is%20intended%20to,Procurement%20Manifesto)%20(2012)>”.></p>
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impact. Positive developments include the fact that SRP award criteria are now being used more frequently in tendering processes and are given increasing weight in ranking methodologies, and that procurement departments are now engaging more frequently in consultations with market participants, with SRP being raised more regularly in such discussions. On the other hand, the evaluation concludes that there is still some work to be done. Devolved government departments feel the greatest need for additional top-down guidance and direction. Additional budget would also allow for the recruitment of specialists. There is also a perceived need for clearer, unambiguous SRP criteria. A number of recommendations are also made, including that making SRP less of a voluntary commitment for local and provincial government would improve its take-up and significantly increase its impact.

A new National Action Plan was presented on January 22, 2021, namely the “National Action Plan for Responsible and Sustainable Procurement by Governments 2021-2025 ‘Contracting with ambition, purchasing with impact’” (*Nationaal Plan Maatschappelijk Verantwoord Inkopen 2021-2025 ‘Opdrachtgeven met ambitie, inkopen met impact’*). This plan maintains the instruments and support mechanism developed under the previous action plan and adds new activities along four focus areas: 1) broad embedding of SRI within the government organizations; 2) creating more commitment to action by setting up a new SRP Manifesto; 3) maximizing impact in the most important sectors by creating buyer groups and making specific agreements; and 4) taking an integrated approach to sustainable and fair procurement where possible.⁶⁰

The Action Plan, like its predecessor, does not set any national targets other than the ambition to promote and mainstream the use of SRP and to make a strong contribution to the sustainable and fair goals set by Dutch governments at all levels, such as climate, circular economy and social goals.⁶¹

60. This adequate summary of the main points of the action plan comes from CIRCABAC, “Green Business,” *CIRCABAC*, 2023, <https://circabc.europa.eu/ui/group/44278090-3fae-4515-bcc2-44fd57c1d0d1/library/b1af4b10-e76c-4e7c-816a-6d9644a5691b?p=1&n=-1&sort=name_ASC>.

61. The main climate targets set by the Netherlands follow from Article 2 of the *Dutch Climate Act* and are (in line with European targets) that CO₂ emissions must be reduced by 49% by 2030 compared with 1990. By 2050, greenhouse gas emissions must be reduced by 95%. See (Dutch) *Climate Act*, 2023, art. 2.

The new “SRP Manifesto 2022-2025”⁶² based on the National Action Plan helps make SRP less non-committal, among other things. The ultimate goal of the manifesto is for signatories to adopt SRP as standard wherever possible. Signatories are required to develop action plans for their own organization based on the Manifesto⁶³ and to monitor the annual progress of the implementation of their action plans and the results achieved, using process and/or impact monitoring. For this monitoring, the SRP Self-assessment Tool (*MVI-Zelfevaluatietool*) was developed.⁶⁴ Signatories send this reporting to PIANOo.⁶⁵ PIANOo, in turn, analyzes the reports at an aggregated level of all Manifesto Parties, publishes them on its website and produces an overview of the overall situation. PIANOo also analyzes the results for learning points of interest to all Manifesto Parties. Parties can also make additional agreements on the application of SRP in promising sectors or product groups.⁶⁶ If the targets in the action plan are not met, the parties will explain in the report why this has not been achieved and what steps will be taken in the following year to achieve the intended results.

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62. The official title of the manifesto is PIANOo, “Manifesto for Socially Responsible Commissioning and Procurement 2022-2025,” *PIANOo*, 2022, <<https://www.pianoo.nl/nl/themas/maatschappelijk-verantwoord-inkopen/manifest-maatschappelijk-verantwoord-opdrachtgeven-en>>. This shows a shift from SRP as a specific procurement issue to ensuring sustainability throughout the organization, including the customer.
 63. A template is available for drawing up action plans. Like the SRI Self-assessment Tool, this contributes to uniform reporting.
 64. See also Government of the Netherlands, “National Climate Agreement,” *The Hague*, 2019, p. 237, <<https://www.klimaatakkoord.nl/documenten/publicaties/2019/06/28/national-climate-agreement-the-netherlands>>.
 65. PIANOo is the Public Procurement Expertise Centre of the Ministry of Economic Affairs and Climate Policy, whose mission is to professionalize public procurement and tender. See <<https://www.pianoo.nl/en>>.
 66. Apart from this manifesto, decentralized government bodies are also dealing with this issue themselves in their policies. For the public procurement policies of the three largest municipalities in the Netherlands, see “Vision document ‘Procurement with Influence’” (*Visiedocument “Inkopen met Invloed”*) and the “Procurement framework for Amsterdam” (*Handelingskader Inkopen voor Amsterdam*) from the Municipality of Amsterdam, “Action Plan Socially Responsible Procurement” (*Actieplan Maatschappelijk Verantwoord Inkopen*) from the Municipality of Rotterdam and “Procurement Framework The Hague 2020” (*Kadernota Inkoop Den Haag 2020*) from the Municipality of The Hague. For the North Holland Province’s policy: “Procurement Policy Province of North-Holland” (*Inkoopbeleid Provincie Noord-Holland 2021-2024*). Policies are also made at the sector-specific level; see, for example, “Sustainable civil engineering approach” (*Aanpak Duurzaam GWW*).

On 23 May 2023, PIANOo published the first report showing the main results of the monitoring of contracting authorities using the SRP self-assessment tool (see above) in 2022. Contracting authorities use this self-assessment tool primarily to monitor the extent to which social issues have been requested in procurement contracts. In addition, Utrecht University conducted analyzes of tenders that included at least one SRI topic. The key conclusions of this report and the Utrecht University study are summarized in a fact sheet.⁶⁷ The most important conclusion on “green” issues are that “environment” is most often requested in a tender, but mostly for relatively small contracts; “climate” is most often requested for large contracts, mostly as an award criterion; and “circularity” is increasingly requested, but relatively little in relation to the 2030 target. The main conclusion in relation to the achievement of the objectives from the Action Plan for Responsible and Sustainable Procurement by Governments 2021-2025 “Contracting with ambition, purchasing with impact” (see above) are a bit ambiguous. Firstly, it concludes that SRP no longer seems to be considered (entirely) non-committal in the larger procurement contracts, since at least one SRP topic is required in these contracts. In most organizations, therefore, SRP seems to be secured. However, it is immediately noted that, if SRI were really fully secured, one would expect that smaller contracts would always pay attention to sustainable and/or social procurement. It is also concluded that SRP is not yet being fully applied because there are relatively few tenders where multiple issues are applied and that the fact that SRP is not yet fully applied is an indication that SRP is not yet fully secured and that the level of non-commitment is still (too) high.

Furthermore, in the area of monitoring, the Ministry of Infrastructure and Water Management issued the “Guide monitoring and contractual assurance of SRP” (*Handreiking monitoring en contractuele borging MVI*) in 2021. This guide provides advice to contracting authorities on how to better organize the monitoring and contractual assurance of SRP.⁶⁸

67. PIANOo, “Socially Responsible Procurement (SRI),” *PIANOo*, 2022, <<https://www.pianoo.nl/sites/default/files/media/documents/2023-05/factsheet-mvi-zet-2022-mei2023.pdf>>.

68. This guide can be accessed via: Ministry of infrastructure and water management, “Handreiking Monitoring En Contractuele Borging MVI,” *PIANOo*, 2021, <<https://www.pianoo.nl/sites/default/files/media/documents/2022-01/Handreiking-Monitoring-en-Contractuele-borging-MVI-3-juli2021.pdf>>. In addition, the results of various studies and (progress) reports on SRP overall and on sub-themes can be accessed via this site (in Dutch): PIANOo, “Onderzoeken MVI algemeen,” *PIANOo*, n.d., <<https://www.pianoo.nl/nl/themas/maatschappelijk-verantwoord-inkopen/praktijk-tools/onderzoeken-mvi-algemeen?page=0>>.

Current opportunities for the use of GPP in public tenders in the Netherlands

In the Netherlands there are no mandatory rules on the use of GPP, but there are several ways to take environmental considerations into account when awarding public contracts. There are also a number of rules that deal directly with green procurement or are related to it. Most of the rules discussed below concern a one-to-one implementation of the rules from the European Public Procurement Directives; where the Dutch rules differ from these directives, I will indicate this. Below, I will limit myself to public contracts that fall within the scope of Part 2 of the *Public Procurement Act*, i.e. classic public contracts.

The following is an outline of the opportunities for contracting authorities to take environmental considerations into account at each stage of the tendering procedure. It follows the chronological structure of a tendering procedure.

I would like to point out in advance that the general principles of public procurement law, i.e. non-discrimination, equal treatment, transparency and proportionality, must of course always be observed when making use of these possibilities. When introducing considerations related to other policy areas into the public procurement process, the most important principle is proportionality: the link to the subject matter of the contract is a fundamental condition to be respected.⁶⁹ The proportionality principle in relation to the application of sustainable (including green) requirements, criteria and conditions in a tendering procedure has already been the subject of much discussion. See also the case law of the CJ EU on this matter.⁷⁰ There is much more to be said on this subject, but it is beyond the scope of this report. Where necessary, I will briefly address this principle in the following. What I would like to stress here is that the Dutch Proportionality Guide pays special attention to this topic in Section 3.5.6,

69. See, for example, European Union Law, "Green Paper on the modernisation of EU public procurement policy towards a more efficient European Procurement Market," *European Commission*, 2011, p. 39-40, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0015>>.

70. See, for example: *EVN and Wienstrom*, CJ EU, 2003, Case C-448/01, ECLI:EU:C:2003:651 and *Commission vs. Kingdom of the Netherlands*, CJ EU, 2012, Case C-368/10, ECLI:EU:C:2012:284. See also recital 97 of the preamble to Directive 2014/24/EU: European Union Law, "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 Text with EEA relevance," *Official Journal of the European Union*, 2014, recital 97.

“Sustainability/social conditions.” This section provides some guidelines on how contracting authorities can deal with the proportionality issue when setting sustainability requirements and criteria.⁷¹

Preparation of the contract

First, let’s look at the preparation of the contract. Article 1.4 (2) of the *Dutch Public Procurement Act* imposes the following duty of care on contracting authorities: “The contracting authority or the utility sector company shall ensure the delivery of the greatest possible social value for the public funds when entering into a written agreement as referred to in the first paragraph.” This is a purely Dutch rule, and is not reflected in the European Public Procurement Directives.

Although this sounds very promising, the value of this article in practice is disappointing. The main reason is that the article contains an open standard and does not define what is meant by “social value.” This is a broad concept that can cover all kinds of objectives. The legislator does not indicate how these objectives should be prioritized. It is therefore quite possible that the “green” objective will lose out. The vast majority of case law shows that judges consider that the duty of care is fulfilled when the contract is awarded on the basis of award criteria that include a quality element. Janssen and Neele say the following about the effect of Article 1.4(2): “The inclusion of Article 1.4(2) *Dutch Public Procurement Act* therefore seems noble, but in legal practice it is elevated to ineffective symbolic legislation.”⁷²

Technical specifications

Now, let’s look at the technical specifications of the contract. Through the technical specifications, the contracting authority formulates the minimum requirements/characteristics to be met by the work, supply or service being put on the market (see Article 2.75 (1) of the *Dutch Public Procurement Act*). Article 2.75 (2) of the Act explicitly stipulates in this respect the obligation that the minimum requirements must relate to the subject matter of the public contract and be proportional to its value and

71. For an English translation of the Proportionality Guide (3rd revision, January 2022) see PIANOo, “Proportionality Guide,” PIANOo, 2022, <<https://www.piano.nl/sites/default/files/media/documents/2022-04/proportionality-guide-engels-3rd-revision-january2022.pdf>>. The principle of proportionality itself is set out.

72. Willem Janssen and Eveline Neele, “The (in)effectiveness of open and concrete public procurement obligations in the fight against climate change,” *TBR*, 2021, p. 129 -136.

objectives. Article 2.75 (3) of the Act elaborates when said requirements/ characteristics are sufficiently related to the subject matter of the contract. This is the case when they relate to the works, supplies or services to be provided under that public contract, in all respects and at every stage of their life cycle. It is explicitly stated here that this may include factors relating to the specific production process, provision or marketing of those works, supplies or services, or a specific process for another stage of their life cycle, even if these factors are not part of their material basis. Part of these characteristics may include green requirements.

Article 2.78a of the *Dutch Public Procurement Act* regulates that quality marks/labels can also be requested. This article concerns the implementation of Article 43 of Directive 2014/24/EU and the Max Havelaar Case.⁷³ The Article states that, where a contracting authority intends to procure a work, supply or service with specific environmental, social or other characteristics, it may require, in the technical specifications, award criteria or contract conditions relating to the performance of the public contract, a specific label as proof that the work, supply or service meets the required characteristics. The right to require a label is subject to strict conditions: a) labels may only be required for criteria which have a sufficient link to the subject matter of the contract; b) the requirements for the label must be based on objective and non-discriminatory criteria; c) the label must have been established in an open and transparent procedure in which all interested parties can participate; d) the label must be accessible to all interested parties; and e) the requirements for the label must have been established by a third party over which the economic operator applying for the label does not exercise decisive influence. In this context, for example, eco-labels can be (and often are) required.

Article 2.83 of the *Public Procurement Act* allows a contracting authority to allow or require tenderers to submit variants. However, a variant must meet the minimum requirements for variants set by the contracting authority, according to Article 2.83 (3). The possibility or obligation to offer variants creates scope for tenderers to offer alternatives that are more environmentally friendly than the solution prescribed in the tender documents. Furthermore, Article 2.80, in conjunction with Article 2.115(3), provides that a contracting authority may also attach special conditions to the execution of a public contract, provided that such conditions are related to the subject matter of the contract and are stated in the announcement or the tender documents. The conditions for the performance of the public contract may

73. *Commission vs. Kingdom of The Netherlands*, CJ EU, 2012, Case C 368/10, ECLI:EU:C:2012:284.

relate to economic, innovation-related, labour-related, social or environmental considerations. This article is also an implementation of the Max Havelaar Case.⁷⁴ In this context, an environmental management system (whether combined or not with the requirement to comply with the ISO 14001 standard) could also be requested, for example.

Article 2.76 deals with the way in which the contracting authority formulates the technical specifications of the contract. Under Article 2.76 (2) sub b, the contracting authority can also choose to formulate the characteristics of the contract in the tender documents as functional or performance requirements. This paragraph explicitly states that these functional or performance requirements may include environmental characteristics, in which case the requirements must be sufficiently precise to enable tenderers to determine the subject matter of the contract and the contracting authority to award the public contract. Functional or performance requirements actually describe the function or result that the output to be delivered should have, as opposed to a technical specification that uses standards to describe exactly what solution is required. From a green point of view, a functional specification may be preferable because it gives the bidder scope to bid with an environmentally friendly option (and perhaps a more environmentally friendly option than if the contracting authority had used a technical specification).

Exclusion grounds

I would not answer the question whether it is possible to exclude companies that have violated environmental law or have other serious shortcomings in their environmental performance with a resounding yes. The only exclusion ground that is specifically related to the environment is the optional exclusion ground that follows from Article 2.87 (1) sub a of the *Dutch Public Procurement Act* and Article 2.81 (2) of the *Dutch Public Procurement Act*.

Article 2.87 (1) sub a stipulates that the contracting authority can exclude a candidate or tenderer when the contracting authority can prove by any appropriate means that the candidate or tenderer has failed to meet one or more of the obligations referred to in Article 2.81(2). Article 2.82 (2) then provides:

74. *Commission vs. Kingdom of The Netherlands*, CJ EU, 2012, Case C 368/10, ECLI:EU:C:2012:284.

A contracting authority shall request tenderers or candidates to indicate that they have taken account, when drawing up their tender, of the environmental, social and labour law obligations arising from European Union law, national law or collective agreements or from the provisions of international environmental, social and labour law listed in Annex X to Directive 2014/24/EU.

The first problem with this provision is that it is not general. As the quote above shows, this ground for exclusion refers only to the need to comply with applicable environmental legislation in the performance of public contracts. This already follows from Article 18(2) Directive 2014/24/EU. In the *Dutch Public Procurement Act*, to paraphrase Meesters,⁷⁵ the scope of this provision has been further limited by linking the ground for exclusion to the provision in the *Dutch Public Procurement Act* (Article 2.81(2), see above), which stipulates that bidders “when drawing up their tender” must take into account, among other things, obligations in the field of environmental law. Thus, this ground for exclusion can only be applied when the contracting authority can prove that a certain economic operator did not take into account the environmental legislation referred to in Article 2.81 (2) of the *Dutch Public Procurement Act* when preparing its tender for a public contract.⁷⁶ The question also remains as to which environmental legislation is meant.

In other words, it is not possible, on the basis of this provision, to exclude from a contract an entrepreneur who violates environmental legislation in general but not in the case of a specific public contract.

Incidentally, Meesters notes that the mandatory wording of Article .81 (2) of the *Dutch Public Procurement Act* can result in the fact that, even when the ground for exclusion has not been declared applicable (after all, it is an optional ground for exclusion), violation of the environmental regulations in the tender (and thus in the execution of the contract) does result in the exclusion of the relevant tenderer from the current tender procedure. Article 2.81(2) can be seen as a minimum requirement.

There are two other grounds for exclusion that may play a role in environmental law violations.

75. Janet Meesters, “The Exclusion Grounds as a Tool for Achieving Climate Goals. Is Europe ready for a concrete ‘climate exclusion ground’?” *TBR*, 2012, p. 137-144.

76. It is also unclear to me whether the article is limited to the failure to take into account these obligations in the preparation of this particular public contract, or whether it covers the preparation of public contracts in general (and thus also previous procedures in which the tenderer has participated).

First, there is the optional exclusion ground of “grave professional misconduct” (Article 2.87 (1) (c)). As under the old directive, it still appears to be possible to classify environmental law violations as grave professional misconduct. This was also allowed under the old classical Directive 2004/18/EC (i.e. before the exclusion ground discussed above was included in the directives). The preamble to this directive provided the following: “If national law contains provisions to this effect, non-compliance with environmental legislation or legislation on unlawful agreements in public contracts which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.”⁷⁷ Meesters believes that this is still the case.⁷⁸

Finally, it should be noted here that it follows from the *Forposta* judgment of the CJ EU⁷⁹ that the term “grave misconduct” usually refers to conduct indicating malice or negligence of a certain seriousness on the part of a market participant.

Another possible ground for exclusion that may play a role in environmental infringements is Article 2.87(1) (g) (the ground for exclusion based on past performance). This ground for exclusion covers cases where the economic operator has demonstrated serious or persistent shortcomings in the performance of a substantial requirement under an earlier classical public contract, a previous contract with a utility sector company or a previous concession contract, which led to the early termination of that contract, to the payment of compensation (damages) or to other comparable penalties. These significant or persistent deficiencies may relate to essential environmental requirements for which a sanction has been imposed.

It should be noted that all these grounds for exclusion are “optional” grounds for exclusion. They exist alongside the mandatory grounds for exclusion in Article 2.86 of the *Dutch Public Procurement Act*. They are optional in the sense that a contracting authority may choose to include them in the tender documents. However, if the contracting authority has

77. Recital 43 (end) of the preamble of Directive 2004/18/EC: European Union law, “Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts,” *Official Journal of the European Union*, 2004, recital 43, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0018>>.

78. Janet Meesters, “The exclusion grounds as a tool for achieving climate goals. Is Europe ready for a concrete ‘climate exclusion ground’?” *TBR*, 2012, p. 141.

79. *Forposta*, CJ EU, 2012, Case C-465/11, ECLI:EU:C:2012:801.

chosen to do so and the grounds for exclusion arise, the supplier in question must be excluded.

Finally, I would like to address the issue of abnormally low tenders. It follows from Article 2.116 (5) of the *Dutch Public Procurement Act* that the contracting authority must reject a tender if it has been established that the tender is abnormally low because it does not comply with environmental, social and labour law obligations under European Union law, national law or collective labour agreements or under the provisions of international environmental, social and labour law listed in Annex X of Directive 2014/24/EU.

This is an implementation of Article 69 (3), second subparagraph, of Directive 2014/24/EU. It should be noted that Article 69 (1) of Directive 2014/24/EU, from which it follows that contracting authorities are always obliged to examine abnormally low tenders, also irrespective of the aforementioned violations in the field of environmental, social and labour law, has not been reproduced exactly in Article 2.116 (1) of the *Dutch Public Procurement Act*. This is because this article uses the more non-committal phrase “requests”: “request the tenderers to further explain their bid that appears abnormally low” instead of “obliges”: “obliges the tenderers to further explain their bid that appears abnormally low” (as follows from Article 69 (1) of Directive 2014/24/EU). Den Houting⁸⁰ signals that the national courts do not assume such an obligation either, but considers that there is a discretionary power of the contracting authority in this regard. In doing so, the national court ignores the fact that, on the CJEU,⁸¹ a contracting authority is always obliged to investigate abnormally low tenders, and not only when it intends to reject a tender. Den Houting concludes that the implementation of Article 69 (1) of Directive 2014/24/EU in the *Dutch Public Procurement Act* is not entirely correct. Den Houting adds the caveat that he has not found any case law on the mandatory ground for rejection of Article 2.116 (5) of the *Dutch Public Procurement Act* and therefore cannot assess whether the national court would adopt such an obligation in a situation where the tender is abnormally low because it does not comply with environmental, social and labour law obligations under European Union law, national law or collective labour agreements or under the

80. Jørgen Den Houting, “Research on the abnormally low tender as a sustainability obligation. An investigation into the inconsistent implementation of Article 69(1) of Directive 2014/24/EU in Article 2116(1) of the *Dutch Public Procurement Act* 2012 and its application in Dutch legal practice,” *TBR*, 2021, p. 146-151.

81. *SAG ELV Slovensko*, CJEU, 2012, Case C-599/10, ECLI:EU:C:2012:191.

provisions of international environmental, social and labour law listed in Annex X of Directive 2014/24/EU.⁸²

Requirements for participation and selection criteria

Under the requirements for participation and selection criteria, a company's past experience and the professional qualifications of its staff may be assessed for environmental considerations.

First, let's look at the requirements for participation. Suitability requirements always relate to the potential contractor and not to the contract. A candidate or tenderer must at least meet the requirements for participation in order to be allowed to participate in the procedure. The contracting authority is not obliged to set suitability requirements.

If the contracting authority wishes to include environmental considerations when assessing a tenderer, it will have to do so for those requirements that relate to technical or professional capacity (see Article 2.90 (1) (b) of the *Dutch Public Procurement Act*). The other suitability requirements concern financial and economic standing and professional competence.

Requirements for participation to be set by the contracting authority as referred to in Article 2.90 (1) (b) may relate, among other things, to the human and technical resources and experience that the candidate or tenderer must have at its disposal to perform the public contract to an appropriate quality standard. If the contracting authority sets requirements with regard to experience, the contracting authority may, in particular, require that the candidate or tenderer demonstrate sufficient experience by means of appropriate references for contracts performed in the past (see Article 2.92a (2) of the *Dutch Public Procurement Act*).

Article 2.93 of the *Dutch Public Procurement Act* exhaustively lists a number of means of proof that a contracting authority may request to test the technical or professional capacity of a candidate or tenderer. These include references to demonstrate experience (see Article 2.93 lid 1 sub a and b of the *Dutch Public Procurement Act*), but the tenderer may also be asked to indicate the environmental management measures that the economic operator may apply for the performance of the public contract (see Article 2.93 (1) sub h of the *Dutch Public Procurement Act*). When a

82. Jørgen Den Houting, "Research on the abnormally low tender as a sustainability obligation. An investigation into the inconsistent implementation of Article 69(1) of Directive 2014/24/EU in Article 2116(1) of the *Dutch Public Procurement Act* 2012 and its application in Dutch legal practice," *TBR*, 2021, p. 149-151.

contracting authority imposes such environmental management requirements, Article 2.97 (1) of the *Dutch Public Procurement Act* stipulates that the contracting authority may require the submission of a statement/certificate drawn up by an independent body to the effect that the economic operator complies with certain environmental management standards. This article also specifies the systems or standards to which the contracting authority must then refer. Article 2.97 (2)⁸³ of the Act then specifies that, if an economic operator proves that it is unable to submit the required certificate within the prescribed period for reasons beyond its control, the contracting authority should also accept other means of proof that the economic operator in question meets the quality standards.

Now let's look at the selection criteria. As is well known, selection criteria are an extension of suitability requirements. The purpose of selection criteria is to further limit the pool of suitable candidates to a predetermined number. Environmental considerations can also be assessed under selection criteria. One could imagine a system where, if a specific environmental certificate is required, a bidder scores more points if they have a certificate with a higher score; or, if a reference project is required, that the bidder whose reference project has the lowest EPC score (the EPC indicates how energy efficient a building is energy performance coefficient) gets the highest score, and the bidder with the project with the second lowest EPC score gets the second highest score, and so on.

Award criteria

The *Dutch Public Procurement Act* takes the award criterion of best price-quality ratio as the starting point for determining the most economically advantageous tender. The assessment is then based on both price and quality. This is the standard criterion. Under this criterion, green criteria can be applied in the form of sub-award criteria as part of the quality assessment. See Article 2.114 (1) – (2) sub a jo. Article 2.115 (1) – (2) sub e of the *Dutch Public Procurement Act*.

The *Dutch Public Procurement Act* additionally provides two other award criteria, namely “lowest price” and “lowest cost calculated on the basis of cost-effectiveness, such as life-cycle costs” (see Article 2.114 (1) jo. 2 sub a

83. This part of the article obviously concerns the implementation of Article 62 (2) of Directive 2014/24/EU: European Union law, “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 Text with EEA relevance,” *Official Journal of the European Union*, 2014, art. 62(2).

and b) jo. Article 2.115a of the *Dutch Public Procurement Act*. Article 68 of Directive 2014/24/EU shows what the concept of life-cycle costing means in procurement: life-cycle costing includes i) costs relating to acquisition; ii) costs of use, such as consumption of energy and other resources; iii) maintenance costs; and iv) end of life costs, such as collection and recycling costs. In addition, the calculation may include external environmental impacts. According to the *Dutch Public Procurement Act*, the contracting authority can only apply the latter two criteria (“lowest price” and “lowest cost calculated on the basis of cost-effectiveness, such as life-cycle costs”) if it justifies this application in the tender documents.

I would also like to mention here that, if some form of life cycle analysis is applied, either as a sub-award criterion or as the main criterion, in the Netherlands the environmental cost indicator (hereinafter referred to as EQI) (*MKI*) is increasingly used. The EQI summarizes all environmental impacts into a single score and is expressed in euros. It weighs all relevant environmental impacts arising during a product’s life cycle and adds them up to a single score. The EQI, or shadow price, of a product is an easy way to compare and communicate the environmental impact of products or projects. EQI was developed for the civil engineering sector but is now also used in other sectors.

The Department of Waterways and Public Works (Rijkswaterstaat) uses the EQI value as a (sub)quality criterion in tenders according to the Best Price-Quality Ratio methodology. Tenders with a low EQI value score better. The lower the EQI value, the more sustainable is the offer. A lower EQI value usually also means CO₂ reduction and a contribution to the goals of the circular economy. The Department of Waterways and Public Works has created a tool for calculating the EQI value: DuboCalc.⁸⁴ It is mainly used for civil engineering projects.

Furthermore, public works contracts use “GPR building” (*GPR-gebouw*) as a sub-award criterion. GPR building is a digital tool for mapping the sustainability of a residential, office or educational building by means of marks for energy, environment, health usage quality and future value.⁸⁵

Finally, I would like to briefly mention that the so-called CO₂ performance ladder, developed by the Foundation for Climate Friendly Procurement and Business, is increasingly being used as a sub-award criterion in the Netherlands. This system works as follows. The CO₂ performance ladder is a CO₂ management system with five levels. Up to level 3, an organization

84. For information on DuboCalc in English, see <<https://www.dubocalc.nl/en/>>.

85. The aim of GPR-building is to make sustainability measurable and discussable.

manages the emissions of its own organization (and all projects). From levels 4 and 5 onwards, the CO₂ emissions in the chain and sector are also addressed. This is not required by law or regulation, but it is common practice.

As mentioned above, the CO₂ performance ladder is intended to be used as part of the best price-quality ratio award criterion in tenders. Companies receive a discount on the bid price for tenders. Companies on the ladder are rewarded with a concrete award advantage in the tender process. The higher the level, the higher the discount. The contracting authority determines the award advantage for each level of the ladder.⁸⁶

TRAINING

A helpdesk is run by PIANOo, the Public Procurement Expertise Centre of the Ministry of Economic Affairs and Climate Policy, whose mission is to professionalize public procurement and tender. The PIANOo website also gathers all the information that can be found on the subject, from policies to guidelines and tools, under the heading “Socially Responsible Procurement.” Practical examples can also be found on this site.

PIANOo and its partners also regularly organize webinars and meetings around an SRP theme. A number of separate courses are also offered in this area.

In addition, the previous Action Plan for Responsible and Sustainable Procurement by Governments 2015-2020 established so-called “buyer groups” in four sectors, namely business management, construction, energy and civil engineering. Within a buyer group, public and private purchasers work together to develop a common market vision and strategy to make a specific product category more sustainable. The aim is for the participating purchasers to implement this vision and strategy in their procurement practices within two years. This stimulates the market to develop sustainable solutions that meet a concrete, widely supported need. These “buyer groups” also report on their work in “impact reports.”

86. For information on the CO₂ performance ladder in English, see CO₂ Performance, “The no. 1 decarbonisation tool,” n.d., <<https://www.co2-prestatieladder.nl/en>>.

KEY GPP SECTORS

According to the National Action Plan for Responsible and Sustainable Procurement by Governments 2021-2025 “Contracting with ambition, purchasing with impact,” research has shown that a strategic focus on sectors is needed. According to the plan: “These are those product categories where government procurement can really make a difference, because there are major opportunities for improvement, it has a big impact, there are major risks in the value chain, the government itself is a big player and/or and within these sectors, there are important policy issues at play, such as the approach to plastics.”⁸⁷ Examples cited include construction, ICT, textiles and catering. Sectors where SRP policy currently has a limited focus may also come into play, such as healthcare, education or the energy sector. In addition, it appears that PIANOo is focusing its support for SRP mainly on the following six product clusters: automation and telecommunications; energy; civil, road and hydraulic engineering; office equipment and services; office buildings; and transport and transportation.⁸⁸

87. Government of the Netherlands, “Action Plan for Responsible and Sustainable Procurement by governments 2015-2020,” *PIANOo*, 2015, p. 17, <<https://www.pianoo.nl/en/sustainable-public-procurement/developments/action-plan-responsible-and-sustainable-procurement>>.

88. PIANOo, “Productgroepen en MVI-criteria,” *PIANOo*, n.d., <<https://www.pianoo.nl/nl/themas/maatschappelijk-verantwoord-inkopen/productgroepen-en-mvi-criteria>>.

Analysis of Semi-Structured Interviews

The second part of the project consisted of semi-structured interviews with people employed or appointed by a contracting authority to design and implement tendering procedures in the role of procurement consultant, procurement manager or legal adviser. The project's research method was a field approach, consisting of semi-structured interviews followed by online questionnaires to a wider group of "public purchasers." The results of the online questionnaire are presented in Part III of this report.

I interviewed five people in total, two of them at the same time. The interviewees were employed by or for the following types of contracting authorities: a water board (interviewees: a procurement lawyer and a procurement team coordinator); two municipalities (both also as part of the Amsterdam Metropolitan Area⁸⁹) (interviewees: a strategic procurement and sales consultant and a contract manager who is also involved in the procurement phase); and the Department of Waterways and Public Works (interviewee: a procurement and contract manager who had also worked extensively on large infrastructure projects in the larger Dutch municipalities in the past).

I conducted half of the interviews online and the other half live. On average, the interviews lasted one hour. I told the interviewees that the conversation would be processed anonymously.

The interviews were conducted in May and June 2022.

89. The Amsterdam Metropolitan Area (AMA), known in Dutch as Metropoolregio Amsterdam (MRA), is comprised of 30 municipalities, two provinces (North Holland and Flevoland) and the Transport Authority Amsterdam. Around 2.5 million people—more than 14 percent of the Dutch population—live within the AMA. Metropool Regioamsterdam, "About Metropolitan Region Amsterdam," *Metropool Regioamsterdam*, n.d., <<https://www.metropoolregioamsterdam.nl/about-mra/>>.

LIMITATIONS OF THE RESEARCH METHOD

The limitations of the research are as follows. Firstly, of course, I only interviewed five people, and no general conclusions can be drawn from the results of these interviews. This also made it difficult to identify patterns in the answers given. Also, in some cases, the interviewees were talking about their past experiences with projects for previous employers and, of course, things may have changed in the field of green procurement in the meantime.

I also note that some of the points I included in the following analysis of responses to a particular theme were not made in response to a question on that theme, but in another part of the interview. In addition, some of the comments made by interviewees are excluded from the following analysis, either because they are irrelevant to the study or because they are too detailed. For example, one interviewee told me how he had included a particular sustainability item as a preliminary budget (*stelpost*) in the specifications for a major infrastructure project and how they had filled it in during the project. I found this too case-specific and so left it out. Finally, all my questions focused on the inclusion of environmental or green considerations in public procurement. However, respondents often used the generic term “sustainability” or “sustainable procurement” when answering the questions. I don’t know exactly what each respondent meant by this, but it tends to refer to a broader concept than green procurement and includes, for example, social aspects.

In this analysis of the results, I first used the deductive method (top-down approach) and then applied the inductive method to the information that was left (bottom-up approach).

QUESTIONNAIRE

The questionnaire below was used to guide the interviews.

T6: Semi-structured interview questionnaire – Netherlands

SEMI-STRUCTURED INTERVIEW QUESTIONNAIRE - NETHERLANDS
<p>Opening:</p> <p>Thank you again for your time and willingness to participate in this research/interview. This interview is about the integration of environmental considerations in public procurement by the organization you work for. It will not be recorded. Notes will be taken. The conversation will remain anonymous. We may stop the interview at any time.</p>
<p>I. Introduction of the interviewee (purchaser/lawyer/other)</p> <p>Aim: to understand the interviewee's position within the organization and the legal background.</p> <ul style="list-style-type: none"> a) Can you tell me what your position/function is within the organization you work for and what your job responsibilities are / what your work consists of? b) Can you tell me about your education? To what extent do you have a legal background / have you taken courses with a legal angle?
<p>II. What types of contracts are procured and what tendering procedures are used?</p> <p>Aim: To understand the types of contracts that are awarded and the procedures that are generally used.</p> <ul style="list-style-type: none"> a) What types of contracts do you or does your organization put out to tender? b) What type of tendering procedures do you or does your organization usually use? c) Are there any other special procurement methods you use (e.g. RCC/RIC)?
<p>III. Environmental considerations in purchasing and procurement policies</p> <p>Aim: To determine if environmental considerations are included in purchasing and procurement policies and exactly what these policies entail.</p> <ul style="list-style-type: none"> a) Does the government organization you work for have an environmentally friendly procurement policy? / To what extent does the government organization you work for have an environmentally friendly procurement policy? / Are environmental considerations included in the procurement policy? b) How is this policy established? / What is the name of the document in which this policy is established? c) Is this document evaluated? If so, how? d) Do you use any other policies/guidelines/guides on environmentally friendly / sustainable purchasing or procurement other than those established by your organization?

(to be cont'd)

T6: Semi-structured interview questionnaire – Netherlands (cont'd)**IV. Green public procurement in practice**

Aim: To understand how environmental considerations are reflected in public procurement (and the procurement process/documents that, if successful, lead to such a contract).

Before and during the tendering procedure

- a) How do you include environmental considerations when defining needs?
- b) Does the desire to take environmental considerations into account play a role in the choice of procedure?
- c) What requirements/criteria during the procurement process itself do you think best integrate environmental considerations? Do you use the SRP criteria tool? Other criteria tools?
- d) Which award criterion do you typically use to select the winning bidder (and which sub-award criteria)? Do you ever use the CO₂ performance ladder? If so, in what way?
- e) What weight should be given to environmental criteria when selecting the winner?

During the performance of the contract

- f) Do you use "environmental clauses" in the contract that is finally concluded with the winner of the procedure? In what way are they included/required? How are they worded? Do you have an example?
- g) On the execution of the contract: Does the execution of the contract meet your expectations in terms of environmental performance?

Monitoring and evaluation

- h) Do you monitor and evaluate the green / environmentally friendly procurement policy? If so, how?
- i) Do you also monitor the performance of the contract? Whether the environmental clauses are implemented in accordance with the agreement? (Sometimes I have the impression that the purchasing organization is more concerned with primary performance.)

V. Conclusion

- a) What do you see as the main obstacles to greener procurement? At the regulatory level?
- b) What do you think would be the best ways to promote green / environmentally friendly procurement? at the regulatory level?

RESULTS AND ANALYSIS

Deductive analysis

On the basis of the interviews, the following can be said about the themes included in the interview guide.

The answers to the questions on theme II (“What types of contracts are procured and what tendering procedures are used?”) show that works, supplies and services are procured by the contracting authorities concerned. It cannot really be said that one procedure is preferred over another, all procedures are used, with some opting more for standard procedures and for more variation between the different options. Of course, this also depends on whether the contract is above or below the European threshold and whether there is a ground to apply a flexible procedure. However, the responses given by these interviewees show that the competitive dialogue is more often used for larger infrastructure projects (i.e. the construction of metro and tram lines). These respondents also make use of the possibility of market consultation, some in a more formal context than others.

The picture that emerges from the interviews on theme III (“Environmental considerations in purchasing and procurement policies”) is that all contracting authorities have some kind of policy in which sustainable (as an umbrella term) procurement is managed, either within the decentralized contracting authority itself or within the region. It is worth noting that one of the interviewees was not aware of the existence of this policy at the time of the interview, although it did exist.

When it comes to monitoring the implementation of these policies, the picture is somewhat diffuse. One interviewee said that this does not happen, and another noted that he did not really know whether it happened, but that he had had questions about certain projects where sustainability measures were applied. Another interviewee mentioned that it is actually done through the annual audit, that their board sometimes asks questions about it and that there are also certain national monitoring instruments to which data must be submitted. Finally, one interviewee said that, within the Amsterdam Metropolitan Area, annual procurement plans are made, and all tenders have to be included in them. The procurement consultant then prepares a report on this plan. According to the interviewee, there is a kind of competition within the MRA to see who has the best sustainability score in this report.

Finally, two respondents told me that sustainability teams or individual officers/consultants had been appointed within their organizations, one of whom spent 12 hours a week working exclusively on procurement sustainability issues.

With regard to theme IV ("Green public procurement in practice"), I discuss the results of the interviews under three sub-themes, namely IV.I, "Green public procurement in practice before and during the tendering procedure"; IV.II, "Green public procurement in practice during the performance of the contract" and IV.III, "Monitoring and evaluation."

First, let's look at sub-theme IV.I, "Green public procurement in practice before and during the tendering process." Regarding this topic and the question whether environmental or green considerations already play a role in the definition of the contracting authority's needs, one of the respondents indicated that, as soon as a call for tenders is issued, a procurement team is set up and a kick-off meeting is held. This kick-off meeting is based on a (procurement process) form where all fields have to be filled in with justification. One of these fields is related to sustainability. Another mentioned that a checklist is used when drawing up the requirements for the design and that sustainability has to be included on the basis of this checklist. There is also a sustainability consultant who oversees this. Three of the interviewees indicated that whether environmental considerations (already) play a role in defining the needs of the contracting authority depends very much on the people involved in the project from the beginning.

Environmental considerations do not play a role in the choice of the type of procedure, according to all respondents. However, they mentioned that market consultation (where sustainability opportunities could be explored) is increasingly being used. All contracting authorities (at least in the projects that the respondents had in mind when they were interviewed) specify green to a greater or lesser extent (in other words, the minimum requirements include green requirements). All of these contracting authorities also sometimes refer to green solutions in the (sub)award criteria. It should be noted, however, that this is especially the case when the bidders can distinguish themselves on the basis of the sustainability or environmental friendliness of their solution. Only then, according to the majority of respondents, does it make sense to include this in the award criteria. One interviewee pointed out that there is a certain fear of using green criteria because there is a chance that the solution that comes out best in the end may not be the one that the

contracting authority wants because it is unfamiliar with it. Three of the four entities occasionally use the lowest life cycle cost as a sub-award criterion. This includes the use of the EQI. The respondent in question believed that use of the EQI should be mandatory. However, one of the interviewees indicated that there is still little awareness of or experience with awarding contracts on the basis of lowest life cycle costs. In at least two companies, the CO₂ performance ladder is used in tendering. One of the respondents criticized the use of the CO₂ performance ladder, saying that it is too easy to obtain a certificate on the basis of the ladder, and so it is not very meaningful. None of the respondents indicated that they use the SRP criteria tool. The respondents believed that environmental criteria should have a weighting of between 30% and 40% when determining the winner of the tender.

I am dealing with themes IV.II, "Green public procurement in practice during the performance of the contract," and IV.III, "Monitoring and evaluation," together, because both are basically about whether the sustainability requirements and criteria, which are ultimately reflected in the contract that is concluded with the winner of the tendering procedure, are properly complied with. The answers I received varied greatly from one contracting authority to another. The two respondents who were involved in large infrastructure projects indicated that the monitoring of compliance with these requirements and agreements is in order for large projects. This is done as follows. The contractor distills from the contract all the requirements it has to meet (sometimes this is done using a specific tool), and then verifies whether the requirements have been met in the execution of the contract. Finally, the contracting authority checks this verification. In effect, the contracting authority is checking the control that the contractor itself has carried out. One interviewee indicated that this check by the contracting authority is often risk driven. Furthermore, the perception is that, on smaller projects, it is all a little less well organized and that the verification of compliance depends very much on the person working on such a project (and that person's professionalism). One interviewee mentioned that there are contracting authorities where contract management is still very much in its infancy in the sense that, once the project is under way, the contract is simply put aside. Another interviewee mentioned that it is simply an organizational issue; for example, if there is a progression from procurement advisor to contract manager, then in the interviewee's experience compliance checks are better handled during the execution phase of the contract.

In response to my question as to whether it is the case that checks during the contract phase are primarily carried out on the primary performance to which the contract relates (e.g. the delivery of a bridge or a building), and less on more secondary requirements such as green requirements, one of the interviewees indicated that no distinction is made here. He suggested that sustainability requirements are simply contract requirements that need to be checked and are no more or less important than other requirements. He then went on to give an example of a project where the winning bidder was selected partly on the basis of a green criterion, and that they were particularly keen to enforce this at the time (partly because the losing bidder was threatening legal action). In the same vein, another interviewee indicated that they were keen to enforce all requirements, including in relation to the procurement doctrine of substantial modification.⁹⁰

In response to my final questions under theme V, “Conclusion,” i.e. what do respondents see as the main barriers to greener procurement and what are the best ways to promote greener procurement, I received the following responses.

First of all, all interviewees stated that the *Dutch Public Procurement Act* does not present any obstacles to green procurement. In other words, on the basis of the *Dutch Public Procurement Act*, there is enough room for green procurement. In response to my question as to whether an obligation (in some form) for green procurement should be included in the *Dutch Public Procurement Act*, one of the interviewees stated that he did not necessarily think it was logical. It could lead to a situation where this obligation would have to be fulfilled in projects where there is no sustainability benefit. On the contrary, another respondent mentioned that the solution would be to make it mandatory to buy with an EQI or a GPR building. If this becomes the standard, what is required will be clear, simple and unambiguous for everyone.

According to the interviewees, the barriers to green procurement are (and this is a compilation of the different answers they gave): fear of the unknown (“What product will come out of this tender process in which we have included green requirements and criteria?”; “What about the durability and maintenance of these products?”; “Is this similar to normal products?”;

90. See European Union law, “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 Text with EEA relevance,” *Official Journal of the European Union*, 2014, art. 72; *Dutch Public Procurement Act*, 2012, chapter 2.5.

“Do we have spare parts in stock for these green products?”), fear of high costs (the unrealistic image that green solutions cost a lot of money) and lack of tactical translation of policy into the organization (“How do you make sure that the policy gets down to the operations in a way that the operation can understand and work with?”).

Finally, the interviewees suggested that green procurement could be promoted in the following ways: green procurement should be promoted from the top layer of an organization down, indicating that help and support are available; policies should include a requirement to check at the beginning of a project that sustainability has been included, and at the end of the project if sustainability plans have actually been implemented (a tender board could do this, for example); more sustainability officers should be appointed; and a standard framework for the use of EQI in award criteria should be developed. In the same vein: (more) objective measurement methods should be developed by the government. It was also suggested that there should be more research into how expensive green procurement is and whether there are any envelopes to fund it. Another suggestion is to increase dialogue with the market, especially with industry associations. This dialogue should not only take the form of market consultation prior to the tendering process, but also take place outside the framework of the tendering process. Finally, one interviewee mentioned that the issue simply needs to be publicized within government organizations if the organization in question wants to do something with it, for example, in the context of the contract managers’ consultation.

Inductive analysis

What also emerged from the interviews, but was not explicitly asked about, was the following (inductive/bottom-up approach).

One interviewee made the down-to-earth comment that it simply takes time to raise GPP to a higher level and that this should be spread over many years. Another interviewee was realistic, saying that there will always be a difference between theory and practice. It can all look wonderful on paper, but in practice it turns out to be unmanageable.⁹¹

91. In this regard, the respondent gave the example of unmanned idling in a factory. The tender documents may say that machinery must be switched off when unmanned, but if you ask a mechanic why they don’t do it, he will say that they don’t do it because the oil has to heat up again before they can start working and that’s not good for the lifespan of the machine. According to the interviewee, “it’s good to look outside once in a while. These men are doing physically demanding

ANALYSIS OF ONLINE QUESTIONNAIRE

The third part of this project involved administering an online questionnaire to public purchasers and others who deal with public procurement in their daily work, such as procurement consultants and procurement lawyers. The research method was, as mentioned, a field approach, and it consisted of conducting semi-structured interviews and then administering online questionnaires to a larger group of public purchasers. The results of the semi-structured interviews served as inspiration for the design of the online questionnaire.

The online questionnaire was completed by 74 people. All of these 74 people answered all the questions. Below, I analyze the results by question and indicate exactly what the question entailed.

The questionnaire was open from September 2022 to February 2023.

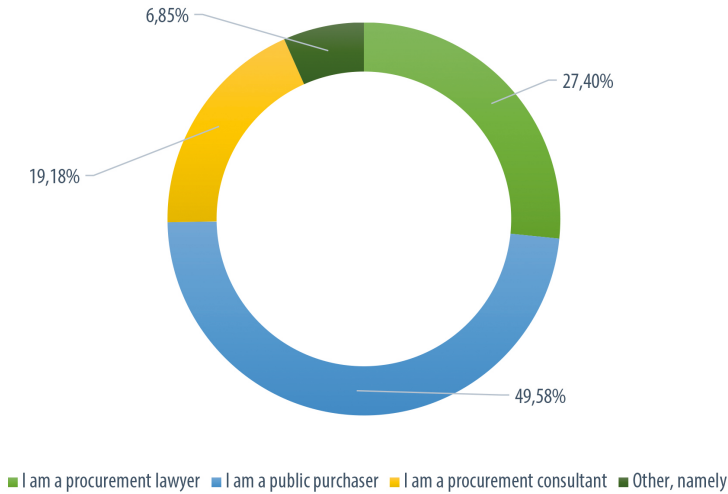
Limitations of the research method

The questionnaire was sent through the VU's Postgraduate Training Institute to all former participants (purchasers and lawyers) who had attended a course on procurement law at the VU. It is of course possible that those from this group who chose to complete the questionnaire already had a particular interest in green procurement. This may have influenced the results of the survey. In addition, after administering the questionnaire, I came to the conclusion that the wording of my questions may have been somewhat vague and broad in places; for example, some of the questions refer to "taking environmental considerations into account in public procurement." This may also have influenced the results of the survey, since it is probably more likely that respondents answer such broadly worded questions in the affirmative.

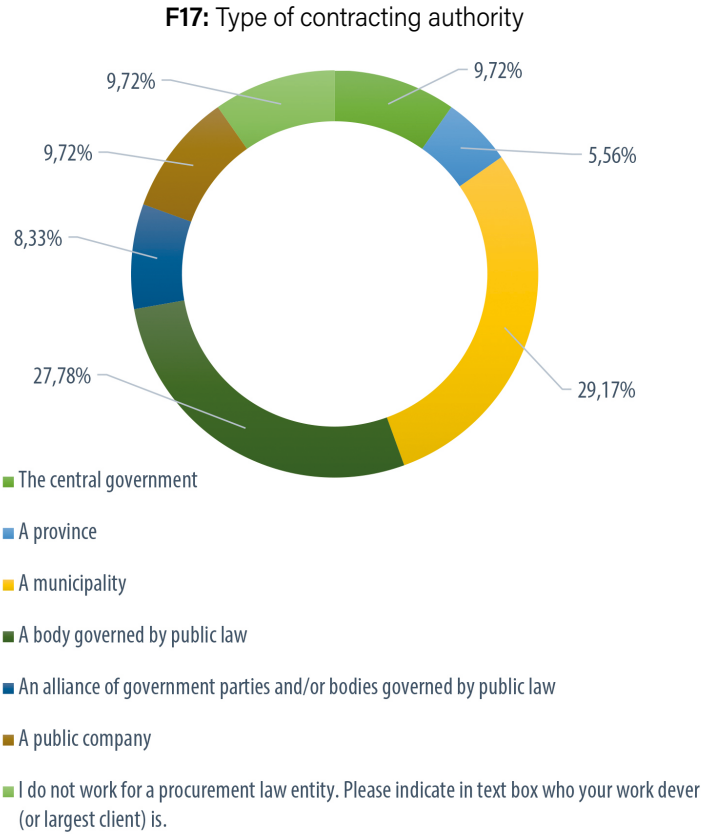
Results and analysis

The first question concerned the respondent's position in the contracting authority. Almost half of the respondents worked as public purchasers, while about a third worked as procurement lawyers. Of the remaining respondents, the vast majority worked as procurement consultants.

work, and they are trying to do it out in the heat. They're not too worried about it, and you can't blame them."

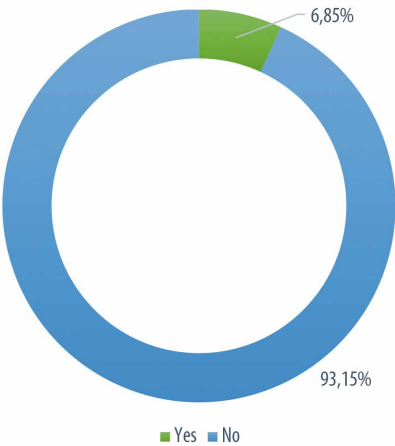
F16: Position in contracting authority

The second question was about the type of contracting authority for which the respondent worked. The question specified that, if the respondent worked as an external procurement consultant, they had to tick the type of contracting authority for which they mainly worked. There was also an option to tick “other: explain.” Almost a third of the respondents worked for a municipality, and almost a third worked for a body governed by public law, as referred to in Article 1 of the *Dutch Public Procurement Act* and Article 2 (1) of Directive 2014/24/EU. Of the remaining respondents, most worked for the central government and public companies. (According to Article 1 of the *Dutch Public Procurement Act*, a public or government-owned company is a company over which a contracting authority can exercise, directly or indirectly, a dominant influence by virtue of ownership, financial participation or the rules applicable to the company.) Just under a tenth of respondents worked for an alliance of government parties and/or bodies governed by public law, as mentioned above. Of the proportion (under a tenth) who indicated that they did not work for a contracting authority, the majority worked as procurement consultants or managers.



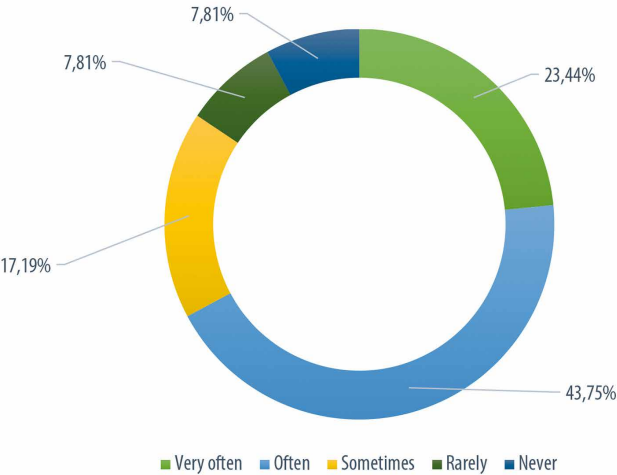
Of the employers for whom the respondents worked, only a small proportion (just over one in twenty) were classified as utility sector companies. The third question addressed this issue.

F18: Classical government or utility sector company?

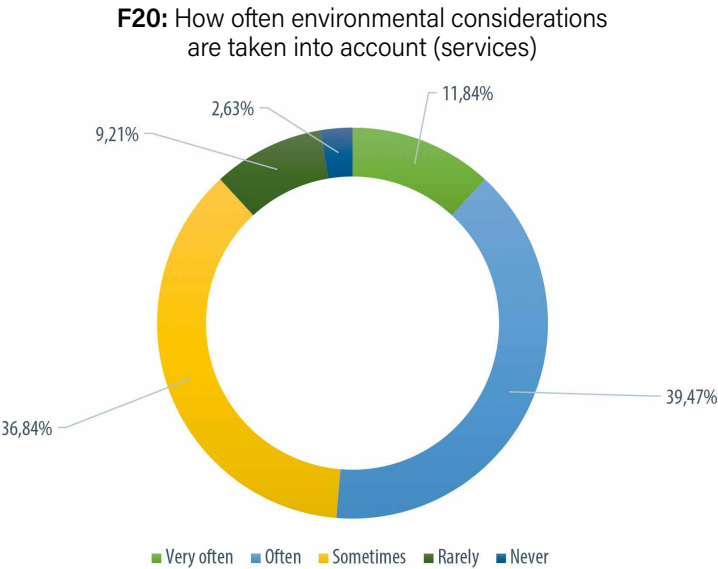


The fourth question asked how often environmental considerations were taken into account in procurement. Here, the question is differentiated by type of contract. Respondents were asked to answer on a five-point scale (very often, often, sometimes, rarely, never). More than two thirds of the respondents took environmental considerations into account “very often” or “often” when awarding public works contracts. Just under a fifth did so “sometimes,” and an even smaller group of respondents said they did so “rarely” or “never.”

F19: How often environmental considerations are taken into account (works)

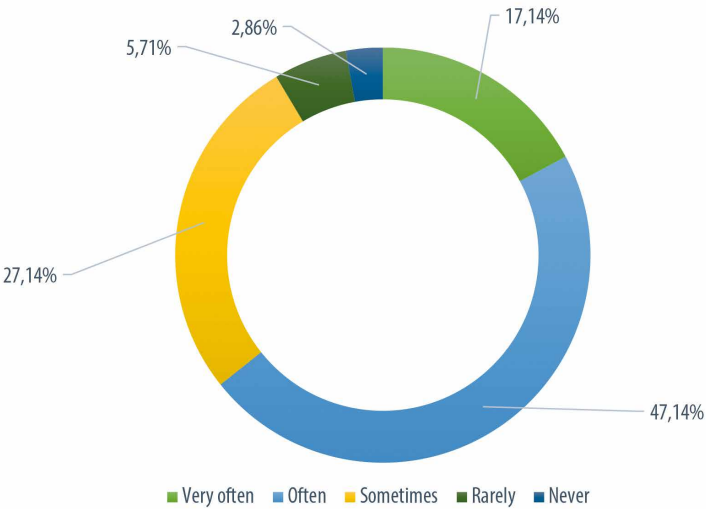


This is slightly less for public service contracts, but still just over half of respondents “very often” or “often” included environmental considerations in procurement, and well over one third did so “sometimes.” A small group (just over a tenth) of respondents said they “rarely” or “never” did this.



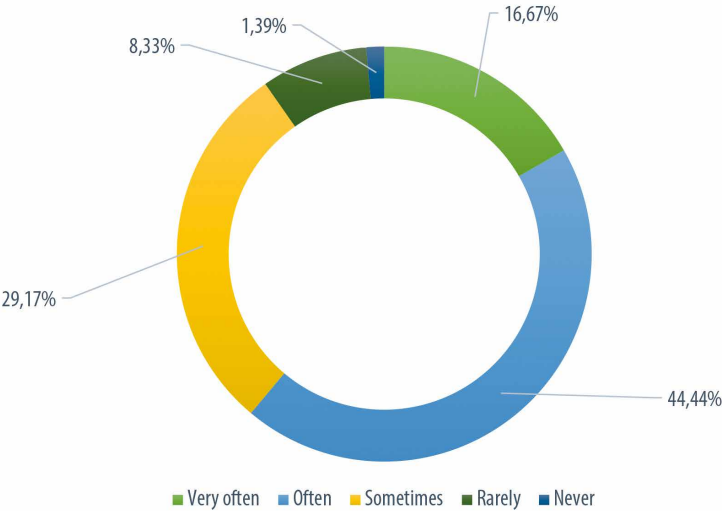
For public supply contracts, the figure is about the same as for works, with just under two thirds of respondents taking environmental considerations into account in their procurement “very often” or “often,” and almost a third “sometimes.” A very small group (less than a tenth) of respondents said they “rarely” or “never” did so.

F21: How often environmental considerations are taken into account (supplies)



The fifth question asked whether environmental considerations were taken into account when drawing up the technical specifications of the product (work, supply or service) to be procured. The same scale of responses was used for this question. Just under two thirds of respondents said they did so “very often” or “often,” just under a third “sometimes,” and the remainder (less than a tenth) “rarely” or “never.”

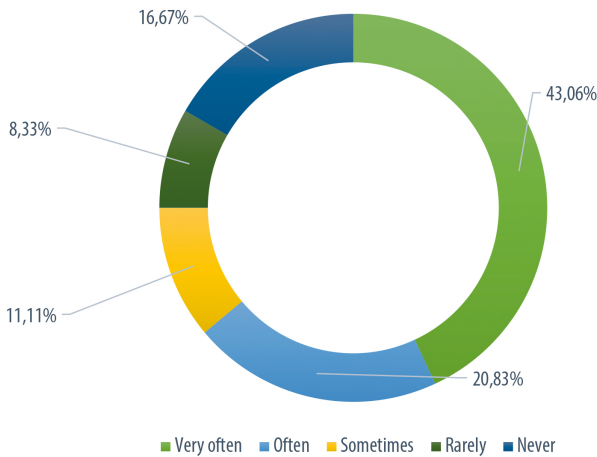
F22: Environmental considerations and technical specifications



The sixth question concerned grounds for exclusion. Respondents were again asked, using the five-point response scale discussed above, whether they applied (in other words, declared applicable in the tender documents) the optional ground for exclusion under Article 2.87 (1) (a) in conjunction with Article 2.81 (2) of the *Dutch Public Procurement Act* in public procurement. (This is the ground for exclusion that refers to the obligation of candidates or tenderers to take account of environmental, social and labour law obligations under (in brief) European Union law, national law or collective agreements when preparing their tenders.)

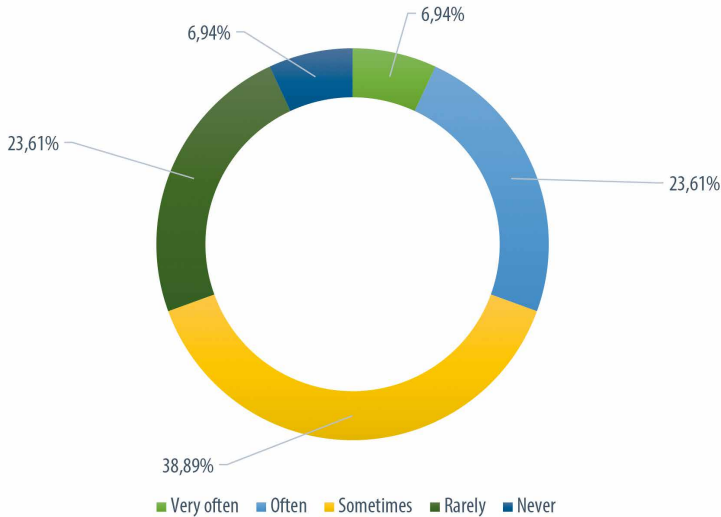
Almost two thirds of respondents said they used this exclusion ground “very often” or “often.” On the other hand, a quarter of respondents did so “rarely” or “never.” Just over a tenth stated that they “sometimes” applied it in tender documents.

F23: Environmental considerations and exclusion ground



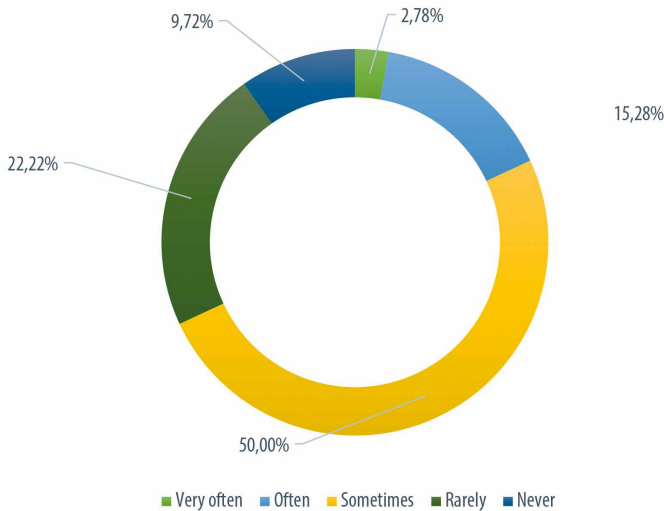
The seventh question asked whether respondents took environmental considerations into account when setting (minimum) suitability requirements. Again, the five-point response scale was used. The same proportion of respondents said they did so “very often” or “often” as said they did so “rarely” or “never” (both just under a third). Just over a third of respondents said they did so “sometimes.”

F24: Environmental considerations and minimum suitability requirements



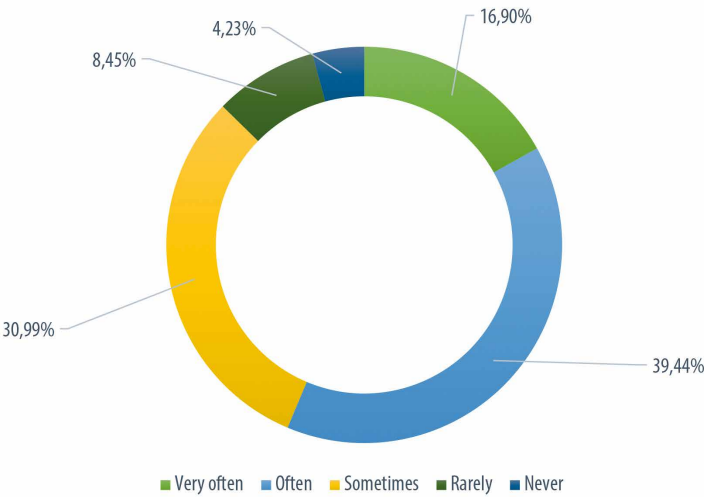
In response to the eighth question on whether respondents took environmental considerations into account when drawing up (further) selection criteria, if they chose to apply them, less than a fifth said they did so “very often” or “often.” Exactly half said that they did so “sometimes,” and just under a third said they did so “rarely” or “never.”

F25: Environmental considerations and selection criteria



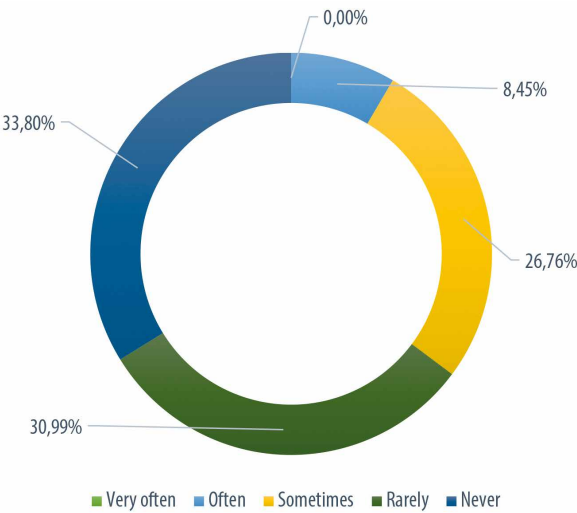
The ninth question related to the inclusion of environmental considerations in award criteria. More than half of the respondents said they did this “very often” or “often,” and just over a third “sometimes.” The remaining respondents did so “rarely” or “never.”

F26: Environmental considerations and award criteria



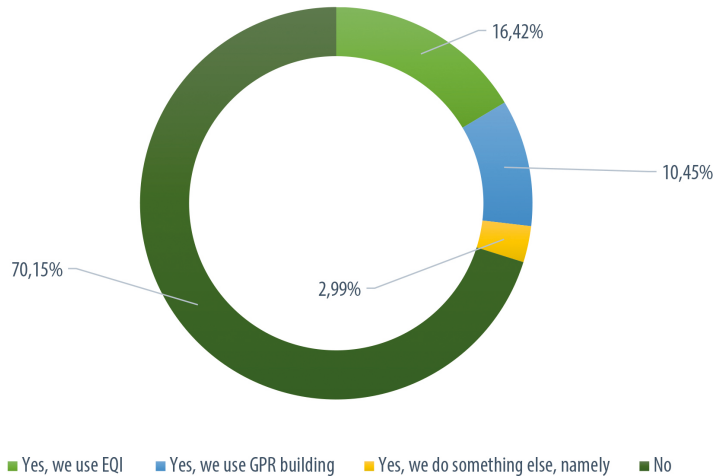
The tenth question is also related to award criteria. Here, it was asked more specifically whether, when the decision was made to include environmental considerations in the award criteria, a (form of) life-cycle assessment (LCA) was then applied. Almost two thirds of respondents said that they “rarely” or “never” used some form of life-cycle analysis (LCA) as an award criterion. Almost a third said they “sometimes” did so. A small number of respondents said they did so “often,” and none ticked the “very often” option.

F27: Life Cycle Assessment (LCA) as an award criterion

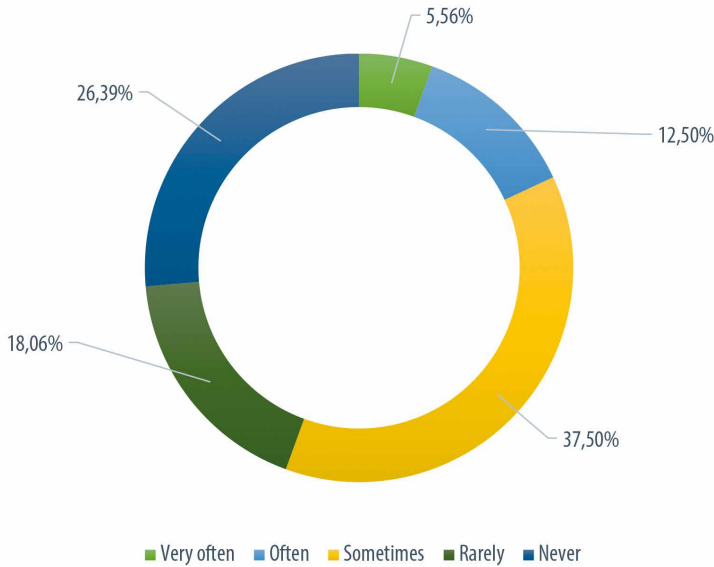


The eleventh question was built on the tenth question and asked about the choice of a particular model or tool when using a (form of) life-cycle assessment (LCA). The response options listed some of the available models/tools by name. An overwhelming majority of the respondents said that they did not use any model or tool. Just under a fifth said they used the (EQI) and just over a tenth replied that they used GPR building. Finally, “yes, we do something else, namely (with an opportunity for the respondent to provide an explanation)” was also included as a response option. One respondent indicated that they use a model that I was not aware of, namely the analysis of bAWear (specialized in textiles).

F28: Life Cycle Assessment (LCA) and tools

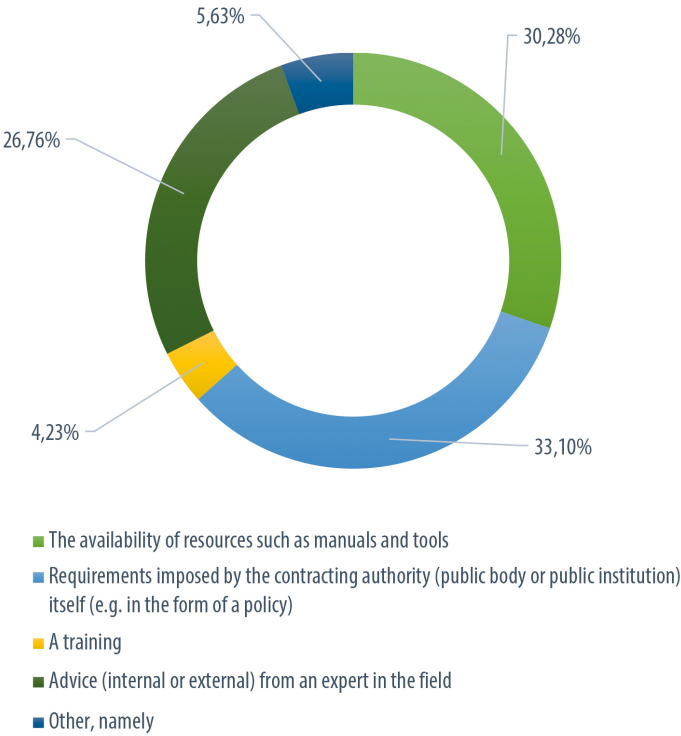


The twelfth question was about taking environmental considerations into account when drafting contract clauses (special performance conditions). More than two fifths of respondents said they “rarely” or “never” did so, and more than a third “sometimes” took environmental considerations into account when drafting contract terms (special performance conditions). Just over a tenth said they did so “often,” and a very small proportion (just over a twentieth) said they did so “very often.”

F29: Environmental considerations and contract clauses

The thirteenth question sought to identify what had helped respondents to integrate environmental considerations into public procurement in the past. The response options specified different possible options in this respect and also included the response option “other: explain.” Multiple answers were also possible. The most important “aid” according to respondents was “requirements imposed by the contracting authority (public body or public institution) itself (e.g. in the form of a policy).” A third of the respondents ticked this option. Just under a third of respondents indicated that the availability of resources such as manuals and tools had helped them to integrate environmental considerations into public procurement. Just over a quarter said that they had benefited from (internal or external) advice from an expert in the field (among other things). Just under a twentieth had benefited from training, and just over a twentieth ticked the option “other: explain.” These explanations included: information from websites such as Pianoo and Europadecentraal, the CSR criteria tool, colleagues’ experience, other tenders on TenderNed, visits to trade fairs, inspiration from other, similar tenders and sustainability ambassadors.

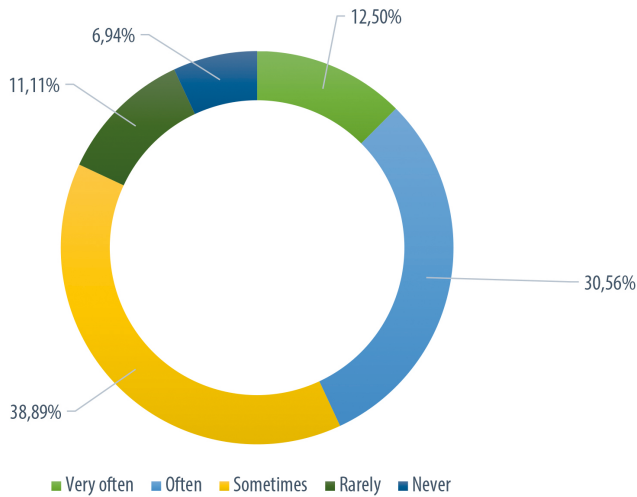
F30: What is helpful for integrating environmental considerations?



The fourteenth question asked what the respondents thought were the main barriers to environmental considerations in public procurement. Again, several answer options were given, but in this case the above five-point response scale was used for each answer option. So here, for each option, each respondent had to indicate whether they felt that it was “very often,” “often,” “sometimes,” “rarely” or “never” an obstacle to taking environmental considerations into account in public procurement. Finally, there was also an option “other: specify.” In the previous question, which asked what had helped respondents to apply environmental considerations in public procurement, I accidentally forgot to give respondents the option of using the five-point response scale, hence the difference in results between these questions.

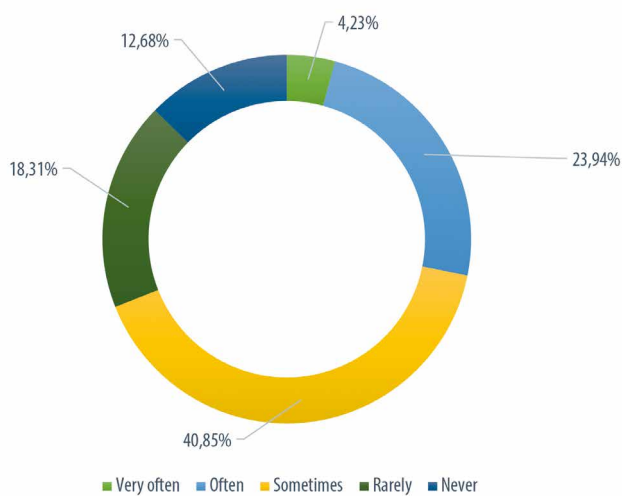
Just over two fifths of respondents said that “the assumption of (too) high procurement costs associated with environmentally friendly procurement” was “very often” or “often” perceived as a barrier. More than a third said it “sometimes” was. The rest “rarely” or “never” perceived this as a barrier.

F31: Main barriers to integrating environmental considerations:
The assumption of high costs



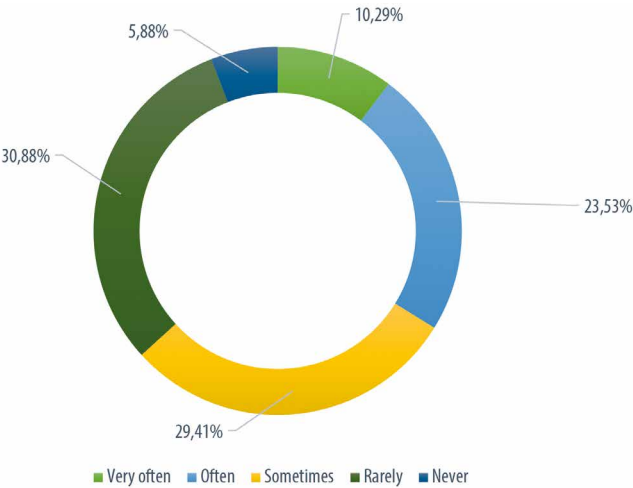
The “fear that there will be (too) few parties bidding for the contract” was perceived as a barrier “very often” or “often” by just over a quarter of respondents, and “sometimes” by two fifths. Just under a third said they “rarely” or “never” perceived it as a barrier.

F32: Main barriers to integrating environmental considerations:
The assumption of high costs: To few parties interested



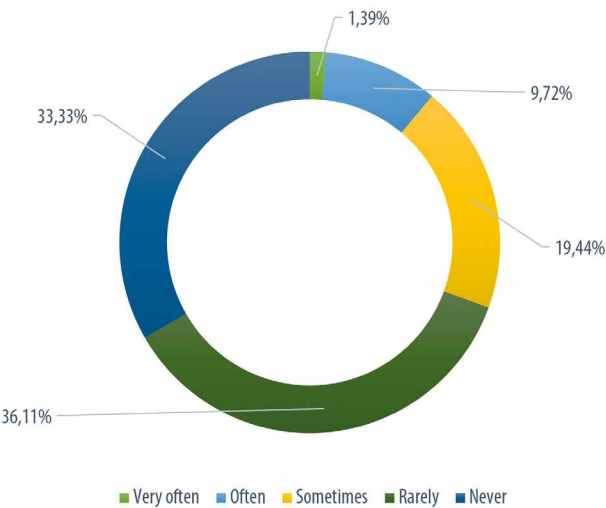
“The fear that it would take (too) much time to prepare” was perceived as a barrier by just over a third of respondents “very often” or “often,” by just under a third “sometimes” and by just over a third “rarely” or “never.”

F33: Main barriers to integrating environmental considerations:
Too much preparation time



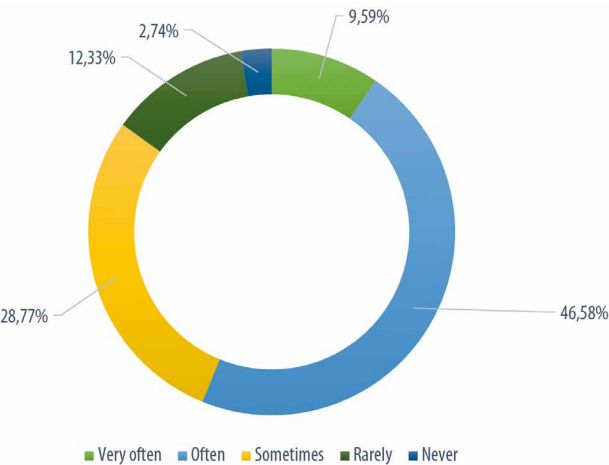
In response to the question “Do you think the legal framework for public procurement is an obstacle?” more than two thirds of respondents ticked “rarely” or “never.” A quarter perceived it as an obstacle “sometimes,” just over a tenth “often,” and a negligible number ticked “very often.”

F34: Main barriers to integrating environmental considerations:
The assumption that the procurement law framework is a barrier



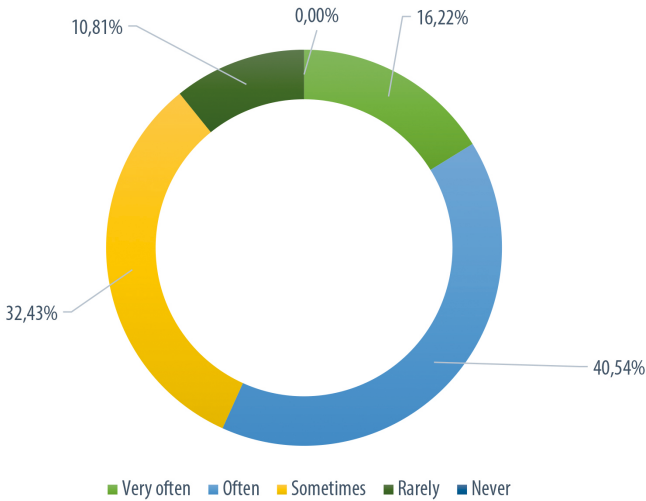
“The assumption that it is difficult to assess bidders and/or tenders on the basis of environmental criteria” was perceived as a barrier “very often” or “often” by well over half of the respondents, and “sometimes” by almost a third. The remaining respondents “rarely” or “never” experienced this as a barrier.

F35: Main barriers to integrating environmental considerations:
The assumption that it is difficult to evaluate tenders on the basis of environmental criteria



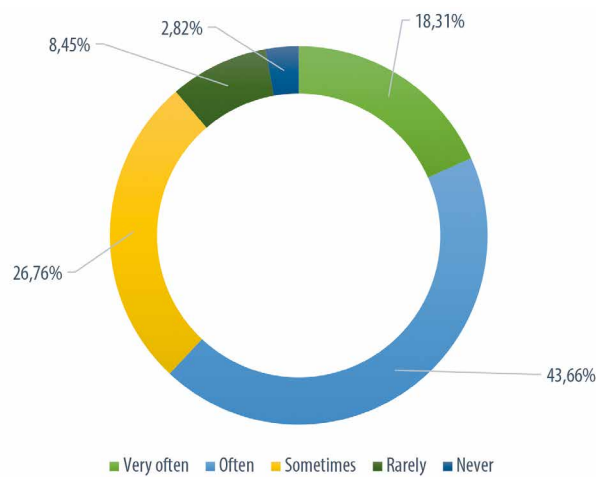
Similarly, “the perception that it is difficult to check compliance with environmental requirements during the performance of the contract” was perceived as a barrier “very often” or “often” by well over half of respondents. Just under a third considered it a barrier “sometimes.” The remaining one tenth of respondents “rarely” saw it as an obstacle.

F36: Main barriers to integrating environmental considerations:
The assumption that it is difficult to monitor compliance with environmental requirements during contract performance



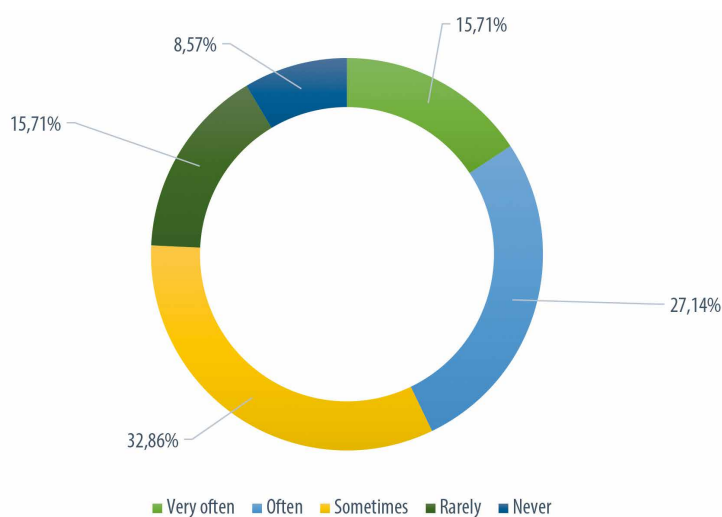
“Lack of expertise or training” was perceived as a barrier “very often” or “often” by just under two thirds of respondents, and “sometimes” by just under a third. Just over a tenth of respondents saw this as a barrier “rarely” or “never.”

F37: Main barriers to integrating environmental considerations:
Lack of expertise or training



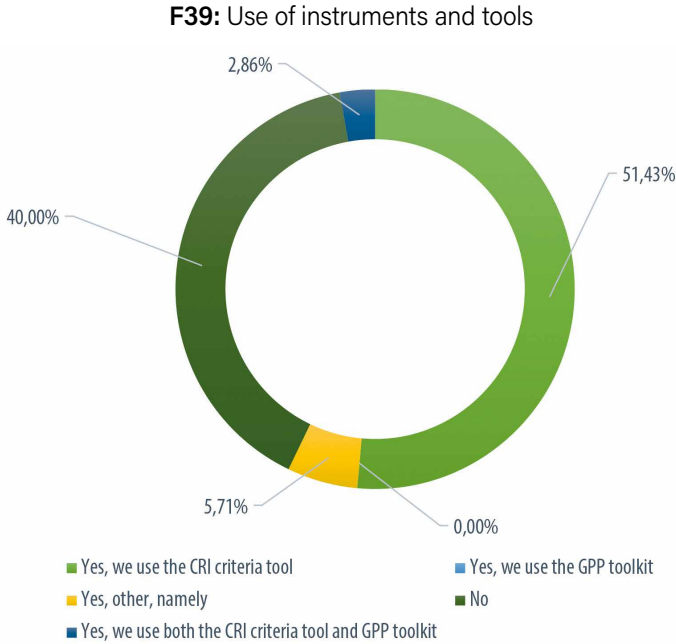
Finally, “lack of capacity” was perceived as a barrier “very often” or “often” by more than two fifths of respondents, and “sometimes” by just under a third. Almost a quarter of respondents “rarely” or “never” perceived it as an obstacle.

F38: Main barriers to integrating environmental considerations:
Lack of capacity



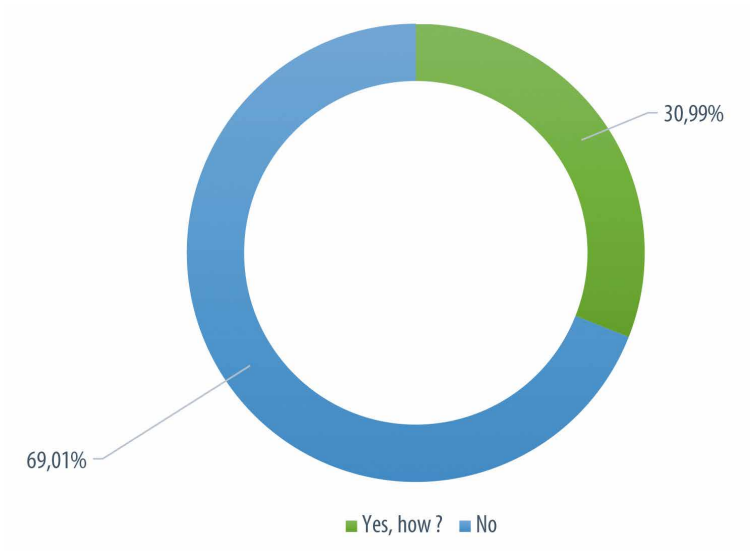
No relevant answers were given for the option “other: specify.”

In question fifteen, I wanted to find out what instruments were used when environmental considerations were taken into account in public procurement. Again, there were multiple response options, and the option “other: specify” was given. More than half of the respondents indicated that they used the CSR criteria tool. Well, over a third said they did not use any tool. A negligible number of respondents indicated that they also used the GPP toolkit. Just under a twentieth of respondents indicated that they used another tool, such as “ambitionweb.” I will leave the responses out here for lack of relevance.



The sixteenth and final question concerned the use of the CO₂ performance ladder (a Dutch instrument and therefore particularly relevant to the Dutch situation). Well, over two thirds of respondents said that they did not use this tool when taking environmental considerations into account when tendering for public contracts. Just under a third said they did. Respondents were asked how they used the CO₂ performance ladder. Respondents then indicated that, broadly speaking, this ladder is used mainly as an award criterion or sometimes as some form of requirement, among other things.

F40: Use of CO2 performance ladder



PUBLIC CONTRACTS AND SUSTAINABLE DEVELOPMENT IN PORTUGAL

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Introduction

This report is the result of a collaborative work undertaken by a team of researchers of Lisbon Public Law – Lisbon Centre for Research in Public Law, a research unit integrated into the School of Law of the University of Lisbon. The authors would like to thank both entities for their support.

The purpose of the report—and of the general project into which it was integrated—was to study the practical implementation of green public procurement considerations in the Portuguese public administration. The type of methodology implied, using questionnaires and interviews, is not common in the Portuguese legal literature, but the conclusions that can be drawn seem immediately relevant. In fact, the very participants in this study (as respondents to the questionnaire, or interviewees), without which the study could not have taken place, seem to confirm this assertion, given the availability and interest demonstrated by their participation.

As is pointed out throughout the following pages, the possibility of developing this analysis, which combines legal texts with empirical data, even if limited, revealed (or confirmed) that the wide possibilities offered by the legal rules and the significant awareness that already exists among public buyers now needs to be followed by strong political drive and actual implementation in practice. The existing rules provide for several ways to give effect to green public procurement considerations, but the managers and staff of the contracting authorities still demonstrate the need for more “hands-on” and practical guidance, which not only provides permission, but actually *shows them how green public procurement (GPP) can work in practice*. The debates on professionalization of the procurement officers, soft law guidance by procurement regulators and authorities, and the general discussion on whether the law should be bolder in establishing the *mandatory use* of GPP tools all come to mind while reading the results of this study.

The report is divided into three parts. The first provides an overview of the legal framework of GPP in the Portuguese legal system, mainly based in the *Portuguese Public Contracts Code*, accompanied by some special regulation and soft law instruments which contain several commitments adopted by the Portuguese government in this field. In terms of the legal framework, since Portugal is a member of the EU, Portuguese law is generally in line

with the EU Directives on public procurement and concessions, in some points developing or going beyond European rules.

The second part describes the interviews that took place with several managers and officers of contracting authorities. Despite the small number of interviews, the selection of interviewees attempted to maximize the diversity of contracting authorities and sectors of activity: one entity in the direct hierarchy of the government, one national regulatory agency, two major delegated entities (acting under the orientation of the government, but with relevant administrative autonomy), and three major municipalities (which, in the Portuguese system, are autonomous from the government and self-governed). The sectors represented are also diverse (water and waste, sea and ports, employment, general administration). This gives clear relevance to the very meaningful responses obtained.

Finally, the third part describes the methodology for the questionnaire that was submitted to interested respondents working with public procurement in contracting authorities, and gives notes of the answers, which again seem meaningful, since they seem to confirm other previous researches in the field. A more detailed presentation of the answers obtained is contained in the Appendix.

Green Public Procurement Legal Framework in Portugal

The main legislative instrument regulating public procurement in Portugal is the *Public Procurement Code* (henceforth, the “PPC”), applicable to continental Portugal.¹ Portugal has two autonomous regions—the Azores and Madeira archipelagos—, which have their own political, legislative and administrative statutes and self-governing institutions. Madeira has some provisions adapting the *Public Procurement Code*, while Azores has a specific diploma regulating public procurement in its territory.

The *Portuguese Public Procurement Code* is in line with the EU 2014 Directives on Public Procurement² and has been consecutively revised throughout the years. The last revision took effect on June 20, 2021. The main provisions defining contracts covered by public procurement law can be found in Articles 4 to 6-A (general) and 9 to 15 (utilities) of the PPC. Portuguese law has a general clause (Article 5(1) PPC), stating that contracts celebrated by classic administration entities covered by public

1. *Public Contract Code – Decree Law*, no.18/2008.

2. European Union Law, “Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance,” *Official Journal of the European Union*, 2014; European Union Law, “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 Text with EEA relevance,” *Official Journal of the European Union*, 2014; European Union Law, “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,” *Official Journal of the European Union*, 2014; European Union Law, “Directive 2014/55/EU of the European Parliament and of the Council of 16 April 2014 on electronic invoicing in public procurement,” *Official Journal of the European Union*, 2014, <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0055>>.

procurement rules are “susceptible of market competition.” This means that the scope of public procurement rules in Portuguese law goes further than the EU directives.

Nevertheless, when the contract is celebrated by “bodies governed by public law” or an entity operating in the utilities sectors, only contracts covered by the EU directives, i.e. a public contract of works, supplies or services and works and service concessions, are subject to the public procurement rules. Public Procurement applies to public contracts of any value, in the classic sectors and concessions. In the utilities sectors, in the case of works, goods and services contracts, Public Procurement applies only above the EU thresholds (Article 11 PPC).

In the upper hierarchy of the normative system, the Constitution of the Republic of Portugal has environmental norms, considering protection of the environment one of the State’s fundamental tasks in Article 9, paragraph d), stating the promotion of the people’s well-being and quality of life and real equality between the Portuguese, as well as the effective implementation of economic, social, cultural and *environmental* rights by means of the transformation and modernization of economic and social structures and, in paragraph e), the protection and enhancement of the Portuguese people’s cultural heritage, the defence of nature and the environment, the preservation of natural resources and the insurance of correct town and country planning.

The Constitution also ensures the right to petition and the right of *actio popularis* in Article 52(1), in order to promote the prevention, cessation or judicial prosecution of offences against public health, consumer rights, *the quality of life or the preservation of the environment and the cultural heritage*. There are also provisions prescribing rights related to the environment

and quality of life in particular, namely in Article 66.³ The environment is also considered in the plans, in Article 90.⁴

There are no direct constitutional norms regarding public procurement. Nevertheless, two articles can be summoned for an indirect approach to constitutional public procurement: Article 81 (Priority duties of the state), paragraph f), stating that in the economic and social field the state is under a priority duty to ensure the efficient operation of the markets, in such a way as to guarantee a balanced competition between enterprises, counter monopolistic forms of organization and repress abuses of dominant positions and other practices that are harmful to the general interest; and Article 266 (Fundamental principles), no. 1, stating that the Public Administration shall seek to pursue the public interest, with respect for all those citizens' rights and interests that are protected by law, and no. 2, administrative organs and agents are subject to the Constitution and the law, and in the exercise of their functions must act with respect for the principles of equality, proportionality, justice, impartiality and good faith.

-
3. "1. Everyone has the right to a healthy and ecologically balanced human living environment and the duty to defend it. 2. In order to ensure the right to the environment within an overall framework of sustainable development, the state, acting via appropriate bodies and with the involvement and participation of citizens, is charged with: a) Preventing and controlling pollution and its effects and the harmful forms of erosion; b) Conducting and promoting town and country planning with a view to a correct location of activities, balanced social and economic development and the enhancement of the landscape; c) Creating and developing natural and recreational reserves and parks and classifying and protecting landscapes and places, in such a way as to guarantee the conservation of nature and the preservation of cultural values and assets that are of historic or artistic interest; d) Promoting the rational use of natural resources, while safeguarding their ability to renew themselves and ecological stability, with respect for the principle of inter-generational solidarity; e) In cooperation with local authorities, promoting the environmental quality of rural settlements and urban life, particularly on the architectural level and as regards the protection of historic zones; f) Promoting the integration of environmental objectives into the various policies with a sectoral scope; g) Promoting environmental education and respect for environmental values and assets; h) Ensuring that the fiscal policy renders development compatible with the protection of the environment and the quality of life." *Constitution of the Republic of Portugal*, 1976, art. 66.
 4. "The objective of economic and social development plans shall be to promote economic growth, the harmonious and integrated development of sectors and regions, the just division of the national product between persons and between regions, the coordination of the economic policy with the social, education and cultural policies, the defence of the rural world, the preservation of the ecological balance, the defence of the environment and the quality of life of the Portuguese people." *Constitution of the Republic of Portugal*, 1976, art. 90.

There are also, consequently, no constitutional norms regarding green public procurement. European rules, however, are fully applicable considering Portugal's membership in the European Union. The basic principles of free movement of goods, services, capital and people, along with a prohibition on discrimination based on nationality, are set out in the Treaty on the Functioning of the European Union, the Treaty on the European Union and, formerly, the Treaty establishing the European Community.

From these basic principles a number of more specific principles applicable in the field of procurement have been developed, primarily through the case law of the European Court of Justice. These are the principles of *transparency, equal treatment, proportionality and mutual recognition*. It is important to note that these principles are of broader application than the Directives—procedures which are excluded from or fall below the thresholds for application of the Directives must still be awarded in accordance with the principles. Public authorities need to observe them when implementing green public procurement, as in all areas of procurement.

Directive 2014/24/EU on public procurement and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors are also worth noting, considering not only their role in the interpretation of national provisions but also the fact that the *Portuguese Public Procurement Code* is, as mentioned, in line with its provisions.

Regarding green public procurement, the following sections of the Directives are worth drawing attention to:

- Defining the requirements of a contract: Defining technical specifications is guided through Article 42 and Annex VII of Directive 2014/24/EU; and Article 60 and Annex VIII of Directive 2014/25/EU;
- Use of labels: Conditions for using labels are laid out in Article 43 of Directive 2014/24/EU and Article 61 of Directive 2014/25/EU;
- Lowest price award and life-cycle costing (LCC): Awarding public contracts on the basis of the most economically advantageous tender is provided in Article 67 of Directive 2014/24/EU and Article 82 of Directive 2014/25/EU;
- Innovation partnerships: Where a contracting authority wishes to purchase goods or services which are not currently available on the market, it may establish an innovation partnership 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. The procedure for

establishing an innovation partnership is set out in Article 31 of Directive 2014/24/EU;

- Consulting the market: The procurement directives specifically allow for preliminary market consultation with suppliers in order to get advice, which may be used in the preparation of the procedure, as set out in Article 40 of Directive 2014/24/EU.

As for applicable supranational guidelines on green public procurement, the following are worth noting:

- Commission Interpretative Communication on the “Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement” (COM (2001) 274);
- Commission Interpretative Communication on “Public procurement for a better environment” (COM (2008) 400, published on July 16, 2008);⁵
- Buying Green! – A Handbook on green public procurement, 3rd edition, April 2016, European Commission;⁶
- EU GPP criteria, which are developed to facilitate the inclusion of green requirements in public tender documents.⁷

Regarding national legislation, namely its relation with Agenda 21 of the United Nations, the following diplomas are worth mentioning: National Strategy for Sustainable Development (NSSD), embodied in the Implementation Plan (PIENDS), and the respective monitoring indicators (Resolution of the Council of Ministers no. 109/2007, 20/08, which expired in 2015) give practical expression to the line of international commitments assumed by Portugal, within the scope of the UN and the European Union; Law no. 58/2005, 29/12 (Water Law), which transposes the Water Framework Directive (Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000); Decree-Law no. 103/2010 of 24 September establishes environmental quality standards (EQS) for priority substances

5. European Union Law, “Public procurement for a better environment,” *Commission of the European Communities*, 2008, <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0400:FIN:EN:PDF>>.

6. European Commission, “Buying green! – A handbook on green public procurement,” *Publications Office*, 2016.

7. European Commission, “Green Public Procurement Criteria and Requirements,” *Energy, Climate Change, Environment*, n.d., <https://green-business.ec.europa.eu/green-public-procurement/gpp-criteria-and-requirements_en>.

and other pollutants, in order to ensure the gradual reduction of pollution and achieve good surface water status; Decree-Law no. 306/2007, approves the standards for the quality of water intended for human consumption; Decree-Law no. 84/2018, 23/12/2018, sets the national commitments to reduce emissions of sulphur dioxide (SO₂), nitrogen oxides (NO_x), non-methane volatile organic compounds (NMVOCs), ammonia (NH₃) and fine particles (PM_{2.5}), for 2020 and 2030, and establishes the obligation to prepare, adopt and implement the National Air Pollution Control Programme (PNCPA), as well as to monitor the effects of air pollution on terrestrial and aquatic ecosystems and to report the results, transposed Directive 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants; Decree-Law no. 145/2017, 30/11 regarding fluorinated greenhouse gases.

Regarding Agenda 30 of the United Nations, national legislation includes the National Strategy for Adaptation to Climate Change (ENAC2020), approved by Resolution of the Council of Ministers no. 56/2015, 30/07, framing it within the Strategic Framework for Climate Policy (QEPiC), which establishes the vision and objectives of national climate policy for the 2030 horizon; the National Strategy for the Conservation of Nature and Biodiversity 2030 (ENCNB 2030), annexed to Resolution of the Council of Ministers no. 55/2018, 07/05; the Roadmap for Carbon Neutrality 2050, approved by Resolution of the Council of Ministers no. 107/2019, 01/07; the National Energy and Climate Plan 2030 (PNEC 2030), approved by Resolution of the Council of Ministers no. 53/2020, 10/07, which arises in the framework of the obligations established by the *Regulation on the Governance of the Energy Union and Climate Action* (Regulation (EU) no. 2018/1999, of 11 December 2018); Decree-Law no. 93/2010 of 27 July (CELE Aviation), as amended and republished by Decree-Law no. 195/2015 of 14 September, establishes the scheme for trading greenhouse gas emission allowances from aviation activities, transposing Directive no. 2008/101/EC of the European Parliament and of the Council of 19 November, amending Directive no. 2003/87/EC of the European Parliament and of the Council of 13 October; Decree-Law no. 145/2017, of 30 November, establishing the regime concerning the control of certain fluorinated greenhouse gases ensures the implementation, in the national legal order, of Regulation (EU) no. 517/2014, of the European Parliament and of the Council, of 16 April.

Since the 2017 revision of the *Portuguese Public Procurement Code*, the principle of sustainability is mentioned as one of the core principles

applicable to public procurement. This principle is applicable in both the formation and execution of public contracts.⁸

The National Strategy for GPP (ENCPE 2020) was approved by Resolution of the Council of Ministers no. 38/2016 of 29 July; the legal determination to define the forms of implementation and coordination to the achievement of the objectives of ENCPE 2020 was published by Despacho no. 2568/2017, 28/03/2017. ENCPE 2020 foresees, to a great extent, the definition of environmental criteria based on the EU guidelines on green public procurement, and their adaptation to the national reality.

The environmental criteria for 21 product groups constitute the main tools for the purposes of meeting the objectives of the ENCPE 2020, and include the following product groups: Cleaning products and services; Copying and graphic paper; Combined heat and power (CHP); Office buildings; Electrical and electronic equipment in the health care sector; Electricity; Food and catering services; Furniture; Gardening products and services; Imaging equipment; Indoor lighting; Office IT equipment; Road design, construction and maintenance; Sanitary tapware; Street lighting and traffic signals; Textiles; Toilets and urinals; Transport; Wall panels; Waste water infrastructure; and Water-based heaters.

Monitoring is automatically obtained in Electronic Platforms for Public Procurement. The ENCPE 2020 foresees some indicators to evaluate its implementation:

- ICPE1 = number of tendering procedures considering environmental criteria $\times 100$ / number of total tendering procedures;
- ICPE2 = value associated with tendering procedures considering environmental criteria established $\times 100$ / value;
- ICPE3 = number of contracts awarded including environmental criteria $\times 100$ / total number of contracts;
- ICPE4 = contract price of contracts including environmental criteria $\times 100$ / contract price of all contracts.

8. "1- In the formation and execution of public contracts the general principles derived from the Constitution, the European Union Treaties and the *Administrative Procedure Code* must be respected, especially the principles of legality, pursuit of public interest, impartiality, proportionality, good faith, protection of legitimate expectations, *sustainability* and accountability, as well as the principles of competition, publicity and transparency, equal treatment and non-discrimination." *Portuguese Public Procurement Code*, art. 1-A (Principles).

The PCC also refers explicitly to the possibility (not the obligation) of using green public procurement in what concerns:

- contract terms (i.e. conditions for performance of contracts), in Article 42, no. 6, especially paragraphs f) and g);⁹
- award criteria, in Article 75, no. 2, paragraphs a) (referring to environmental aspects), d) (referring to environmental sustainability), and e) (referring to circularity);
- technical specifications, in Article 49, no. 7, paragraph a), and labels, in Article 49-A, even though these do not explicitly mention environmental labels;
- selection criteria, regarding technical capacity and experience, in Articles 164, nos. 2 and 3 (refer to environmental certification); 165, no. 1, paragraph d) (refers to the ability of candidates to implement environmental measures), and application of Annex XII of Directive 2014/24/EU.

Also, specific provisions in special statutes (outside the PCC) refer to the application of environmental criteria, in some cases in a mandatory fashion, such as the case of acquisition of food supplies for cafeterias in public buildings (Articles 4 and 7 of Law no. 34/2019, of 22 May) or the acquisition of vehicles, following, in this case, the transposition of EU legislation (Decree-Law no. 86/2021, of 19 October, which transposes Directive (EU) 2019/1161).

In the Portuguese system, it is also possible to exclude companies that have breached environmental law or have other serious defects in their environmental performance. The general exclusion grounds, foreseen in the Directives, and transposed into Article 55, no. 1, of the PCC, regarding grave professional misconduct, or a serious breach of contract, or the application of administrative sanctions, or even criminal convictions (since some breaches of environmental law are criminal offences) should be considered to cover the indicated situation. See especially paragraphs b), c), f) and l), considering each specific case, of Article 55, no. 1, of the PCC.

In some specific cases, administrative offences in the field of environmental law can give rise to the application of a specific sanction (“secondary

9. “Aspects of contract performance, mentioned in the clauses of the procurement documents (“caderno de encargos,” equivalent to the French “cahier de charges”) may refer, as long as they are linked to the subject matter of the contract, to social or environmental aspects, or if they are meant at favouring: f) The promotion of circular economy and short distribution circuits; g) The promotion of environmental sustainability; *Portuguese Public Procurement Code*, art. 42, no. 6.

sanction”) exclusively aimed at barring the person/entity in question from participating in any public procurement procedures, for a period of up to three years: this is foreseen in Article 30, no. 1, paragraph e) of Law no. 50/2006, of 29 August (Framework Law for Environmental Administrative Offences). It should be noted, however, that the compliance of this type of “secondary sanction” with EU law regarding exclusions from public procurement is currently being questioned by Portuguese authors.

Also, in the context of the legal figure of “abnormally low tenders,” one of the exclusion grounds is the proof that the offer presented is insufficient to comply with *environmental* conditions set forth by law. This is foreseen in Article 71, no. 2, of the PCC.

In addition, and reinforcing the above-mentioned aspects, it should be noted that Article 1-A, no. 2, of the PCC has a general provision stating that during the formation *and* performance of public contracts, contracting authorities must ensure (which means monitor and, if necessary, take other action) that economic operators respect applicable rules in, among other matters, environmental rules.

The past experience of a company and the professional qualifications of its personnel can be assessed with a view to environmental considerations. Regarding the professional qualifications of its personnel, see Article 75, no. 2, paragraph b) of the PCC, which mentions, generally, the possibility of evaluating the experience of the personnel assigned to perform the contract (in transposition of the Directives) and, although it does not explicitly mention skills or experience in environmental aspects, the provision would surely cover this.

The PCC itself does not explicitly refer to *environmental* labels in public procurement; however, the possibility of its use is clear. This derives from the articulation of Article 49-A of the PCC (which refers, generally, to “labels,” without specifying), with Ministry regulation (“Portaria”) no. 72/2018, which regulates the topic, and, in any event, Article 43 of Directive 2014/24/EU, which, covering labels, refers explicitly to labels certifying environmental conditions.

Regarding the conditions for using labels in general terms, labels can be used when the contracting authority wishes to ask bidders to present a certain label certifying the existence of certain qualities (in this case, environmental qualities) of the goods, services or works it wishes to obtain. No other specific pre-conditions apply. This is also understood to be something which is part of the contracting authority’s discretion when defining the conditions of the tender and contract (see Article 49 of the PCC). However,

as imposed by Article 43 of Directive 2014/24/EU, transposed into Article 1 of “Portaria” no. 72/2018, there are some conditions that the labels themselves must meet in order for their use to be possible: they need to be objectively defined, accessible, non-discriminatory, granted through an open procedure and by someone over whom the bidder does not have control.

Regarding the conditions for using green public procurement criteria, it is generally understood that, aside from the (very few) situations in which it is mandatory to use environmental award criteria, the choice whether to use this type of criteria belongs to the contracting authority, within its margin of discretion, and according to the specific contract it wishes to carry out. This choice is, of course, dependent on compliance with the general principles. In other words, criteria should be linked to the subject matter of the contract, and they should be proportional and not entail a breach of the principles of equal treatment and non-discrimination (Articles 1-A and 75, nos. 1, 3)

Life cycle costs can be used. Article 75, nos. 7 to 10, of the PCC, provide for this possibility (there is no case in which it is mandatory), using essentially the same wording as the Directives in this regard, and not adding any specific detail.

Environmental considerations can be included in contract performance clauses for the supply of goods, works and services. Article 42, no. 6, as mentioned above, allows for the inclusion of environmental considerations in clauses on contract performance, and it does distinguish between goods, services, works or concessions.

There are no specific mechanisms to monitor and review green public procurement. In each contract, a “contract manager” is assigned (see Article 290-A of the PCC), and this person is in charge of monitoring the performance of the contract; if they identify any breach of contract, they have a duty to report it to the competent body of the contracting authority. But, as mentioned, this does not refer specifically to green public procurement aspects of the contract, but to all of them.

In addition, but not as *hard law*, we should mention that, in 2016, the government approved a “National Strategy for Environmental Public Procurement 2020” (*Estratégia Nacional de Compras Públicas Ecológicas*), by Council of Ministers Resolution no. 38/2016 of 29 July. This Resolution established goals in terms of global percentages of procedures using environmental criteria by 2020. However, it should be mentioned that this is essentially a political objective, which does not create for contracting authorities’ specific duties of using green public procurement criteria in specific

procurements. Rather, it is the whole public sector which must seek to comply with this general goal.

In the context of the above-mentioned National Strategy for Environmental Public Procurement 2020, a general working group was established to draft a set of environmental criteria that contracting authorities could (voluntarily) use. In the context of the implementation of the National Strategy, the general working group identified so-called “priority working groups” to define these criteria by sector. The sectors are:

- GT1: (public) office buildings
- GT2: Electrical and electronic equipment used in healthcare (public) facilities and services
- GT3: Public lighting and traffic signalling
- GT4: Copy and print paper and paper for graphic use
- GT5: Food supplies and catering services
- GT6: Transport/mobility

Report on the Interviews on Sustainable Procurement in Portugal

The second part of this project consisted in conducting interviews on sustainable procurement with pre-selected awarding entities. Seven entities were selected for an extended interview, conducted by conference call with audio and video. The project was explained to each one of these entities, as well as the confidentiality-related issues (cf. *infra* “The Interviews”).

Regarding the typology of the said entities and having in mind the special intention of having some diversity among them, the following entities were interviewed (the degree of detail regarding the identification of the entities is related to their manifested preference to remain anonymous in certain cases):

- one government-related entity (considered legally part of the State’s Direct Administration);
- two public institutes (considered legally part of the State’s Indirect Administration);
- one national regulatory agency (considered legally part of the Independent Administration of the State);
- three large municipalities (considered legally part of the Autonomous Administration of the State).

The diversity of interviewed entities turned out to be very important, since a clear division became evident during this part of the project. The approach to sustainable procurement is very different in two different groups of entities: on one side stood the government-related entity, the two institutes and the regulatory agency, henceforth also called “group 1” or “first group,” which had some knowledge about sustainable procurement but were very conservative towards its use; on the other side, the three municipalities, henceforth also called “group 2” or “the second group,” which were extremely

well versed in the subject. Not only had they some sustainable procurement projects running already, they in fact used sustainable procurement on a more regular basis and had specific goals for the near future.

In most cases the respondents were the heads of the divisions responsible for public procurement or sustainability. In one case the respondent was the president of the board itself, and in the municipalities several respondents from different areas attended the interviews. The duration of the interviews ranged from about 40 to 50 minutes in group 1, and 90 to 120 minutes in group 2.

All the interviews followed the same set of pre-determined questions, divided into seven parts, each with a different purpose:

- 1) Presentation of the respondent and the institution to which they belong

Objective: to understand the position occupied by the interviewee and their training

- 2) Purchase procedures conducted by the organization

Purpose: to understand what types of contracts and procurement procedures are regularly adopted by the contracting authority in question

- 3) Definition of policies on green purchases and sustainable purchases

Purpose: to understand whether the organization adopts green procurement policies and strategies and to understand what they consist of specifically

- 4) Green contracting in practice

Objective: to understand in practice how environmental considerations are or are not integrated into the organization's contracts

- 5) Monitoring and evaluation of CPE policies

Objective: to understand how public buyers assess the practical application of green procurement policies

- 6) Energy performance contracting

- 7) Conclusions

THE INTERVIEWS

Presentation of the respondent and the institution to which they belong

All the interviewees were informed about the scope of the interviews and the aim of the study. There were three possible degrees of anonymity: i) full anonymity; ii) disclosure of the entity but not of the respondent; and iii) disclosure of the entity and the respondent. The first group of entities—the government-related entity, the two public institutes and the national regulatory agency—chose complete anonymity and the second group—the municipalities—chose disclosure of the entity but not of the respondent.

The said municipalities were the Municipality of Lisbon (the biggest in Portugal, and its capital), the Municipality of Oporto (the second biggest municipality in Portugal) and the Municipality of Braga (the third biggest municipality in Portugal).

Purchase procedures conducted by the organization

The second set of questions regarded the purchase procedures conducted by the organizations, namely to understand what types of contracts and procurement procedures are regularly adopted by the contracting authority in question. Most of the entities used only direct award, public consultation (semi-competitive procedure with invitation to three or more entities) and public tenders. Some of them used framework agreements, and an even smaller number used other procedures (like innovation partnerships).

Regarding contracts for public works, food and catering or transport, all of them used the first category (public works), but only some of them had already contracted food and catering or transport.

Definition of policies on green purchases and sustainable purchases

This set of questions related to the definition of policies on green purchases and sustainable purchases, namely to understand whether the organizations adopt green procurement policies and strategies and to understand what they specifically consist of.

Almost all the entities in the first group stated that they did not utilize sustainable procurement frequently, which also led to a negative answer

regarding the monitoring and evaluation of the entities' public procurement with regard to its environmental impact. Consequently, the majority of the follow-up questions were not answered.

As for the second group, the municipalities tended to monitor procurement in relation to its sustainability, and not only have initiatives regarding green or sustainable procurement but also policies and strategies in general procurement to try to incentivize sustainable procurement. Belonging to international groups and attending seminars and forums was also identified as a way of updating knowledge on sustainability in these entities.

Green contracting in practice

As for the ways in which these considerations are integrated in the procedures, one municipality spoke about policies of reconciling family life and valuing people, as well as considering the origin of some products and the certification of its origins. There were also references to the reduction of paper and plastic and the consideration of distribution circuits. Others said they use sustainability on a regular basis, in the procedures for the acquisition of goods, giving as an example the submission to competition of the delivery of goods in recyclable boxes and the fact that the transport is carried out in environmentally friendly vehicles. Some entities pointed out the difficulty of measuring environmental criteria and advocated for the collaboration of public bodies in this task. The vast majority of the entities considered that the Portuguese revision of the *Public Procurement Code* (following the 2014 Directives) had an effect on the way sustainable procurement is now addressed. The same does not apply to the 2021 revision, which was not deemed relevant for sustainable procurement. One entity suggested that the fewer rules there are, the better. Others want the opposite: more regulation on sustainable procurement.

Monitoring and evaluation of GPP policies

Regarding entities belonging to group 1 and the monitoring and evaluation of GPP policies, only one entity had some specific comments, referring to the existence of a strong monitoring policy, namely through the contract manager (Article 290-A of the *Portuguese Public Procurement Code*¹⁰).

10. "Article 290-A – Contract Manager

1. The public contractor must designate one or more contract managers, with the function of permanently monitoring the execution of the contract.
2. If the public contractor appoints more than one contract manager, he must clearly define the roles and responsibilities of each one.

Municipalities talked about internal disclosure of models, public sustainability reports, participation in forums with the local community (residents and enterprises) regarding the future of public procurement and analyzing the ongoing procedures for future improvements.

Energy performance contracting

Half of the first group said they had no contracts of this type. The second group (municipalities) mentioned that they had these types of contracts, giving as examples the purchase of printers, vending machines, vehicles and various contracts related to public lighting.

CONCLUSIONS

The first group of entities mentioned obstacles to sustainable procurement, namely the existence of a very rigid legal regulation and difficulty putting that type of procurement into practice. There seems to be a consensus that controlling bodies like the Court of Auditors and the administrative courts dissuade public entities from using this type of procurement, because they are worried about drafting potentially illegal tenders, especially regarding the safeguard of competition. The discrepancy between the idea of “buy local” and the idea of competition in a common market was also brought up.

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3. In the case of contracts with special characteristics of technical or financial complexity or with a duration of more than three years, and without prejudice to the functions that are defined by each public contractor, the manager or managers must prepare adequate quantitative and qualitative performance indicators for each type of contract, which allow, among other things, to measure the performance levels of the co-contractor, the financial, technical and material execution of the contract.
 4. If the manager or managers detect deviations, defects or other anomalies in the performance of the contract, they must immediately report them to the competent body, proposing, in a reasoned report, the corrective measures that, in each case, prove to be appropriate.
 5. The contract manager may be delegated powers to adopt the measures referred to in the previous number, except in terms of modification and termination of the contract.
 6. In exceptional cases, duly substantiated, the public contractor may contract the management of the contract with a third party.
 7. Before taking up his duties, the contract manager signs the declaration that there are no conflicts of interest, according to the model provided for in Annex XIII to this Code.” *Portuguese Public Procurement Code*, art. 290-A.

In the case of municipalities, they said that they contracted so many different types of goods, services and public works, in diverse and completely different areas and with a degree of complexity, that sometimes it becomes difficult to have know-how in all those areas.

In general, lack of information, lack of internal and external cooperation, as well as lack of human resources are seen as obstacles. The legal framework is considered by some as not encouraging (either with incentives or obligations) of this type of procurement. The lack of a stronger role of a regulator in sustainability matters was also pointed out.

It was said that not everyone understands the importance of sustainability, which contributes to making its execution harder, and that there is a lack of market response, with few operators ready to respond to those types of calls. Other respondents had a different opinion, saying that the private sector is more concerned about following the path of sustainability than the awarding entities themselves.

The respondents said that any innovation that is intended to be introduced through public procurement comes up against an essential obstacle in terms of the complexity of the rules. Financial legislation and the responsibility of workers and managers are also dissuasive. The lack of examples, guides and reliable recommendations were mentioned several times, as well as the lack of resources in the pre-contractual phase and the follow-up phase of execution of the contracts.

The tenders are already seen as lengthy; buying sustainable becomes more expensive; using those types of criteria makes no difference “because they [the competitors] say they comply even if they don’t,” another entity said.

Regarding the suggestions for better results, framework agreements can have specialized teams and could be a good solution for centralizing knowledge and getting good results upstream; more awareness of the topic, dissemination and promotion are needed; drafts or non-binding recommendations and specifications models available on open source; the need for a legislative movement that made sustainable procurement mandatory in some cases, even though the lack of resources is always mentioned. Purchase planning is valued. Many companies have not changed their value chains because customers (awarding entities) are changing.

Report on the Questionnaire on Sustainable Procurement in Portugal

The third part of this project consisted in preparing and making available an online survey to be filled out by people who carry out their professional activity (at the managerial level or other) in an awarding authority. The survey was answered by a total of 110 respondents, 46 of whom completed the entire survey, and 64 of whom did not finish it. Only complete responses were considered for this report.

The large majority of respondents (more than two thirds) worked in municipalities; the next three biggest categories were the State, public institutes and public bodies.

Almost half of the respondents worked for an entity with 500+ collaborators. One fourth of the respondents belonged to entities with 100 to 499 collaborators.

About two thirds of respondents worked as technicians, while one fourth worked as a head of division or director.

Regarding their background, almost half of the respondents had a legal background, followed by people from the areas of management, economy and engineering.

More than two thirds of respondents had had training on sustainable procurement.

Regarding the interest rate on sustainable public procurement in their organization, about one third of the respondents answered 5 out of 5; the other two thirds mostly answered, in equal parts, 3 or 4 out of 5. The arithmetic mean was 3.7 out of 5.

Regarding the general level of knowledge on sustainable public procurement in the awarding entities that responded to the questionnaire, half of the respondents answered 3 out of 5; the majority of the remaining was distributed between 2 out of 5 or 4 out of 5. The arithmetic mean was 2.88.

Two thirds of respondents said they frequently used sustainable public procurement; one third said they didn't.

Regarding the sources of knowledge to understand and implement this type of procurement, directives and manuals had the most responses, followed by strategies, goals and internally defined policies, then conferences and specialized training and financed environmental programs.

As for the use of labels and certifications, the majority of the responses were divided between "almost never" and "often," with the option of "never" also having a significant presence.

The majority of respondents thought the public tenders can most easily integrate environmental considerations.

The majority of the respondents said that they rarely used framework agreements or centralized procurement with environmental criteria.

Regarding the use of sustainability considerations in the award criteria in service acquisitions procedures, one third of respondents answered that they "never" used it, one third answered that they "rarely" used it, and the remaining were divided between "frequently" and, less often, the option not to answer.

Regarding the percentage that these factors have in the global evaluation model, half of the respondents did not answer. The remaining were mainly divided between 1% to 5% and 6% to 10% of the global score.

Regarding the use of sustainability considerations in the award criteria in goods acquisition procedures, the scenario was very similar to service acquisitions: one third of the respondents answered "never," one third answered "rarely," and the remaining were divided between "frequently" and, less often, the option not to answer.

Regarding the percentage that these factors have in the global evaluation model, the majority of the respondents chose not to answer. The ones who answered focused more on 6% to 10% of the global score.

Regarding the use of sustainability considerations in the award criteria in public works, there was also a big percentage of respondents that choose not to answer. The ones that answered focused mainly, in even terms, on "never" or "rarely."

Regarding the percentage that these factors have in the global evaluation model, the majority of the respondents chose not to answer. The remaining were mainly divided between 1 to 5%, followed by 6 to 10% of the global score.

The majority of the respondents claimed to frequently use multifactorial models of evaluation, with about 1/2 of the answers. The next most chosen option was “rarely.”

Regarding the promotion of sustainable procurement, one of the two questions that was an open one and had no set of predetermined possible answers, the respondents suggested several things, such as creating specific funding for this type of procedure to increase interest in this topic; creating legal obligations, with consequences similar to the ones the GDPR determined, to promote sustainable procurement; organizing awareness actions among awarding entities, namely to the competent bodies that decide the terms of the procedures; more specific training; training buyers and suppliers; meeting with suppliers to understand difficulties and opportunities; creating a multidisciplinary team to identify environmental criteria according to the contractual objects and disseminating that knowledge; ensuring that there is information at the European level, with product data sheets and life cycle calculators, but clarification is needed on how these criteria can be adapted to the Portuguese reality and to the awarding entities’ specific procedures, taking into account the reality of the market and the short time available to develop the procedural documents.

Other respondents thought sustainability considerations should be used as an exclusion factor rather than an evaluation factor. Training was often mentioned, as well as awarding benefits to those who exceed the goals and penalties to those who don’t reach them; professionalization of the public buyer was also among the main suggestions. In addition, public funding to investigate and make knowledge available to small and medium enterprises, as well as the standardization of procedures, with examples and technical specifications, were also mentioned. Defining sustainable procurement as mandatory by law was also one of the suggestions.

Continuing with the closed questions, entities were asked if they used any procedures other than direct award, previous consultation (semi-competitive procedure with invitation of at least three competitors), public tender and bid limited by pre-qualification. Most of them mentioned framework agreements, and a very small percentage said innovation partnerships.

Asked if there was monitoring of the execution of the contract and of compliance with environmental clauses during that period, the majority of respondents answered no.

The second and last open question was about the monitoring of the execution of the contract and compliance with environmental contract clauses during that period; the entities were also asked if there was someone responsible for this verification and what means were used. All the respondents answered “contract manager,” which is a figure that can be found in Article 290-A of the *Portuguese Public Procurement Code*.¹¹

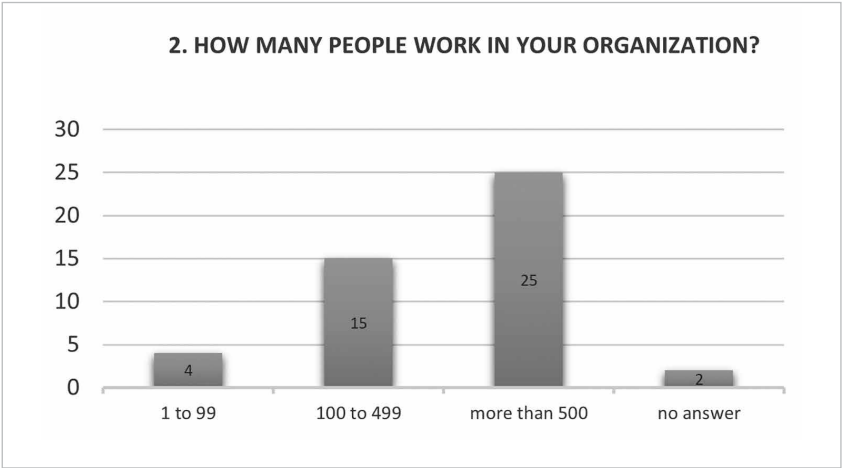
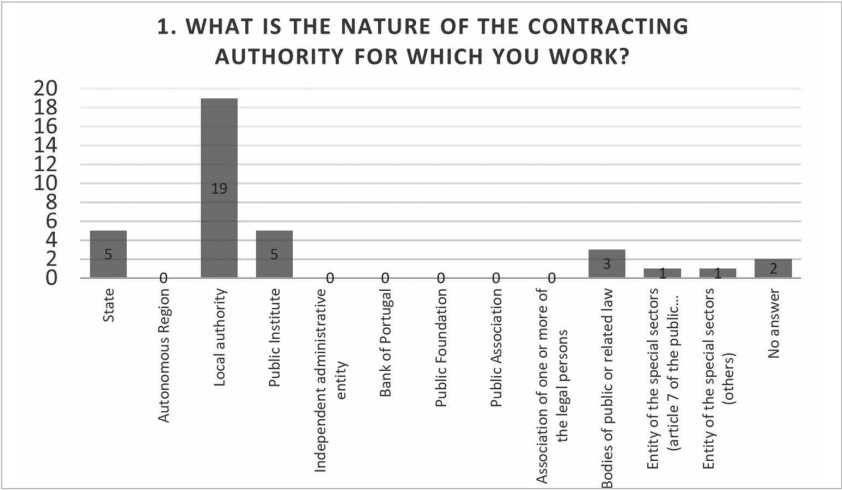
The last question was whether the respondents had ever applied contractual sanctions for contractual breaches: the vast majority said no, some didn’t answer, and none said yes. We believe this should be interpreted in the sense that the respondents have not applied sanctions for breach of contract regarding environmental aspects, not regarding every possible breach.

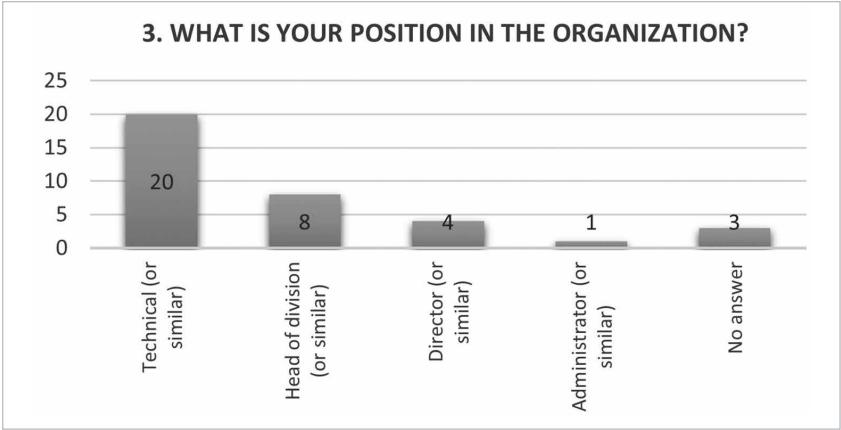
11. “Article 290-A – Contract Manager

1. The public contractor must designate one or more contract managers, with the function of permanently monitoring the execution of the contract.
2. If the public contractor appoints more than one contract manager, he must clearly define the roles and responsibilities of each one.
3. In the case of contracts with special characteristics of technical or financial complexity or with a duration of more than three years, and without prejudice to the functions that are defined by each public contractor, the manager or managers must prepare adequate quantitative and qualitative performance indicators for each type of contract, which allow, among other things, to measure the performance levels of the co-contractor, the financial, technical and material execution of the contract.
4. If the manager or managers detect deviations, defects or other anomalies in the performance of the contract, they must immediately report them to the competent body, proposing, in a reasoned report, the corrective measures that, in each case, prove to be appropriate.
5. The contract manager may be delegated powers to adopt the measures referred to in the previous number, except in terms of modification and termination of the contract.
6. In exceptional cases, duly substantiated, the public contractor may contract the management of the contract with a third party.
7. Before taking up his duties, the contract manager signs the declaration that there are no conflicts of interest, according to the model provided for in Annex XIII to this Code.” *Portuguese Public Procurement Code*, art. 290-A.

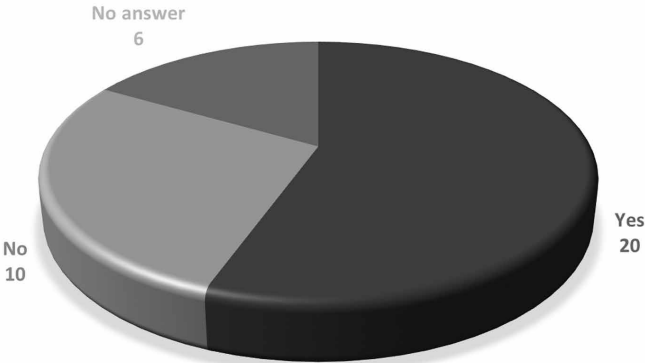
APPENDIX

Questionnaire Answers

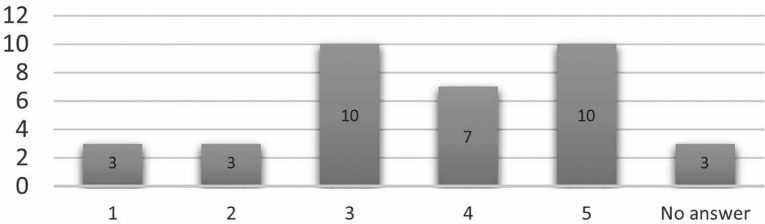




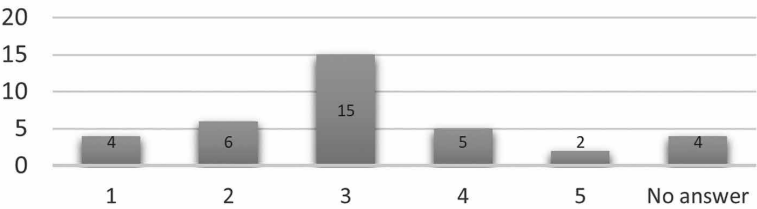
5. HAVE YOU EVER ATTENDED TRAINING COURSES THAT ADDRESSED SUSTAINABLE HIRING?



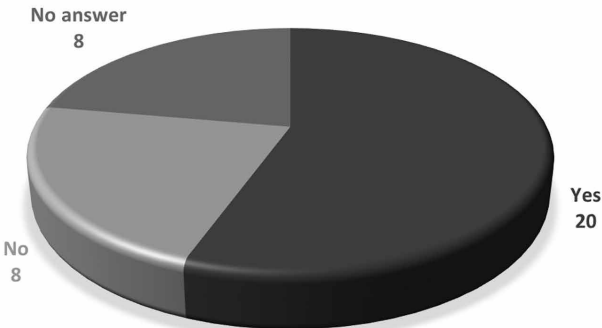
6. WHAT IS YOUR ORGANIZATION'S LEVEL OF INTEREST IN SUSTAINABLE PUBLIC PROCUREMENT? (1 IS THE LOWEST LEVEL AND 5 IS THE HIGHEST)

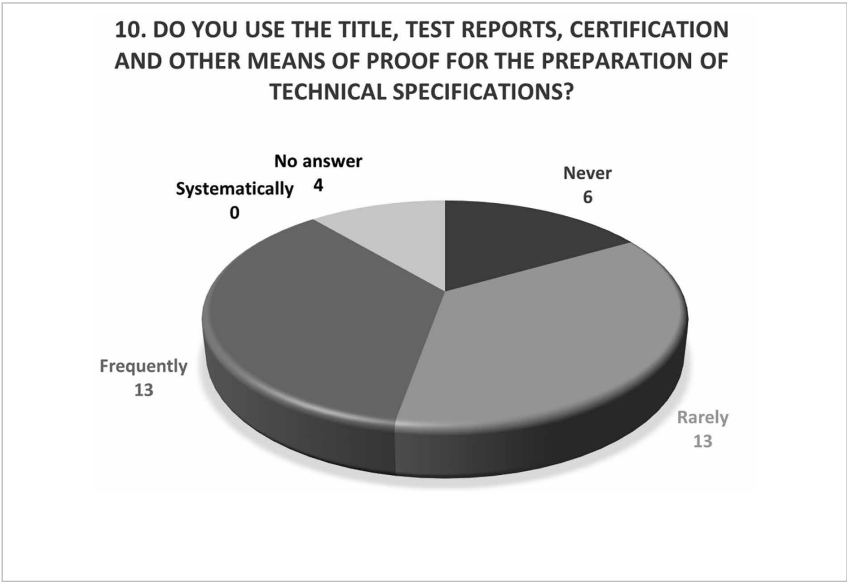
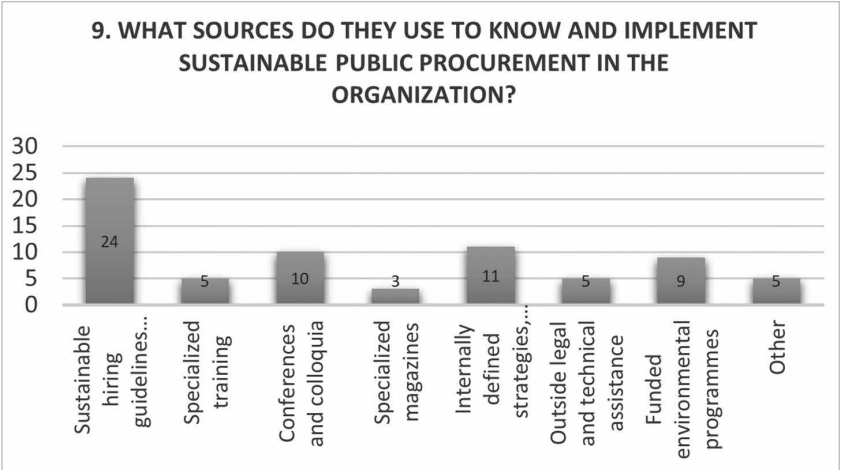


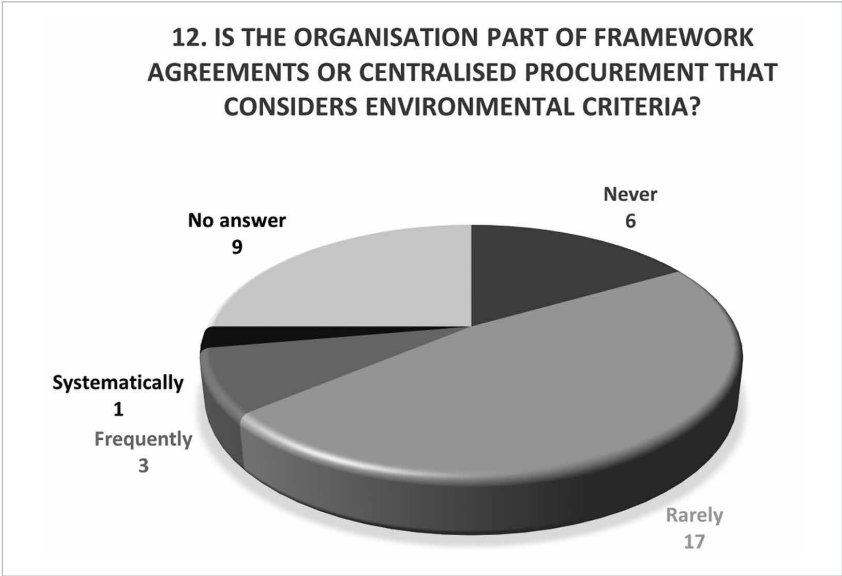
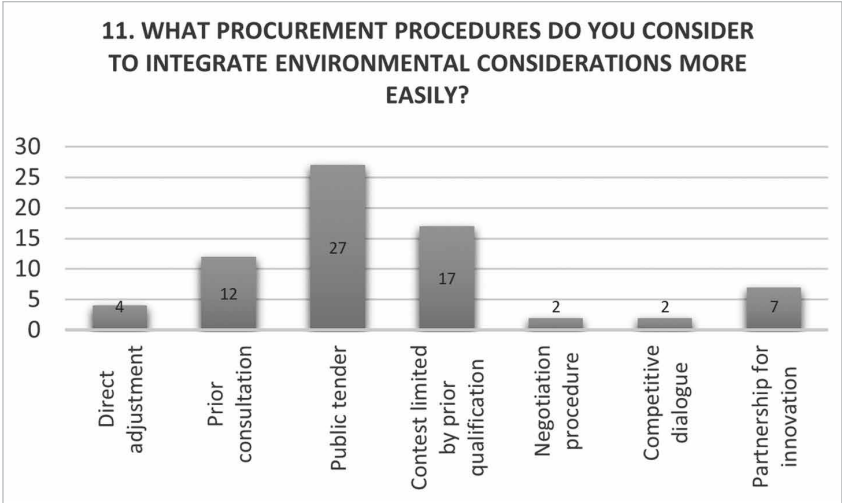
7. WHAT IS THE LEVEL OF GENERAL KNOWLEDGE IN YOUR ORGANIZATION ABOUT SUSTAINABLE PUBLIC PROCUREMENT?
(1 IS THE LOWEST LEVEL AND 5 IS THE HIGHEST)



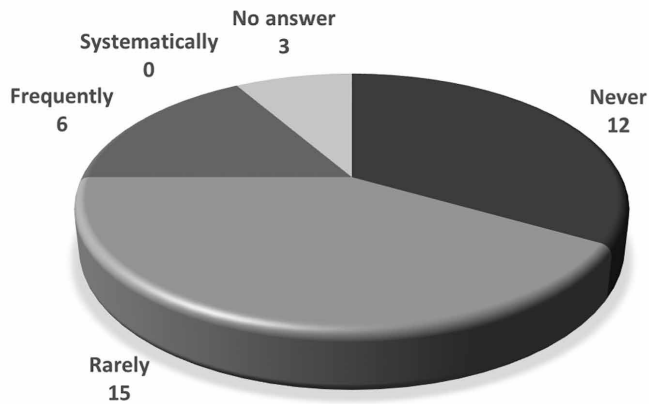
8. DO THEY USE SUSTAINABLE PUBLIC PROCUREMENT IN ANY WAY?



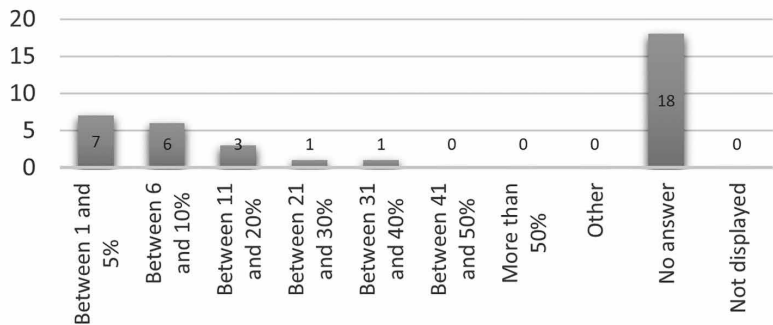




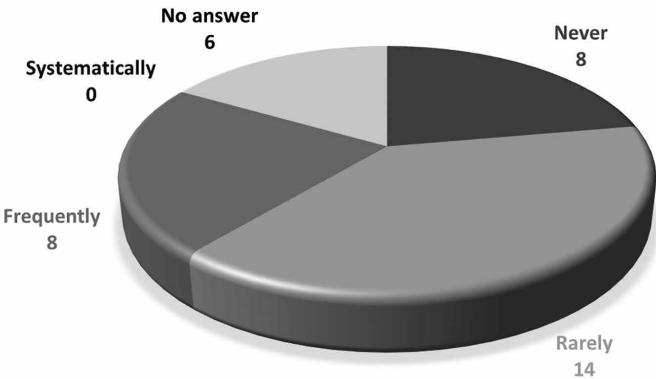
13. DO THEY USE ENVIRONMENTAL CRITERIA AS FACTORS OR SUBFACTORS IN THE AWARD CRITERIA IN THE ACQUISITION OF SERVICES?



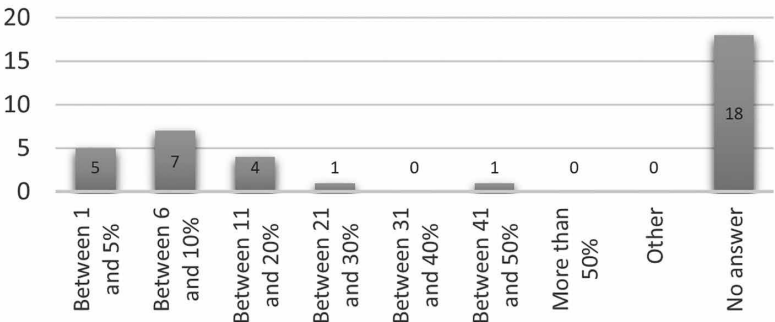
14. IN CASES WHERE ENVIRONMENTAL CRITERIA ARE USED, WHAT WEIGHT IN TERMS OF PERCENTAGE HAS THE WEIGHTING OF THE RESPECTIVE FACTORS OR SUBFACTORS IN RELATION TO THE TOTAL WEIGHTING?

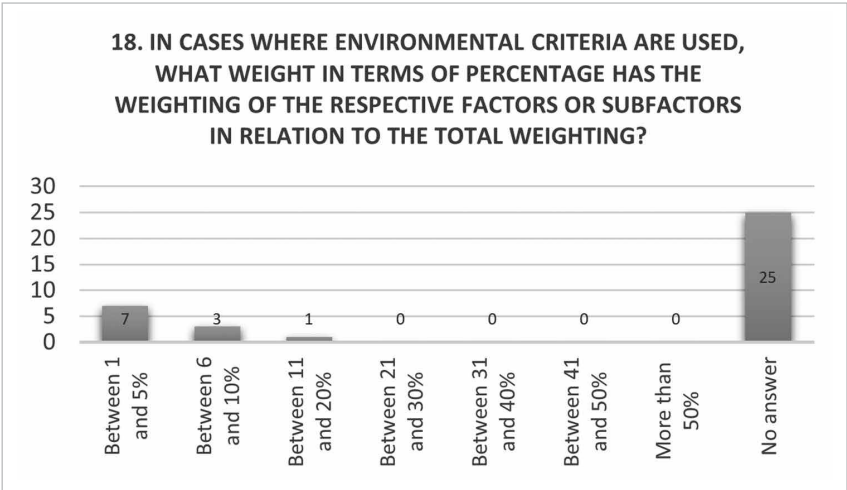
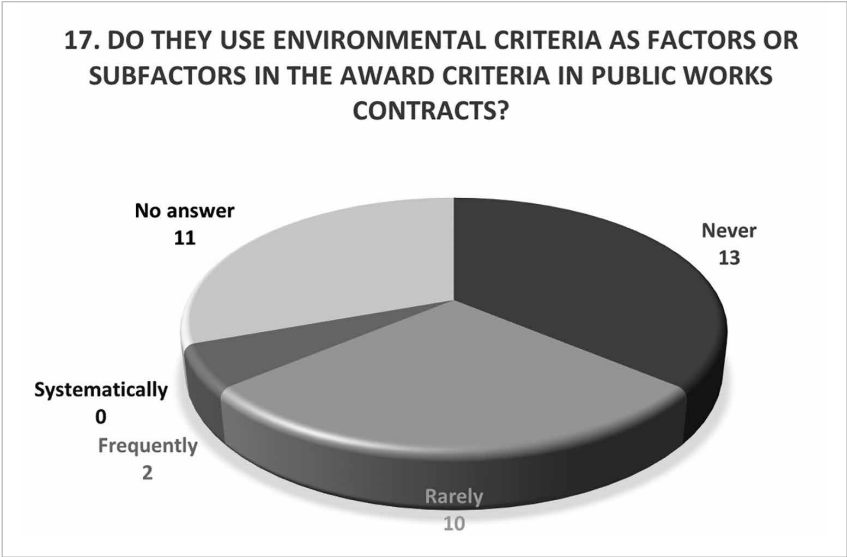


15. DO THEY USE ENVIRONMENTAL CRITERIA AS FACTORS OR SUBFACTORS IN THE AWARD CRITERIA IN THE ACQUISITION OF GOODS?

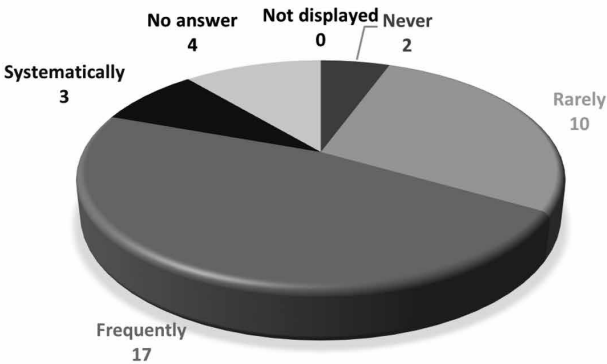


16. IN CASES WHERE ENVIRONMENTAL CRITERIA ARE USED, WHAT WEIGHT IN TERMS OF PERCENTAGE HAS THE WEIGHTING OF THE RESPECTIVE FACTORS OR SUBFACTORS IN RELATION TO THE TOTAL WEIGHTING?



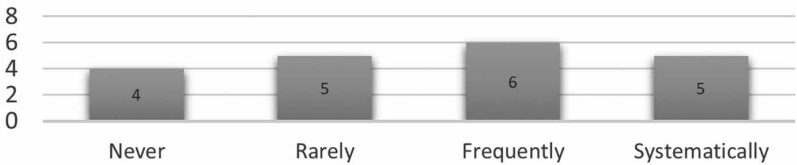


19. IN COMPETITIVE PROCEDURES, DO THEY USUALLY USE MULTI-FACTOR AWARD CRITERIA? IF SO, HOW OFTEN?

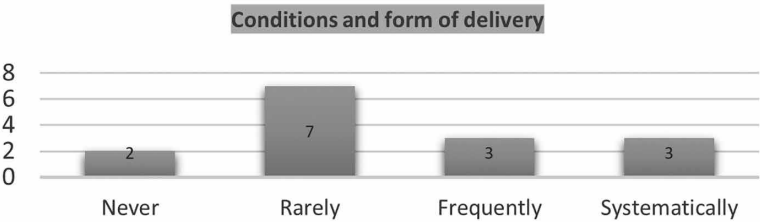


20. CONSIDERING NOW THE OVERALL CONTENT OF THE PARTS OF THE PROCEDURE USED IN YOUR ORGANIZATION, WHAT KIND OF ENVIRONMENTAL REQUIREMENTS OR SPECIFICATIONS (TECHNICAL SPECIFICATIONS, CERTIFICATIONS, VARIOUS CONTRACTUAL OBLIGATIONS) ARE USED?

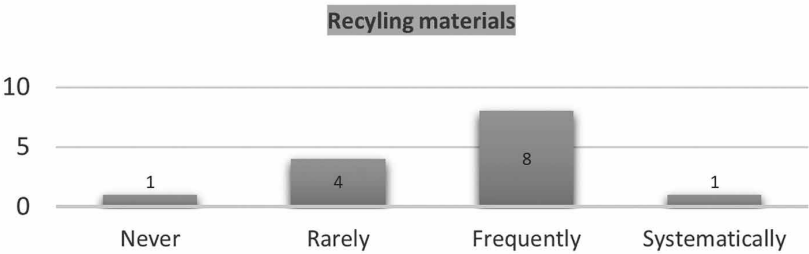
Regarding the packaging of products



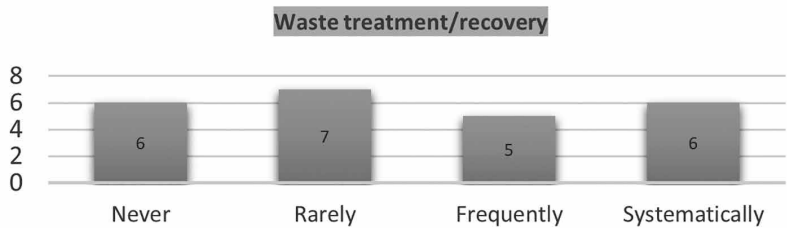
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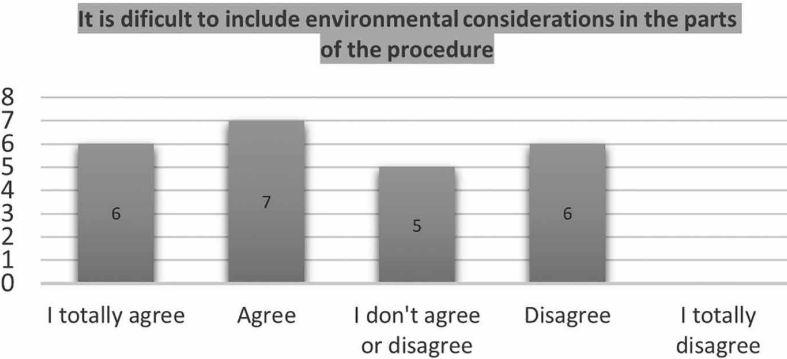
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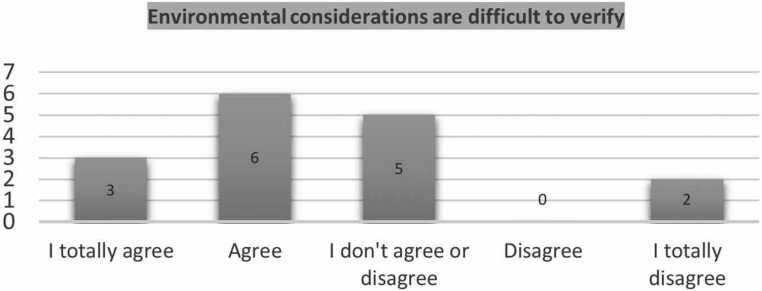
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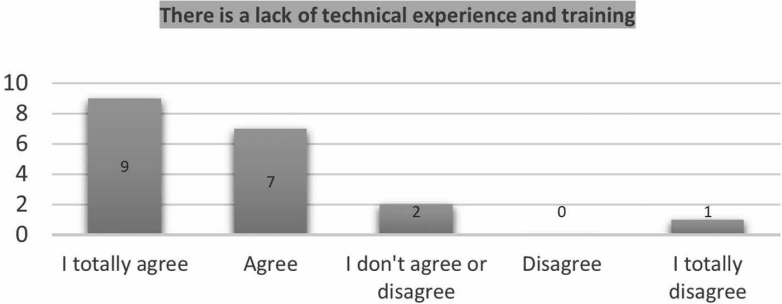
21. WHAT DO YOU CONSIDER TO BE THE BIGGEST OBSTACLES TO NOT INCLUDING SUSTAINABILITY ASPECTS IN THE PROCEDURES?

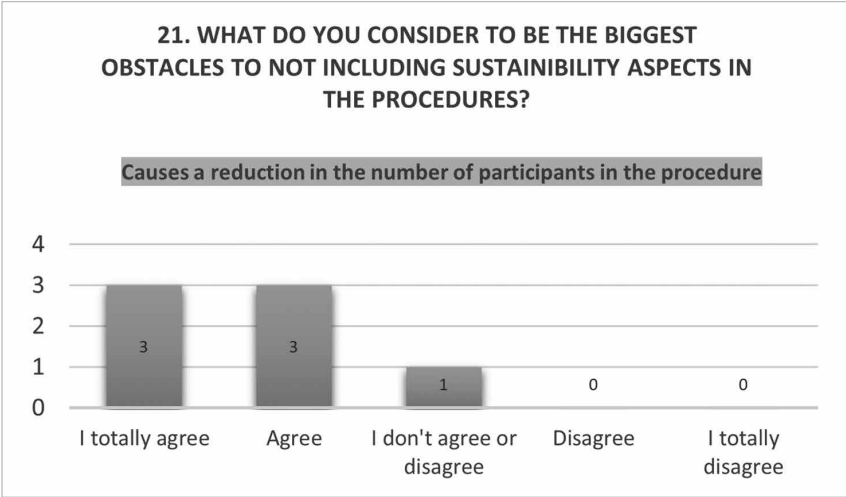
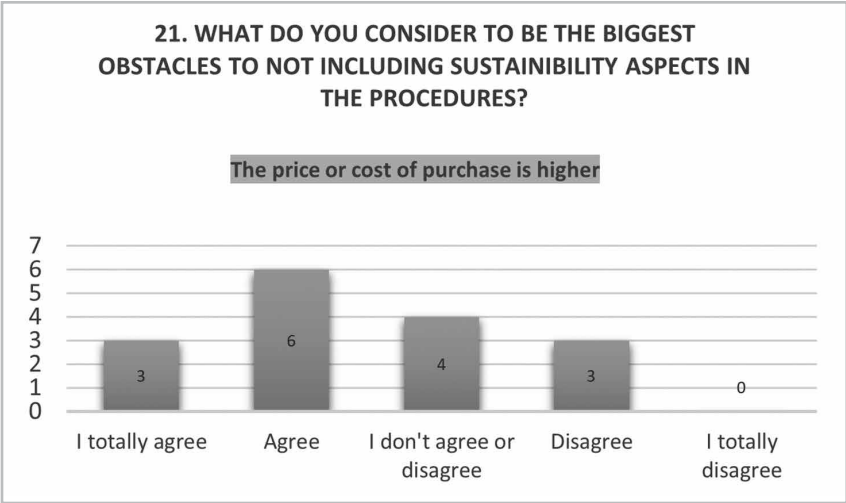


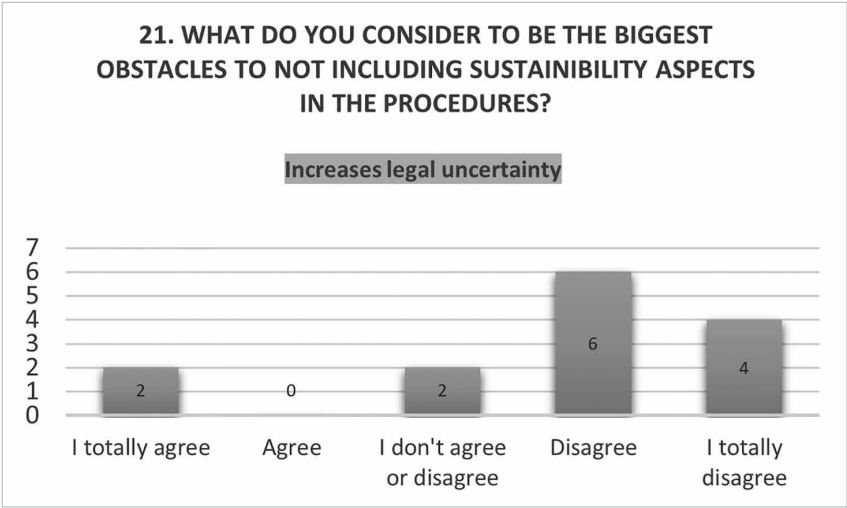
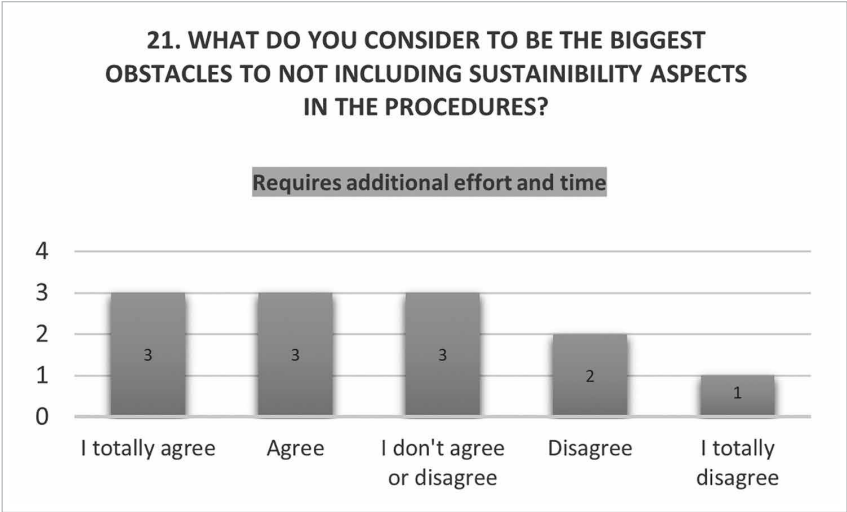
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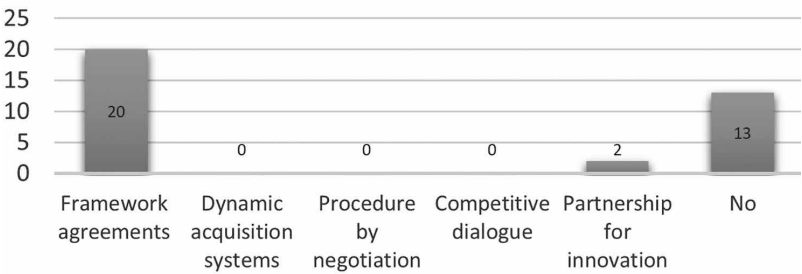
21. WHAT DO YOU CONSIDER TO BE THE BIGGEST OBSTACLES TO NOT INCLUDING SUSTAINABILITY ASPECTS IN THE PROCEDURES?



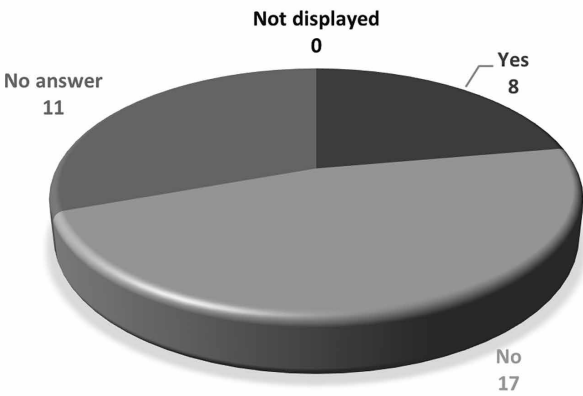




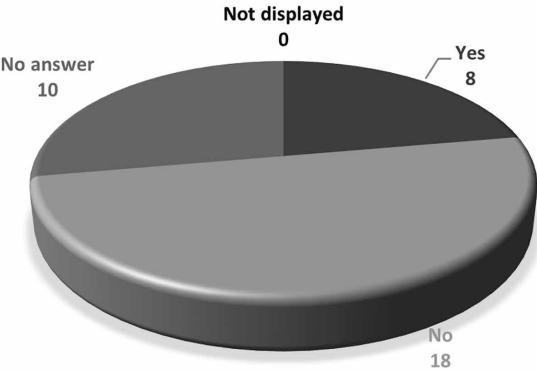
23. DO THEY OFTEN USE PROCEDURES OTHER THAN DIRECT ADJUSTMENT, PRIOR CONSULTATION, PUBLIC TENDERING AND COMPETITION LIMITED BY PRIOR QUALIFICATION? WHICH ONES?



24. DO YOU MONITOR AND SUPERVISES THE IMPLEMENTATION AND COMPLIANCE WITH ENVIRONMENTAL CLAUSES?



**26. HAVE YOU ALREADY IMPOSED CONTRACTUAL
PENALTIES FOR FAILURE TO COMPLY WITH
CONTRACTUAL CLAUSES?**



GREEN PUBLIC PROCUREMENT IN SWITZERLAND: A LEGAL AND ECONOMIC ANALYSIS

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The Legal Framework of Green Public Procurement in Switzerland

Kristina Strelchouk¹

In the context of the shift of the global community towards reducing environmental footprints, many initiatives have been launched at an institutional level in order to foster a more sustainable future of economic activities, notably with States' engagements to adopt the 2030 UN Agenda for Sustainable Development. In the field of public procurement, this movement led States to adopt legislative measures in order to encourage public buyers to balance the historically predominant financial aspects of an offer with factors related to sustainability. Following the amendment of the Agreement on Government Procurement in 2012, Swiss public procurement legislation, both federal and cantonal, has undergone a total revision which entered into force on January 1, 2021. The aim of this reform was notably to encourage public procurement practice to take greater account of the qualitative aspect of an offer, including ecological benefits, and to enshrine the notion of sustainability in the law. In addition to the increased focus on sustainability, the total revision resulted in the almost complete harmonization of the federal and inter-cantonal legislations. In the present contribution, I will present a general overview of the Swiss legislative landscape in the field of public procurement with a focus on new provisions. I will start with a brief overview of the legal framework in the field of public procurement, including constitutional rules focusing on environment and sustainability (2). In the second part, I will outline major novelties pertaining to green public procurement introduced with the total revision of the legal regime (3), before concluding (4).

1. Written by Kristina Strelchouk, Qualified Lawyer, PhD candidate, Faculty of Law, University of Geneva; Coordinated by François Bellanger, Lawyer, Professor, Faculty of Law, University of Geneva.

GENERAL RULES ON SWISS PUBLIC PROCUREMENT

Public procurement in Switzerland is regulated at two levels—federal and cantonal—which is a characteristic of Switzerland’s federalist structure. Legislation on public procurements is based on the Agreement on Government Procurement as amended on 30 March 2012 (GPA 2012), which entered into force for Switzerland on January 1, 2021, replacing the GPA 1994.² The GPA for procurements of federal authorities was implemented by the *Federal Act on Public Procurement* (PPA) and its *Ordinance on Public Procurement* (PPO). As for procurements of cantonal and municipal authorities, these are subject to cantonal laws and regulations. Despite the multiplicity of cantonal legislations, of which are 26 in total, they are largely similar, since almost all cantons adhere to the provisions of the Inter-cantonal Agreement on Public Procurement (IAPP), which provides a common legal framework for harmonizing cantonal legislations and facilitating the application of the GPA by cantonal and municipal authorities. Cantonal legislation must also comply with the provisions on transparency and non-discrimination of the Federal Law on the Common Market of 6 October 1995 (LCM).

Core constitutional rules

The Swiss Federal Constitution contains several provisions concerning the environment and sustainability.³ The notion of sustainable development is explicitly referred to in Article 2 (Goals), which provides that the Confederation shall promote notably the common welfare and sustainable development (par. 2), and that it is committed to the long-term preservation of natural resources and to a just and peaceful international order (par. 4). This provision covers the three-dimensional notion of sustainable development, i.e. its social, environmental and economic aspects. Sustainable development in its purely ecological perspective is specifically addressed in Article 73 (Section 4 on Environment and Spatial Planning), which states that the Confederation and the cantons shall endeavour to achieve a balanced and sustainable relationship between nature and its capacity to renew itself and the demands placed on it by the population. It is widely accepted among

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2. The Agreement on Government Procurement was adopted on April 15, 1994, and entered into force on January 1, 1996.
 3. More specific environmental matters are covered in Articles 74 (Protection of the environment), 76 (Water), 77 (Forests), 78 (Protection of national and cultural heritage), 79 (Fishing and hunting) and 80 (Protection of animals). As for the notion of sustainability, it appears in several provisions of the Federal Constitution, notably in Articles 104 (Agriculture) and 104a (Food security). *Federal Constitution of the Swiss Confederation*, 1999, art. 74, 76, 77, 78, 79, 80, 104, 104a.

scholars that Article 73 establishes sustainability as a constitutional principle. However, it does not confer rights on individuals, and the question of its justiciability has been left open by the Federal Supreme Court to this date.⁴

The subject matter of public procurement, and hence the question of its sustainable character, is not addressed in the Federal Constitution. This means that cantons are competent to regulate procurements led by cantonal and municipal authorities.

Supranational rules

The Swiss public procurement legal regime is based on the GPA and the Agreement between the European Community and the Swiss Confederation on certain aspects of government procurement of 21 June 1999.⁵ Switzerland is also member of the European Free Trade Association (EFTA) and thus must comply with the provisions relating to public procurement of the EFTA Convention.

As regards applicable supranational instruments, Switzerland hasn't directly integrated the United Nations Agenda 21 and the 2030 Agenda for Sustainable Development into its national legislation. Instead, the Federal Council adopted two strategies aiming to adapt federal legislation and policies to the goals set by the UN. The first strategy adopted on April 19, 1997, called "Sustainable development in Switzerland," aimed to integrate sustainable development into all sector-specific policies and has been subsequently updated. The most recent strategy is the 2030 Sustainable Development Strategy, in which the Federal Council outlined the priorities it intends to set to implement the 2030 Agenda and set out guidelines for the federal sustainability policy in all areas. It is complemented by the 2021-2023 Action Plan.

4. Raphael Mahaim, "Art. 73 Cst.," in Vincent Martenet and Jacques Dubey (Eds.), *Constitution fédérale – Commentaire romand*, vol. 2, Helbing Lichtenhan Verlag, 2021.

5. The latter affects only procurements in the water, energy, transport and telecommunication sectors. According to art. 3 par. 1 of the Agreement between the European Community and the Swiss Confederation on certain aspects of government procurement, it affects only procurements in the water, energy, transport and telecommunication sectors. *Accord entre la Confédération suisse et la Communauté européenne sur certains aspects relatifs aux marchés publics*, no. 0.172.052.68, art. 3, par.1, <<https://www.fedlex.admin.ch/eli/cc/2002/296/fr>>.

Procurement goals and principles

The goals of the legislation on public procurement, set out in art. 2 PPA/2 IAPP, are to ensure i) the cost-efficient use of public funds in a manner that is economically, ecologically and socially sustainable; ii) the transparency of the award procedure; iii) equal treatment and non-discrimination of tenderers; and iv) the promotion of effective, fair competition among tenderers, in particular by means of measures against unlawful agreements affecting competition and measures against corruption. It should be noted that the explicit inclusion of the notion of sustainability in relation to the cost-effective use of public funds is one of the major novelties of the total revision of the legislation on public procurement.

The legislation on public procurement sets out several general principles. Procedural principles require the contracting authority, when awarding public contracts, to a) carry out the award procedure transparently, objectively and impartially; b) take measures against conflicts of interest, unlawful agreements affecting competition and corruption; c) ensure equal treatment of tenderers at all stages of the procedure; d) dispense with bidding rounds; and e) safeguard the confidential nature of the information provided by tenderers (art. 11 PPA/11 IAPP). Other general principles relate to recusal (art. 13 PPA/13 IAPP), prior involvement (art. 14 PPA/14 IAPP) and determination of the contract's value (art. 15 PPA/15 IAPP).

The recent reform introduced a new principle, enshrined in Article 12 PPA/12 IAPP, in the form of compliance with workplace health and safety regulations, terms and conditions of employment, equal pay for men and women and environmental law. In relation to the environmental aspect, paragraph 3 states that "the contracting authority shall award a public contract only to tenderers that comply as a minimum with the legal provisions on the protection of the environment and the conservation of natural resources applicable at the place of performance. ..." For services provided in Switzerland, these provisions include the federal environment protection law.⁶ For services provided abroad, tenderers must observe the applicable local regulations on environmental protection and the preservation of natural resources, as well as international agreements on the protection

6. For an overview of the federal environmental legislation, see Federal Office for the Environment, "Swiss Environmental Law. A brief guide," *Environmental Info*, no. 2218, Bern, 2022. The list of current environmental laws is available at: Federal Office for the Environment, "Current environmental law," FOEN, n.d., <<https://www.bafu.admin.ch/bafu/en/home/topics/law/current-environmental-law.html>>.

of the environment designated by the Federal Council, especially those that go beyond local environmental legislation.

Finally, as already mentioned, the *Federal Common Market Act* sets out in its Article 5 additional principles of transparency and non-discrimination which must be observed by cantonal and municipal authorities when awarding procurements.

Subjective scope of application

According to Article 4 par. 1 PPA, federal contracting authorities that are competent to award procurement contracts are the administrative units of the central and decentralized Federal Administration, the federal judicial authorities, the Office of the Attorney General and the parliamentary Services. At the cantonal level, the terms of the application of the Inter-cantonal Agreement to procurements awarded by cantonal and municipal authorities depend on whether a procurement is subject to international agreements.⁷ If they are, the Inter-cantonal Agreement applies to procurement by public authorities and units of the centralized and decentralized administration, including public entities of the canton, district and municipality, except if they engage in commercial or industrial activities. If the procurement is not subject to international agreements, the Inter-cantonal Agreement applies in addition to procurement by other public bodies assuming cantonal or municipal duties, if they do not have commercial or industrial activities, and to projects or services which are publicly funded at least at 50%.

Public or private undertakings may also award procurements if they provide public services, have exclusive special rights and are active in specific sectors⁸ (art. 4 par. 2 PPA/art. 4 par. 2 IAPP). In this instance,

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7. The threshold values required to be subject to international agreements are set out in Annex 1 and Annex 2 of the IAPP. *Accord intercantonal sur les marchés publics (AIMP)*, annex 1 and annex 2.
 8. The public or private undertakings must be active in the following sectors: a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water, or the supply of drinking water to such networks; b) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity, or the supply of electricity to such networks; c) the provision of airports or other terminal facilities to air carriers; d) the provision of inland ports or other terminal facilities to inland waterway carriers; e) the provision of postal services in the reserved services area in accordance with the *Postal Services Act* of 17 December 2010; f) the provision or operation of railways, including the traffic thereon; g) the provision or operation of fixed networks intended

inter-cantonal and federal provisions are equivalent, with slight variations regarding sectors.⁹

Objective scope of application

Pursuant to art. 8 par. 2 PPA/art. 8 par. 2 IAPP, a public procurement can have three types of services and supplies, which will determine the corresponding procurement contract, namely i) construction work; ii) supplies of goods; and iii) services, provided that it does not fall within the exception list of art. 10 PPA/art. 10 IAPP. Authorities may also enter into mixed contracts which comprise various services and/or supplies, in accordance with paragraph 2, and form an overall transaction categorized based on the financially predominant supply (art. 8 par. 3 PPA/art. 8 par. 3 IAPP). Article 9 PPA/9 IAPP provides that the delegation of a public task and the granting of a concession are deemed to be a public contract if it gives the tenderer exclusive or special rights which the tenderer exercises in the public interest and for which the tenderer receives direct or indirect remuneration or compensation.

Rules on award procedures

A public procurement can be led according to the following award procedures, depending on the value of the contract and thresholds¹⁰ (art. 17 PPA/17 IAPP): i) open procedure; ii) selective procedure; iii) invitation procedure; and iv) direct award procedure. In certain circumstances or for special needs, contracting authorities may resort to additional special procedures as part of the award procedure. Firstly, award procedures may be preceded by a design contest or a competition to conduct a study (art. 22

to provide a service to the public in connection with the production, transport or distribution of gas or heat, or the supply of gas or heat to such networks; or h) the exploitation of a geographical area for the purpose of exploring for or extracting oil, gas, coal or other solid fuels. *Accord intercantonal sur les marchés publics (AIMP)*, 2019, art. 4 par. 2; *Federal Act on Public Procurement*, 2019, no. 172.056.1, art. 4 par. 2, <<https://www.fedlex.admin.ch/eli/cc/2020/126/en>>.

9. Art. 4 par. 2 IAPP is limited to procurements subject to international agreements and lists in addition the sector of the operation of networks intended to provide a service to the public in the field of transport by urban railway, automatic system, tramway, trolleybus, bus or funicular, whereas the PPA includes the provision of postal services. *Accord intercantonal sur les marchés publics (AIMP)*, 2019, art. 4 par. 2.
10. Article 16 PPA/16 IAPP provides for the rules governing thresholds which are set out in Annex 4 PPA, respectively annexes 1 and 2 IAPP. *Accord intercantonal sur les marchés publics (AIMP)*, 2019, art. 16 and Annex 4; *Federal Act on Public Procurement*, 2019, no. 172.056.1, art.16, Annex 1 and Annex 2.

PPA/22 IAPP). In case of procurements for standardized goods, work or services, contracting authorities may hold electronic auctions (art. 23 PPA/23 IAPP). Inversely, in case of complex contracts, intellectual services or the procurement of innovative goods, work or services, contracting authorities have the option to conduct a dialogue in order to specify the subject of the supply as well as identify and define the solutions or procedures (art. 24 PPA/24 IAPP).¹¹ Finally, contracting authorities may conclude framework agreements, which aim to determine the terms for the goods, work and services to be procured over a given period, in particular with regard to their price and, where appropriate, the quantities envisaged (art. 25 PPA/25 IAPP).

The contracting authority may exclude a tenderer from an award procedure or revoke a contract that has already been awarded notably if there are sufficient indications that the tenderer disregards the provisions of Swiss or international environmental law (art. 44 par. 2 let. f PPA/44 par. 2 let. f IAPP) and, if the tenderer or its subcontractor engages in this conduct to a serious extent, they may be excluded from future public contracts for a period of up to five years (art. 45 par. 1 PPA). Article 45 par. 1 IAPP provides for an alternative sanction in the form of a fine which can amount up to 10% of the final bid price.

Right to appeal

The main higher judicial instance to hear appeals on matters of federal public procurements is the Federal Administrative Court (art. 52 PPA), since appeals on this matter to the Federal Supreme Court are largely inadmissible.¹² As regards the procurements of cantonal and municipal authorities, Article 52 IAPP provides that an appeal may be brought before cantonal administrative courts. Appeals to the Federal Supreme Court are admissible only in the case of alleged violation of constitutional rights.

11. Art. 24 par. 2 PPA/24 par. 2 IAPP provides that the dialogue shall not be used for negotiating prices. *Accord intercantonal sur les marchés publics (AIMP)*, 2019, art. 24 par. 2; *Federal Act on Public Procurement*, 2019, no. 172.056.1, art. 24 par. 2.

12. An appeal against a decision of federal authorities on matters of public procurement to the Federal Supreme Court falls within the general list of exceptions of Article 83 let. f of the *Supreme Federal Court Act* of 17 June 2005. An appeal is admissible firstly if the decision raises a legal question of principle. This condition does not apply to procurements of the Administrative Federal Court, Criminal Federal Court, Federal Patent Court, Attorney General of Switzerland or cantonal higher judicial authorities; and secondly, if the estimated value of the contract to be awarded exceeds the threshold value referred to in art. 52 par. 1 and fixed in Annex 4 PPA. *Supreme Federal Court Act*, 2005, art. 83f.; *Federal Act on Public Procurement*, 2019, no. 172.056.1, art. 52, par. 1 and Annex 4.

RULES ON GREEN PUBLIC PROCUREMENT

GPP provisions in the Revised Swiss Public Procurement Law

The reform of the Swiss legislation on public procurements introduced several novelties in the sphere of green public procurement. This paradigm shift towards encouraging sustainability is well reflected in Article 41 PPA/41 IAPP, which states that the contract is awarded to the most advantageous tender, meaning that the offer is evaluated according to its price and quality.¹³ Indeed, the wording of the former version of the PPA/IAPP, which stated “economically advantageous tender” has been amended in that the word “economically” was removed. Firstly, the notion of sustainable development in its three dimensions is explicitly stated in the goals of the PPA/IAPP in relation to cost-efficient use of public funds in the implementation of public procurements. Secondly, compliance with environmental laws constitutes a new general principle in Article 12 PPA/12 IAPP. Other important novelties are to be found in Chapter 5 PPA/IAPP pertaining to award requirements. Firstly, the participation conditions (art. 26 PPA/26 IAPP) require, as the minimum standard in accordance with Article 12 PPA/12 IAPP, compliance by the tenderer and by its subcontractors with the legal provisions on environmental protection and the conservation of natural resources applicable at the place of performance during the award procedure and the execution of the contract. This condition is binding and independent from the object of the procurement. Secondly, contracting authorities may impose green public procurement through technical specifications which describe the characteristics of what is to be procured, such as function, performance, quality, safety, security, dimensions and production processes, and regulate the labelling and packaging requirements (art. 30 par. 1 PPA/30 par. 1 IAPP). Article 30 par. 4 PPA specifies that technical specifications may be stipulated for the conservation of natural resources or the protection of the environment, thus explicitly allowing public buyers to set ecological requirements to the object of the tender. Moreover, according to the recommendations of the federal authorities, the entire life cycle of the product has to be considered in the setting out of technical specifications.¹⁴ It is also recommended to require where possible, meaning to the extent that a market for this purpose

13. Jean-Baptiste Zufferey, “Nouveau droit (fédéral) des marchés publics: faire du neuf avec de l’ancien ? Un peu plus tout de même,” *BR/DC*, 2020, p. 6.

14. Swiss Confederation, “Les bases méthodologiques des écobilans,” *OFEV*, 2023, <<https://www.bafu.admin.ch/bafu/fr/home/themes/economie-consommation/info-specialistes/les-bases-methodologiques-des-ecobilans.html>> [consulted in 2023, document now inaccessible].

exists, the use of recycled or recyclable materials, as well as materials that are separable and free of toxic substances. Criteria related only to the manufacturing process are also allowed, on the condition that they are objectively linked to the object of the procurement and positively change the value of the product.¹⁵ Thirdly, the eligibility criteria (art. 27 PPA/27 IAPP) can also encourage sustainable development by requiring specific technical competencies or specific environmental know-how.¹⁶ However, the eligibility criteria must be objectively necessary or verifiable for the procurement project (par. 1 second sentence). Hence, it can have only a limited impact on the promotion of green public procurement, since the admissibility of environmentally friendly eligibility criteria depends on the object of the procurement.¹⁷ It is important to note that eligibility criteria should not preclude competition, e.g. by leaving only one potential tenderer. Fourthly, the award criteria (art. 29 PPA/29 IAPP) can have an ecological character, since the law explicitly mentions sustainable development and life cycle costs as potential criteria. The environmental aspect of sustainable development covers the environmental compatibility and the preservation and rational use of resources. Factors used for its assessment include pollutant content, as well as water, soil and air pollution, energy or water consumption and the impact on biodiversity. The environmental aspect can be related to the object of the procurement as well as its fabrication process, use or

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15. Examples of authorized requirements are electricity produced from renewable energy sources, organic food, wood from sustainable forest management, and printed products from a printing process that contains only a small proportion of volatile organic compounds. Swiss Confederation, "Achats durables – Recommandations aux services d'achat de la Confédération," *Conférence des achats de la Confédération CA*, 2021, ch. 3.2.2, p. 7, <<https://www.bafu.admin.ch/dam/bafu/fr/dokumente/wirtschaft-konsum/fachinfo-daten/empfehlungen-fuer-die-beschaffungsstellen-des-bundes.pdf.download.pdf/Recommandations%20aux%20services%20d%E2%80%99achat%20de%20la%20Conf%C3%A9d%C3%A9ration.pdf>>.
 16. Such requirements can be proven by means of certificates or references. Swiss Confederation, "Achats durables – Recommandations aux services d'achat de la Confédération," *Conférence des achats de la Confédération CA*, 2021, ch. 3.2.6, p. 9, <<https://www.bafu.admin.ch/dam/bafu/fr/dokumente/wirtschaft-konsum/fachinfo-daten/empfehlungen-fuer-die-beschaffungsstellen-des-bundes.pdf.download.pdf/Recommandations%20aux%20services%20d%E2%80%99achat%20de%20la%20Conf%C3%A9d%C3%A9ration.pdf>>.
 17. Swiss Confederation, "Achats durables – Recommandations aux services d'achat de la Confédération," *Conférence des achats de la Confédération CA*, 2021, ch. 3.2.6, p. 9, <<https://www.bafu.admin.ch/dam/bafu/fr/dokumente/wirtschaft-konsum/fachinfo-daten/empfehlungen-fuer-die-beschaffungsstellen-des-bundes.pdf.download.pdf/Recommandations%20aux%20services%20d%E2%80%99achat%20de%20la%20Conf%C3%A9d%C3%A9ration.pdf>>.

suppression.¹⁸ Regarding life cycle cost criteria, it is worth noting that they are considered major new criteria following the total revision,¹⁹ since they have high ecological potential.²⁰ External costs caused by environmental damage related to the object of the procurement during its life cycle may be taken into account, provided they can be assessed using a widely recognized method approved by the competent body.²¹ The methodology used to determine life cycle costs must be described by the contracting authority.²² In addition, besides the mandatory criteria of price and quality, the provision contains an illustrative list of other admissible award criteria, such as creativity, innovation content, expertise and efficiency of the methodology.

The ecological requirement must be described in the tender documents with sufficient clarity and be non-discriminatory, for instance against foreign tenderers. As with other factors, an objective link with the object of the procurement is required, which is a crucial condition for green public procurements. For instance, it has been ruled that, for the distance of the transport route to be admitted as an award criterion, the transport process has to be an essential part of the service in a procurement for waste disposal.²³ Another example is emissions from transportation, which can be accepted if the contracting authority requires a global CO₂ balance and if this element

18. Message of the Federal Council on the total revision of the Federal law on public procurement of February 15, 2018, p. 1788 (FF 2017 1695).

19. The prior version of the law mentioned only “ecological character” criteria. For arguments on replacement of the price criteria by the life cycle cost, see Domenico Di Cicco, “Le coût du cycle de vie comme critère alternatif au prix?”, *DC*, 2023, p. 10-12.

20. Swiss Confederation, “Achats durables – Recommandations aux services d’achat de la Confédération,” *Conférence des achats de la Confédération CA*, 2021, ch. 3.2.7, p. 10, <<https://www.bafu.admin.ch/dam/bafu/fr/dokumente/wirtschaftskonsum/fachinfo-daten/empfehlungen-fuer-die-beschaffungsstellen-des-bundes.pdf.download.pdf/Recommandations%20aux%20services%20d%E2%80%99achat%20de%20la%20Conf%C3%A9d%C3%A9ration.pdf>>.

21. Message of the Federal Council on the total revision of the Federal law on public procurement of February 15, 2018, p. 1788 (FF 2017 1695).

22. The relevance matrix highlights the most relevant environmental aspects of the life cycle which should be considered in the tender. Swiss Confederation, “Achats durables – Recommandations aux services d’achat de la Confédération,” *Conférence des achats de la Confédération CA*, 2021, ch. 3.2.7, p. 10.

23. *Decision of the Supreme Federal Court*, 2000, no. 2P.342/1999.

is evaluated as an award criterion.²⁴ The award criterion is examined once the technical specification and eligibility criteria are met. The authority may set a weighting in such a way that tenderers who are able to provide additional environmental performance can achieve a higher evaluation score. It enjoys a large margin of appreciation in this respect.

Tools to implement GPP

In order to implement the new provisions encouraging green public procurements, federal authorities published various general as well as sector-specific²⁵ guidelines and recommendations.²⁶ In addition, an online knowledge platform on sustainable public procurement, the Sustainable Procurement Knowledge Platform (PAP),²⁷ and a Toolbox on Swiss responsible purchasing (*Toolbox achats responsables suisses*)²⁸ were created in order to assist public buyers by providing detailed information and tools for conducting sustainable procurements. The PAP is used by federal authorities and is accessible to cantonal and municipal authorities. Moreover, a tool in

24. Conférence des achats de la Confédération (CA), *Achats durables. Recommandations aux services d'achat de la Confédération*, 2021, ch. 3.2.7, p. 10, <<https://www.bafu.admin.ch/dam/bafu/fr/dokumente/wirtschaft-konsum/fachinfo-daten/empfehlungen-fuer-die-beschaffungsstellen-des-bundes.pdf.download.pdf/Recommandations%20aux%20services%20d%E2%80%99achat%20de%20la%20Conf%C3%A9d%C3%A9ration.pdf>>.

25. For example, in the construction sector, see Swiss Confederation, “Cockpit Gestion immobilière durable,” *Conférence de coordination des services de la construction et des immeubles des maîtres d'ouvrage publics KBOB*, 2021, <<https://www.kbob.admin.ch/kbob/fr/home/themen-leistungen/nachhaltiges-immobilienmanagement/cockpit-faktenblaetter.html>>.

26. See in particular the following guidelines: Swiss Confederation, “Principes directeurs pour des achats publics durables (de biens et de services) à la Confédération 2018,” *Conférence des achats de la Confédération CA*, 2019, <https://www.bafu.admin.ch/dam/bafu/fr/dokumente/wirtschaft-konsum/fachinfo-daten/leitsaetze-fuer-eine-nachhaltige-oeffentliche-beschaffung.pdf.download.pdf/BKB_Leitsaetze_fr.pdf>; Swiss Confederation, “Corporate Social Responsibility (CSR): Der Bund als Beschaffer,” *Office fédéral du développement territorial*, 2018, <<https://www.are.admin.ch/are/fr/home/media-et-publications/publications/developpement-durable/corporate-social-responsibility-csr-der-bund-als-beschaffer.html>>; Swiss Confederation, “Recommandations / Fiches d'information / Guides,” *Conférence des achats de la Confédération CA*, 2023, <<https://www.bkb.admin.ch/fr>>.

27. Swiss Confederation, “WöB platform for sustainable public procurement,” *WöB*, <<https://www.pap.swiss/de/>>.

28. Swiss Confederation, “Toolbox achats responsables suisse,” *PAP*, <<https://www.pap.swiss/fr/toolbox>>.

the form of a relevance matrix was developed specifically for the setting of technical specifications.²⁹

Environmental-friendly labels are also a helpful tool for formulating ecological criteria.³⁰ Since the use of labels in technical specifications cannot cause a barrier to trade, there are certain limitations to the use of label in ecological criteria. Contracting authorities and entities must thus fulfill the following conditions for using labels:³¹ the labels must be i) based on transparent, objective, and non-discriminatory criteria; ii) accessible to all; and iii) granted by an independent organization.

Moreover, federal authorities, namely the Unit for Ecological Public Procurement, provide training on green public procurement for students and professionals (art. 28 par. 2 lit. c of the *Ordinance of the Organization of Federal Public Procurement*). Training and advanced training will also be offered by the Interest Group for Federal Diplomas in Public Procurement (*Groupement d'intérêt pour les diplômes fédéraux dans le domaine des marchés publics* [IAöB]) in order to develop the professionalization of the sectors of activity that deal with public markets.

CONCLUSION

In the present contribution, I presented some major novelties of the recent legislative reform affecting the conduct of public procurements in Switzerland. The new legislation represents a major paradigm shift for the practice of green public procurement, since it encourages contracting authorities to adopt a more global approach, taking into consideration the financial aspect as much as the overall quality of the offer in order to conduct more sustainable public procurements. Concrete results will depend on the

29. Swiss Confederation, "Plateforme de connaissances sur les achats publics responsables," *PAP*, <<https://www.pap.swiss/fr/>>.

30. In Switzerland, there is no specific legislation governing labels. Hence, any company or organization could in principle create its own quality label. Swiss Confederation, "Certificates and labels," *SME Portal for small and medium-sized enterprises*, 2021, <<https://www.kmu.admin.ch/kmu/en/home/concrete-know-how/sme-management/standards-quality-guarantees-labels/certificates-labels.html>>.

31. Swiss Confederation, "Achats durables – Recommandations aux services d'achat de la Confédération," *Conférence des achats de la Confédération CA*, 2021, ch. 3.2.4, p. 8, <<https://www.bafu.admin.ch/dam/bafu/fr/dokumente/wirtschaft-konsum/fachinfo-daten/empfehlungen-fuer-die-beschaffungsstellen-des-bundes.pdf.download.pdf/Recommandations%20aux%20services%20d%E2%80%99achat%20de%20la%20Conf%C3%A9d%C3%A9ration.pdf>>.

implementation of the legal provisions by public buyers, which still enjoy great discretion in setting various criteria for procurements. Considering the many challenges that the conduct of green procurements entails, notably the importance of technical knowledge for persons leading procurements, it is crucial to achieve a consistent and, where possible, harmonized implementation, notably by an exchange of practices and training, in order for sustainable public procurements to be anchored in practice.

A Qualitative Interview Analysis of Green Public Procurement in Switzerland

Kristina Strelchouk³²

I will analyze the appropriation of the green public procurement (GPP) legal framework by public buyers based on seven semi-structured interviews conducted with federal, cantonal and municipal public buyers. I conducted interviews with persons representing five public authorities and two sustainability consulting entities at the cantonal and municipal levels. One of the interviewed sustainability consulting entities also acts as public buyer. The respondents were either heads of the division responsible for public procurements of the authority or legal counsels assisting notably on matters related to public procurements. The duration of the interview was approximately 60 minutes.

All the interviews were structured around the following predetermined set of topics: i) presentation of the purchaser in order to understand the position of the interviewee and their legal background; ii) procurements led by the purchasing entity, including types of contracts and of procurement procedures; iii) definition of an environmentally sustainable procurement policy by the public purchaser; iv) environmental procurement practice in order to understand how environmental considerations are or are not integrated into contracts; v) monitoring and evaluation of the environmental purchasing policy; vi) experience with energy performance contracts; vii) obstacles and ways to encourage environmental public purchasing.

In the following analysis, I will try to respond to the three following research questions:

32. Written by Kristina Strelchouk, Qualified Lawyer, PhD candidate, Faculty of Law, University of Geneva; Coordinated by François Bellanger, Lawyer, Professor, Faculty of Law, University of Geneva.

- 1) Are green considerations integrated into public contracts by public purchasers?
- 2) How are green considerations implemented in these public contracts?
- 3) In which parts of the tenders are green considerations integrated (technical specifications, award criteria, terms of the contract)?

I will analyze the proactiveness of the implementation of green considerations in procurements by interviewed public buyers based on the following hypothesis: the integration of environmental considerations in public procurement is determined by the more or less proactive implementation of the GPP legal framework by public purchasers. I will also try to understand the role of the legal framework in the proactiveness of the implementation of green considerations in public procurement and whether other factors influence the inclusion of environmental aspects in public procurements. The question of the incentives and barriers to GPP will also be discussed.

METHOD

In this analysis, I will follow the deductive analysis method. In the choice of public buyers, I focused on authorities from the French-speaking part of Switzerland, in particular the Cantons of Geneva and Vaud. In our choice of public buyers, I focused on the following sectors: construction, collective catering and transport. Three interviewed authorities were active in other sectors, mainly purchasing of office supplies and other goods.

The main difficulty in the conducting of interviews was the availability of public authorities. In addition, concerns about the private or academic character of our research and confidentiality have been raised.

IDENTIFICATION OF GPP PRACTICE

During the interviews, the following subjects were addressed by the interviewees from the French-speaking part of Switzerland.

Environmentally sustainable procurement policy

Each interviewed authority reported that it had an internal directive or a regulation on the inclusion of environmental criteria in procurements. Examples of environmental criteria explicitly mentioned in policies are local

products and service providers, the origin of the products, carbon emissions and life-cycle costs.

Regarding contracts for construction work, representatives of one federal authority affirmed that it had been using quality criteria, including ecological considerations, for the past 10 to 15 years. In their opinion, federal legislation on public procurements did not influence this policy. However, they believed that, with the revised legislation on public procurements, the weight of environmental aspects will tend to become more significant in procurement policies. The interviewees explained the use of life-cycle cost criteria with higher costs of green procurements. They also noted that the cost criteria already tend to have less weight in procurement policies, which, they believed, could expose the authority to the risk of appeal. In their experience, however, this risk had never yet materialized. According to the interviewees, this is because of enhanced transparency and communication on the part of the authority they represented. Another entity responsible for construction work in a municipality in the canton of Vaud declared that environmental criteria were weighted between 5% and 15% on average in its policy based on the current legislation, which had not yet been adapted to the revision. The interviewee reported that the municipality's clear objective was to prioritize the environment and limit the weighting of the cost criteria, noting that a maximum weighting of 50% for cost criteria was in place before the recent revision of the legal framework, except for some very standard procurements. The interviewee explained that the objective to move towards a green procurement policy was influenced by the Climate Plan 2021, which focuses on building sanitation, the Agenda 2030, climate strikes, and the importance of environmental issues in the eyes of the entity's director.

An entity acting as a public buyer in the canton of Geneva stated that sustainable development is one of the focuses of their procurement policy. However, in the current procurement policy, the environmental aspect is weighted at only 3%. The representative of this entity affirmed that quality criteria had been considered for 18 years without any appeals. However, they did not specify if and how ecological considerations were part of the quality criteria. According to the interviewee, the revision of the legislation on public procurement will not influence the entity's procurement policy. To our sub-question regarding the practice of favouring local tenderers, the interviewee answered that this entity does not favour local tenderers, except for well-founded reasons, meaning that the decision should be related to the object of the procurement. Such cases are rare. According to this entity, favouring local tenderers is incompatible with the legal framework on public procurement and the federal act on the internal market.

In the field of collective catering, a political initiative in the canton of Vaud on the promotion of an exemplary approach in terms of sustainability in collective catering was mentioned in two interviews. This initiative led to the creation of a strategy promoting local and seasonal products in collective catering. The goal of this strategy was awareness-raising on sustainable development among all procurement actors and civil society as vector for change. This strategy is an incentive in four areas: i) training of cooks and purchasers of public food products on best practices concerning local and seasonal products; ii) environmental assessment through an evaluation of cooks with a specially designed tool;³³ iii) creation of a model tender; iv) creation of an online platform to allow public buyers, local companies and entrepreneurs to meet.

Finally, a body advising a municipality on sustainable development stated that it was currently working on the elaboration of a climate plan. In this context, it will focus on providing information and raising awareness on climate change among civil society and economic actors. In addition, an internal directive on procurements for office supplies, vehicles, clothing, food products and furniture was created, aimed at choosing environmentally friendly products.

Environmentally sustainable procurement practice

The discussion on current practices related to environmental aspects focused on the following elements.

Integration of green considerations in public procurements

The interviewees presented concrete examples of eligibility and award criteria, as well as technical specifications used by authorities to enhance GPP. An example of the integration of green considerations into eligibility criteria was given only in relation to the collective catering sector, namely the criteria of contribution of tenderers to local and seasonal products. According to the interviewees, eligibility criteria are evidenced by certifications when available or statements.

Requirements related to local and seasonal products in the collective catering sector in the invitations to tender are incentive based in order to favour local and seasonal products that are environmentally friendly, fair

33. Beelong, "ECO-SCORE" by Beelong pour tous vos produits alimentaires," *Beelong*, <<https://beelong.ch/>>.

trade and short circuits. It was explained that the purchase of local products was made possible through the increase of meal prices in order to ensure that at least some of the products are local and seasonal with a tracing system.

As regards labels, it was reported that collective catering entities use tools and advice provided by the nutritional indicator “Beelong,”³⁴ and WWF guides, the “ONE TWO WE” tool,³⁵ which integrate climate protection into the management of collective catering, as well as the Swiss label “Fourchette verte.”³⁶ In the construction sector, the municipality in canton Vaud uses the Swiss construction label “minergie”³⁷ or “performance énergétique” and, in case of wood, the international FSC and PEFC labels. This authority mentioned a risk of competition issues in the case of the use of Swiss labels, like COBS, in public procurements related to wood. A federal authority in the construction sector uses the Swiss SNBS norm³⁸ for sustainable construction, which goes beyond the energy aspect. It also includes ISO standards in technical specifications and life-cycle costs in the selection and award criteria.

One entity responsible for the purchase of various products for the cantonal administration specifies in the technical specifications the types of drive mechanism, carbon emission levels or decibel levels. However, regarding the purchase of products such as movable goods, administrative products (books for schools, clothes, vehicles, computer equipment) and services such as printing orders, relocations, expertise, transport and goods, it is said that they use in their tenders criteria which correspond to the market reality. In terms of labels, it uses “Label bleu,”³⁹ certification “Cradle to cradle”⁴⁰

34. Beelong, “ECO-SCORE” by Beelong pour tous vos produits alimentaires,” n.d., *Beelong*, <<https://beelong.ch/>>.

35. ESU Services, “Ensemble pour cantines respectueuses de l’environnement,” n.d., <<https://esu-services.ch/fr/projects/lcafood/onetwowe/>>; WWF, “Partenariat SV Suisse 2019,” n.d., <<https://www.wwf.ch/fr/partenariats/parteneriat-sv-suisse-2019>>.

36. Fourchette Verte, “Fourchette verte, une alimentation équilibrée et durable pour toutes et tous,” *Fourchette verte*, 2024, <<https://www.fourchetteverte.ch/#news>>.

37. Minergie, “Qu’est-ce que Minergie?,” n.d., <<https://www.minergie.ch/fr/>>.

38. Swiss Confederation, “Standard Construction Durable Suisse SNBS 2.1 – Bâtiment,” *Conférence de coordination des services de la construction et des immeubles des maîtres d’ouvrage publics KBOB*, 2021, <<https://www.kbob.admin.ch/kbob/fr/home/themen-leistungen/nachhaltiges-bauen/standard-nachhaltiges-bauen-schweiz.html>>.

39. MagicTomato, <<https://labelbleu.ch/startpage-lb-fr>>.

40. Cradle to cradle, <<https://c2ccertified.org/>>.

for fabrics, and “Nordic swan”⁴¹ or “etiquette énergie”⁴² for electronic devices and household appliances.

Examples of large GPP projects

In construction, it was mentioned that procurements related to energy are in general more sustainable. Options such as the use of photovoltaic and geothermal heating systems are more and more considered. For example, at the federal level, the use of photovoltaic cells has benefited from a loan, which made it possible not to include its cost in the calculation of total costs of a construction project, even though it was economically unprofitable.

Another example of the implementation of green considerations in procurements by municipalities is a pilot project set up by a municipality in the canton of Vaud to use local wood in construction projects. For a small construction project, the wood was provided on a mandatory basis to tenderers, such as carpenters, by the municipality, which owns the forest from which the wood comes. Although such a process is more complex in terms of tender procedure, since it increases the number of intermediaries and requires the calculation of the necessary volume of wood, the municipality decided to repeat it, since it ensures traceability of the wood and allows for the use of more local wood. Employees of the municipalities in charge of tender procedures welcome this new approach despite the complexity and challenges it creates.

In the collective catering sector, one municipality uses a system which makes it possible to bypass the tender procedure. In fact, its collective restaurants are managed on a decentralized basis with a separate budget for each restaurant. As a result, the minimal tender threshold is never reached.

In the transportation sector, one municipality is currently renewing its vehicles using the internal directive on public procurements elaborated by the entity advising on sustainable development. Although environmental aspects are considered in the choice of vehicles, it was noted that the reduction of the number of vehicles was not considered.

Monitoring and evaluating GPP policies

As regards the evaluation and monitoring of environmental purchasing policies, it was reported during most of the interviews that authorities

41. The Nordic Swan Eco-label, <<https://www.nordic-swane-label.org/>>.

42. New Label, <<https://www.nordic-swane-label.org/>>.

monitor or tend to monitor its respect by the tenderer. In construction, the following tools and measures were mentioned: certification, carbon balance, post-control of tenderer having a label. Several authorities do not monitor the respect of environmental criteria or give only general informal feedback. In collective catering, interviewees reported that entities were trying to install a periodic evaluation between the direction of the public buyer and the tenderer.

Advising and educating on environmental issues

All the interviewed entities confirmed that they benefit from the advice of specialists on sustainable development aspects. Most of them declared that internal entities advising on sustainable development take part in the drawing up of invitations to tender. Interviewees from entities advising on sustainable development said they often take part in the selection process.

Regarding employee education, one person working for a federal administration stated that various courses are offered to make employees more attentive to the recommendations of the knowledge platform on sustainable public procurement (PAP).⁴³ Another tool called RUMBA⁴⁴ is used by federal authorities to assess the ecological footprint of the activities of all employees of the federal administration. This person also provides internal training on GPP for employees of other authorities. During the interview, it was affirmed that each employee of the federal administration must be informed about environmental aspects, including the impact of their work.

General remarks

Green considerations are almost systematically taken into consideration in procurements. All the entities active in the construction sector confirmed that they set up architecture contests for large projects.

Even though all the interviewees reported that green considerations are almost always taken into account by their respective entities, even with a low weight percentage, and that the quality criteria are given more and more weight, price criteria are still very important. Public buyers are in particular limited by the requirement of effective and fair competition among tenderers.

43. Swiss Confederation, "Plateforme de connaissances sur les achats publics responsables," PAP, <<https://www.pap.swiss/fr/>>.

44. Swiss Confederation, "Les objectifs de RUMBA," *Gestion des ressources et management environnemental de l'administration fédérale RUMBA*, 2023, <<https://www.rumba.admin.ch/rumba/fr/home.html>>.

It has also been stressed that, when weighing various criteria, it is crucial to be able to understand what is being measured from a technical point of view. As regards the revised legislation on public procurement, some interviewed authorities believe that it will give more flexibility in terms of environmental aspects, notably through innovation criteria.

Barriers and incentives to GPP implementation

Barriers

Firstly, one of the most often mentioned barriers to GPP were the limits of the legal framework, particularly the requirement of effective and fair competition among tenderers when it comes to the choice of local service providers or products.

The second most often mentioned barrier in the implementation of more environmentally friendly processes were suppliers and service providers, and generally the economic actors. According to several interviewees, economic actors are not doing enough and, even when tenderers do promote sustainability, it is difficult to assess their constraints and to control what they really implement. In addition, it was noted that suppliers are often retailers, which results in a lack of knowledge on their part of the fabrication processes and by extension of environmental considerations.

A third commonly mentioned barrier is the increased workload and technical knowledge required from employees of public buyers. Indeed, technical knowledge is necessary notably to determine the weighting to give to different criteria, which is crucial in order to avoid appeals from tenderers. One interviewee acting for a federal entity explained that preparing a tender has become much more demanding for public buyers, especially as concerns the weighting of criteria and the tender documentation.

Another reported barrier is the lack of flexibility of the tender procedures, which results in a slow implementation of green considerations. Finally, several persons stated that public procurement legal framework and sustainable development are simply incompatible.

Incentives

All interviewees affirmed that the main incentive to GPP would be the awareness raising on the impact of non-ecological procurements and on issues of biodiversity. One interviewee mentioned tax policy incentives, a more flexible legal framework regarding the decision-making power of

public buyers in terms of sustainability, and the creation of more practical guidelines and training courses for employees on technical aspects.

DISCUSSION OF FINDINGS

Typology of appropriation of GPP by public buyers

From the conducted interviews, I assume that the GPP appropriation type depends on one hand on the procurement sector, and on the other hand on local political initiatives and internal strategies. The latter appear to be often related to the personal motivation of the head of the public buyer. In general, municipalities appeared more ambitious in the implementation of green considerations in procurements in the collective catering and construction sectors. In the canton of Vaud, such approach is influenced by the incentive-based political initiative towards local and seasonal food products in collective catering. High motivation in other sectors, such as logistics or mobility, has been reported. It appears from concrete procurement examples that a greater implementation of environmental aspects is possible when the procurement does not have to be led via a tender procedure and when the procurement is of a smaller size. A good example is the case of the use of local wood in smaller construction projects. Several municipal authorities also appeared to be keener to work with local commercial partners because this enhances the local circular economy.

The public buyer that was most oriented to strict respect of the legal framework appeared to have a less ambitious appropriation of GPP. It explained such policy by the procurement sector: in sectors such as construction, a public buyer has more power on the market, whereas in other sectors, such as the purchase of various goods, the public buyer could not impose environmental criteria on suppliers.

As regards the main drivers of a more sustainable approach to public procurements from an environmental perspective, the interviewees mentioned political impulses, the legal framework, and the personal interest of the employees in charge. Only one interviewed authority declared that it does not focus on enhancing the implementation of green considerations in its procurement practice due to the legal framework.

The environmental dimensions which were most often considered requirements were energy efficiency, renewable energy, waste reduction (e.g. reuse of concrete), carbon emissions, life-cycle costs and local and seasonal food in collective catering.

Finally, it is interesting to note that the authorities interviewed all benefit from advice on suitability from internal specialized bodies and are provided with online tools with precise recommendations on sustainability.

Barriers and incentives

The respect of fair competition among tenderers is seen as an important barrier and even as incompatible with GPP. In this regard, it should be noted that recommendations to public buyers explicitly address the question of technical specifications and competition, pointing out that the consideration of non-economical purchase objectives cannot be exploited to legitimize protectionist practices, and that ecological criteria may not be misused to give targeted preference to Swiss suppliers. The recommendations recall that the World Trade Organization (WTO) specifically grants States the right to encourage environmental protection on the condition that State measures respect equal treatment between national and foreign providers, are effective, lead to the desired objective and are part of a global environmental policy. This means that procurement criteria may give preference to environmentally friendly products, but that discrimination against foreign suppliers is forbidden.⁴⁵ It is therefore recommended to formulate environmental requirements that are desirable but not absolutely necessary and that restrict competition as award criteria instead of in the form of technical specifications, because if an offer does not meet technical specifications, it will be excluded from the award procedure. If these requirements are set as award criteria, the offer will only be less well evaluated in case of non-compliance, but not excluded. In light of these recommendations, the case of the collective catering system of decentralized management is particularly interesting, since it is considered a grey zone in terms of tender legislation. According to the interviewee, this system has never been reported for circumventing the public procurement legislation, which is quite surprising with regard to the conditions of non-discrimination of tenderers. Although this principle is fundamental in public procurement, it would be interesting to analyze solutions that would make it possible to combine both the objective of fair competition on the market and the favouring of local products.

45. Swiss Confederation, "Achats durables – Recommandations aux services d'achat de la Confédération," *Conférence des achats de la Confédération CA*, 2021, ch. 3.2.3, p.8, <<https://www.bafu.admin.ch/dam/bafu/fr/dokumente/wirtschaft-konsum/fachinfo-daten/empfehlungen-fuer-die-beschaffungsstellen-des-bundes.pdf.download.pdf/Recommandations%20aux%20services%20d%E2%80%99achat%20de%20la%20Conf%C3%A9d%C3%A9ration.pdf>>.

Another finding that is worth mentioning is that additional workload is not seen as a barrier for the public buyer's employees, which can be explained by a higher awareness of the impacts of green public procurements.

On the other hand, the lack of technical knowledge of employees in view of the growing complexity of the implementation of green considerations in procurements is seen as a substantial barrier. However, in practice, it seems that this barrier can be overcome, at least in a long-term perspective. Indeed, all interviewed authorities are advised by specialized entities and can benefit from special training, at least at the federal level.

CONCLUSION

To understand whether the integration of environmental considerations in public procurement is determined by the more or less proactive implementation of the GPP legal framework by public purchasers, it should first be noted that the Swiss legal framework is not strict on the inclusion of green considerations in public procurement. Moreover, the greater importance given to the quality criteria in the revised legislation on public procurement in comparison with price criteria is very recent. I note, however, that quality criteria have been systematically implemented by the interviewed public authorities for many years. From the personal impressions of the interviewees, it is unclear whether the total revision of public procurement legislation will have an impact on the GPP practice by local and even federal authorities. Price criteria are still very important in the choice of tenderer, although it is becoming less so.

Furthermore, the interviews revealed that factors other than the legal framework seem to significantly influence the implementation of GPP, including a political commitment to ecology and the personal motivation of the employees of public buyers. However, even in the presence of these two elements, it was pointed out that economic actors may not be in the position to meet environmental requirements in every sector. Indeed, it has been argued that the market strength of the public purchaser plays a role in the criteria which it can reasonably impose on its business partners.

Finally, the size of procurements appears to be another major factor for the implementation of environmental criteria since, in case of small-scale contracts, the direct award procedure can be applied and allows more flexibility in the choice of the contracting party.

Green Public Procurement Law and Practice in Switzerland: A Quantitative Analysis

Désirée U. Klingler⁴⁶

This part examines how contracting authorities and specialist offices apply and implement green public procurement (GPP) law in Switzerland across various industries. To complement the qualitative interview responses of the previous part and to test their robustness, this part relies on a structured survey analysis with over 100 procurement officials who purchase goods, works and services at the federal, regional and local levels. The quantitative analysis of GPP practice fills a major research gap because it not only focuses on what is permitted and required by law, but also aims to understand the practical implications of GPP law. With one exception,⁴⁷ the data-based analysis of GPP uptake in Switzerland is largely absent. With this novel database, this part also provides a welcome basis for future empirical research on factors that can promote GPP—a strand of research that is growing.⁴⁸

The survey responses reveal that the most active promoters of GPP are legal experts and procurement officials working at large cantonal

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47. Désirée Klingler, *Efficiency, Quality, and Sustainability in Government Contracting: A Law and Economics Analysis*, University of St. Gallen, 2024 (unpublished).

48. See, for example: Jordi Rosell, “Getting the Green Light on Green Public Procurement: Macro and Meso Determinants,” *Journal of Cleaner Production*, no. 279, 2021; Francesco Testa et al., “What Factors Influence the Uptake of GPP (Green Public Procurement) Practices? New Evidence from an Italian Survey,” *Ecological Economics*, no. 82, 2012; Isac Olave and Carine Staropoli, *Simple Auctions to Boost Green Public Procurement: Evidence from Colombia*, Université Paris Dauphine, 2021.

procurement agencies. They report being most strongly incentivized to promote GPP through political pressure and personal beliefs. The construction sector has experienced the most GPP activities with a focus on reducing energy consumption. It is also the largest procurement sector in Switzerland, offering a strong lever to promote GPP. Interesting findings are that no procurement procedure seems to be superior to promote GPP and that energy performance contracts are primarily used for school buildings. Common obstacles to GPP uptake include the lack of agency expertise and higher administrative costs. These identified challenges provide valuable insights for developing GPP solutions, such as involving external experts and offering economic incentives to procurement officials and companies.

METHODOLOGY

To complement the legal analysis and test the robustness of the interview responses, the author conducted an anonymous online survey with Swiss procurement officials and specialist GPP offices across the three language regions and different government levels. Conducting an online survey yields several advantages: 1) an anonymous survey can reduce biased results as compared to in-person interviews; 2) an online survey allows for a structured analysis and comparison of results; 3) it can be conducted with minimal time effort and is scalable; 4) the results, if a sufficient sample size is reached (as here), make it possible to draw conclusions for the larger population; and 5) the survey results deliver a much needed database for future empirical analyses of GPP uptake.

Survey design and response rate

In line with the book's questionnaire design, the author conducted two surveys: one with Swiss procurement agencies (*Vergabestellen*) and one with specialist GPP offices. The survey with procurement agencies consists of 29 questions, which are organized into five groups: 1) buyer profile, 2) GPP resources and policies, 3) application of environmental criteria in acquisition planning and procurement procedures, 4) monitoring and evaluation of GPP implementation, and 5) obstacles and solutions to promote GPP uptake. Because the establishment of specialist GPP offices is a rather recent development and because GPP offices take an advisory role, rather than procuring goods themselves, the survey with specialist

GPP offices consists of five questions regarding 1) the offices' sectorial focus; 2) buyers' GPP awareness; 3) the need for GPP guidance; 4) mandatory monitoring of GPP implementation; and 5) solutions to promote GPP uptake. The surveys consist of binary (yes or no) questions, of multiple-choice questions with a Likert scale from 1 to 5 (strongly agree to strongly disagree), and a few open-ended questions.

To collect answers, the author used the *Qualtrics* software, which makes it possible to send to respondents anonymous links and offers advanced data analytics tools and illustrative reports. Even though in-person interviews generally have a higher response rate than online questionnaires, online surveys have a significantly higher response rate than mail or phone polls.⁴⁹ Furthermore, the online survey allowed respondents to complete and continue the questionnaire whenever it was convenient for them. To increase the response rate, the survey was sent out in both German and French, which covers two of the three official languages in Switzerland and also reaches Italian-speaking officials as most are fluent in either German or French.⁵⁰

Sample size

To yield meaningful results, the sample size of a survey needs to be representative of the underlying population. A sample is a selection from the population, which refers to all cases.⁵¹ For the first survey, the population size consists of the total number of Swiss procurement agencies. The population includes the four largest federal buyers (the defence procurement agency *armasuisse*, the Swiss Federal Office for Buildings and Logistics BBL, the Swiss Federal Roads Office ASTRA,⁵² and the Swiss Federal Railways SBB), the procurement offices of the 26 cantons, and those of around

49. Colin Robson, *Real World Research: A Resource for Users of Social Research Methods in Applied Settings*, 3rd ed. Wiley, 2011, p. 244-245; Yang, Zhilin, "A Review of Research Methodologies in International Business," *International Business Review*, vol. 15, no. 6, 2006, p. 601-617.

50. Swiss Confederation, "Language – facts and figures," *About Switzerland*, 2023, <<https://www.eda.admin.ch/aboutswitzerland/en/home/gesellschaft/sprachen/die-sprachen---fakten-und-zahlen.html>>.

51. Colin Robson, *Real World Research: A Resource for Users of Social Research Methods in Applied Settings*, 3rd ed. Wiley, 2011, p. 270.

52. Swiss Confederation, "Directory of Procurement Authorities," 2024, <<https://www.beschaffungsstellen.admin.ch/>>.

2,000 municipalities.⁵³ Together they yield a total population size of around 2,031 Swiss procurement agencies.

To reach federal procurement authorities, the survey was sent out to the three federal strategic procurement committees (BKB,⁵⁴ KBB,⁵⁵ and KBOB⁵⁶) and the four largest federal buyers (armasuisse, BBL, ASTRA and SBB). The survey was also sent to the Swiss Federal Chancellery (*Bundeskanzlei*), which supports authorities by “provid[ing] its services in a citizen-oriented, sustainable, effective, and efficient manner.”⁵⁷ To reach cantonal procurement agencies, the survey was sent to the president of the Construction, Planning and Environment Directors Association (BPUK),⁵⁸ who forwarded the survey to the responsible cantonal procurement agencies. The survey was also sent to federal and cantonal procurement officials that hold a position related to sustainable public procurement as published in the Swiss government directory (*Staatskalender*)⁵⁹ and the cantonal procurement portals.⁶⁰ To reach municipal and city procurement agencies, the survey was distributed by the Swiss Association of Cities, which represents the majority of cities in Switzerland.⁶¹

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53. Swiss Confederation, “Swiss Municipalities,” *BFS*, January 1, 2024, <<https://www.bfs.admin.ch/bfs/de/home/statistiken/kataloge-datenbanken.assetdetail.30566928.html>>.
 54. Swiss Confederation, “Federal Procurement Conference BKB,” *BKB*, 2024, <<https://www.bkb.admin.ch/bkb/de/home.html>>.
 55. Swiss Confederation, “Federal Procurement Competence Centre KBB,” *KBB*, 2024, <<https://www.beschaffung.admin.ch/bpl/de/home/fachstellen/kompetenz-zentrum-beschaffungswesen-bund-kbb.html>>.
 56. Swiss Confederation, “Coordination Conference of the Construction and Real Estate Bodies of Public Builders KBOB,” *KBOB*, September 2024, <<https://www.kbob.admin.ch/kbob/de/home.html>>.
 57. *Government and Administration Organisation Ordinance*, SR 172.010.1, Article 11(c) – Principles of administrative activity (November 25, 1998).
 58. BPUK, “Schweizerische Bau-, Planungs- und Umweltdirektoren-Konferenz,” *BPUK*, 2024, <<https://www.bpuk.ch/fr/dtap>>.
 59. Swiss Confederation, “Suche nach Personen, Behörden, Organisationen und Institutionen des Bundes,” *Staatskalender*, 2024, <<https://www.staatskalender.admin.ch/home>>.
 60. See, for example, the procurement website of the Canton of Zurich, 2024, <<https://www.zh.ch/de/politik-staat/kanton/kantonale-verwaltung/beschaffung-einkaeufe/nachhaltige-beschaffung.html>>.
 61. See Swiss Associations of Cities, “Schweizerischer Städteverband,” 2024, <<https://staedteverband.ch/>>, which counts 132 cities (out of a total of 162 Swiss cities), see Swiss Federal Statistics Office, *BFS*, 2024, <<https://www.bfs.admin.ch/bfs/de/home/statistiken/raum-umwelt/nomenklaturen/stst.assetdetail.415869.html>>.

The population of the second survey consists of specialist GPP offices at the federal, cantonal and municipal levels. Since the revised federal *Public Procurement Act* (PPA) entered into force in January 2021, and cantons are still in the process of implementing the revised law,⁶² the number of these offices is still small. Aside from contacting the federal Specialist Office for Ecological Public Procurement (*Fachstelle für Ökologische Öffentliche Beschaffung*)⁶³ and some large cantonal and municipal agencies directly,⁶⁴ the survey was sent to the federal, cantonal and municipal authorities, who forwarded the survey to the responsible GPP office in their organization (if one exists).

To make statistically reliable statements for the entire population, a sufficiently large sample size is necessary. To calculate a survey's necessary sample size, the following formula applies:⁶⁵

$$\text{Necessary sample size} = \frac{(z \text{ score})^2 * \text{StdDev} * (1 - \text{StdDev})}{(\text{margin of error})^2}$$

The z-score is calculated based on the confidence level. Many social science studies use a confidence level of 90% or 95%, and a +/- 10% margin of error, also known as the confidence interval or statistical power of 80%.⁶⁶ This means that we are 90% confident that the responses are within a margin of error of +/- 10%. For example, if the survey was conducted 100 times, 80% of respondents who “strongly agree” with a statement will range between

62. BPUK, “Revidierte IVöB (IVöB 2019),” BPUK, 2019, <<https://www.bpuk.ch/fr/dtap/concordats/aimp/aimp-2019>>.

63. “Fachstelle ökologische öffentliche Beschaffung,” BKB <<https://www.beschaffung.admin.ch/bpl/de/home/fachstellen/fachstelle-oekologische-oeffentliche-beschaffung.html>>.

64. Such as the Canton of Zurich, “Nachhaltige Beschaffung,” 2024, <<https://www.zh.ch/de/politik-staat/kanton/kantonale-verwaltung/beschaffung-einkaeufe/nachhaltige-beschaffung.html#contact>>; The City of Zurich, “Nachhaltige Beschaffung,” 2024, <https://www.stadt-zuerich.ch/gud/de/index/departement/strategie_politik/umweltstrategie/nachhaltige_beschaffung.html>; The Canton of St. Gallen, “Mehr Nachhaltigkeit und Qualität bei Beschaffungen,” May 2023, <https://www.sg.ch/news/sgch_allgemein/2023/05/mehr-nachhaltigkeit-und-qualitaet-bei-beschaffungen.html>; The City of St. Gallen, “Stadt St. Gallen setzt auf nachhaltige Beschaffung,” June 2023, <https://www.stadt.sg.ch/news/stsg_medienmitteilungen/2023/06/stadt-st-gallen-setzt-auf-nachhaltige-beschaffung.html>.

65. Qualtrics, “Determining Sample Size,” 2022, <<https://www.qualtrics.com/experience-management/research/determine-sample-size/>>.

66. Lee Epstein and Andrew D. Martin, *An Introduction to Empirical Legal Research*, Oxford University Press, 2014, p. 151.

70% and 90% most of the time. The z-score for a 90% confidence level is 1.645.⁶⁷ The standard deviation estimates how much the responses will vary from one another and from the mean.⁶⁸ A common choice for surveys is a standard deviation of 0.5.⁶⁹ Based on these statistical measures, the necessary sample size for the survey conducted here should be at least 67 responses (see formula below).

$$\text{Necessary sample size} = \frac{(1.645)^2 * 0.5 * (0.5)}{(0.1)^2} = 67$$

The surveys yielded a total of 136 responses, with 90 completed questionnaires and 46 partially completed questionnaires. The sample size of 90 completed questionnaires is higher than the minimum required number and therefore sufficient to draw meaningful conclusions for the underlying population. It also meets a common rule of thumb, which holds that the sample size should not exceed 10% of the population size.⁷⁰ Ninety responses amounts to around 4% of the total population size (consisting of 2,031 procurement agencies plus GPP offices).

IMPLEMENTATION OF GPP BY PROCUREMENT AGENCIES

This section gives an overview of the practice and implementation of GPP requirements by Swiss procurement agencies. It critically analyzes the survey responses from procurement agencies along the survey's structure, starting with the buyers' profile, followed by the GPP resources and policies, the implementation of GPP criteria, the monitoring and evaluation of GPP implementation, and concludes with obstacles and solutions to promote GPP uptake in Switzerland.

67. Z Score Tables, <<https://www.z-table.com/>>.

68. Lee Epstein and Andrew D. Martin, *An Introduction to Empirical Legal Research*, Oxford University Press, 2014, p. 134.

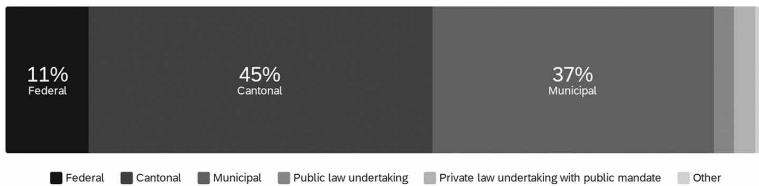
69. Qualtrics, "Determining Sample Size," 2022, <<https://www.qualtrics.com/experience-management/research/determine-sample-size/>>.

70. Study.com, "Determining if the 10% Rule is Satisfied When Sampling for the Sample Mean Is Done Without Replacement," 2024, <<https://study.com/skill/learn/determining-if-the-10-rule-is-satisfied-when-sampling-for-the-sample-mean-is-done-without-replacement-explanation.html>>; Lee Epstein and Andrew D. Martin, *An Introduction to Empirical Legal Research*, Oxford University Press, 2014, p. 90; Statology, "The 10% Condition in Statistics: Definition & Example," 2020, <<https://www.statology.org/10-percent-condition/>>.

Buyer profile

Eleven percent of the respondents were affiliated with federal contracting authorities, 45% with cantonal procurement agencies, 37% with municipal authorities, and 6% with public undertakings or private undertakings with a public mandate, such as utilities and public transportation companies. The survey responses seem representative and aligned with the procurement spending power of federal and sub-federal procurement agencies. In Switzerland, around 80% of public contracts (by value) are awarded by cantonal and municipal agencies, and only about 20% by federal agencies.⁷¹

F41: Procurement agencies by government level



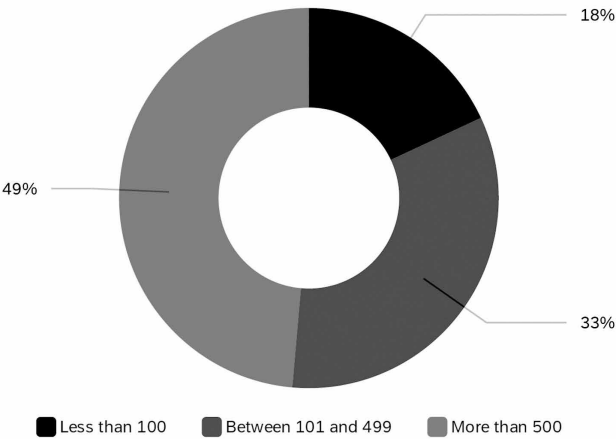
The survey results are also representative of the language distribution in Switzerland, where 63% of the Swiss population speaks German, 23% speaks French and 8% speaks Italian (who tend to be fluent in one of the other two languages).⁷² Most participants (77%) completed the survey in German, and 23% in French.

The survey inquired about the size of the agency, measured by the number of employees working there. Nearly 50% of participants were affiliated with large agencies with more than 500 employees, one third with medium-sized agencies (between 100 and 500 employees), and 18% with smaller agencies (with fewer than 100 employees).

71. Désirée Klingler, *Efficiency, Quality, and Sustainability in Government Contracting: A Law and Economics Analysis*, University of St. Gallen, 2024; Marc Steiner and Désirée Klingler, "The Revised Swiss Public Procurement Law: More Quality and Sustainability," *European Procurement & Public Private Partnership Law Review*, no. 1, 2023, p. 89.

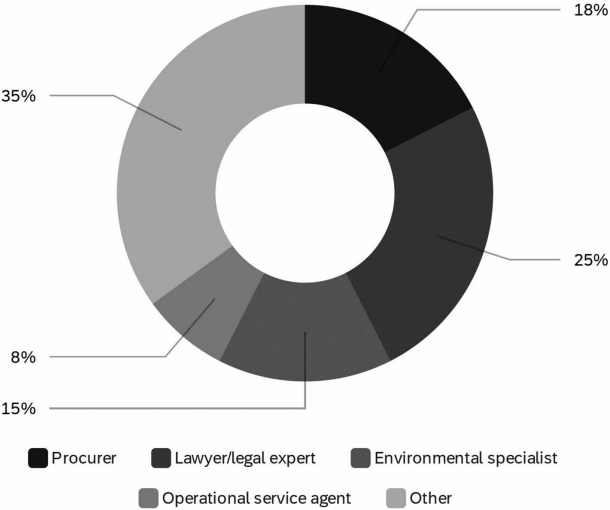
72. Swiss Confederation, "Language – facts and figures," *About Switzerland*, 2023, <<https://www.eda.admin.ch/aboutswitzerland/en/home/gesellschaft/sprachen/die-sprachen---fakten-und-zahlen.html>>.

F42: Agency size by number of employees



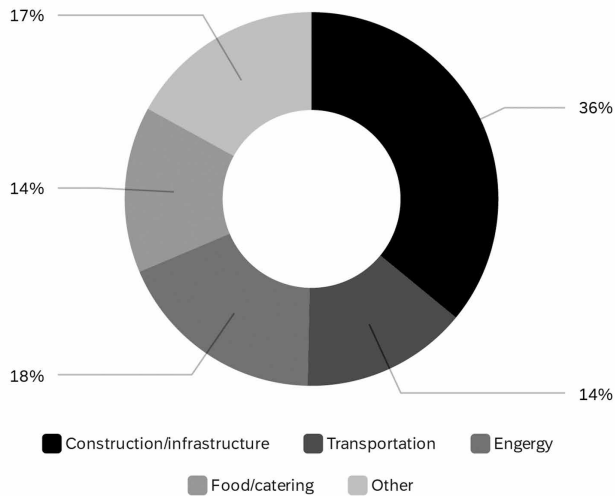
Most participants were identified as legal experts (25%) or purchasers (18%). A few officials were reported as environmental specialists (8%) or operational service agents (6%). Thirty-five percent of participants reported that they held another function, including head of a cantonal construction department, head of a cantonal procurement competence centre, or project manager.

F43: Function/position of respondents



The survey revealed that most of the procurement agencies were buying goods and services in the construction sector (36%), followed by the energy sector (18%), public transportation (14%) and food/catering (14%). Seventeen percent of procurement agencies are purchasing goods and services in other sectors, such as legal and IT services, and office supplies.

F44: Agency's main procurement sectors



In short, most respondents in the survey were either legal experts or procurement officials working at large cantonal procurement agencies (with over 500 employees) that are predominantly purchasing goods, works and services in the construction sector.

GPP resources and training

As mentioned in the first part, the revised Swiss public procurement law now specifically lists the use of public resources in a sustainable manner as one of its objectives.⁷³ Even though procurement agencies were allowed to consider environmental award criteria under the former law,⁷⁴ the new objective puts more emphasis on GPP and increases the pressure on

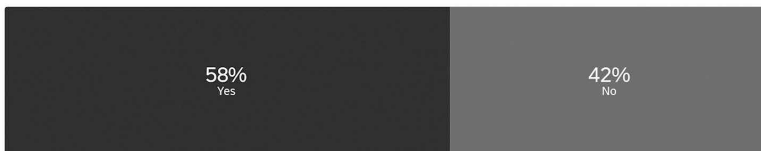
73. *Swiss Federal Act on Public Procurement Law*, 2019, SR 172.056.1, Article 2(a) – Purpose.

74. *Swiss Federal Act on Public Procurement Law*, 1994, SR 172.056.1, Article 21(1) – Purpose.

procurement agencies to “buy green.” Recognizing that the law provides for the necessary legal basis for agencies to buy green, the author argues that the main lever to promote sustainable public procurement lies in its implementation.⁷⁵ As argued previously, important aspects to promote GPP uptake in practice are that agencies have the necessary awareness, knowledge and skills to define and implement environmental award criteria.⁷⁶ These features form part of implementation practice, rather than hard-law requirements.

To test the agencies’ environmental awareness and expertise, the survey asked procurement agencies whether they participated in training on how to buy green. Over half of the respondents reported that they participated in training courses on ecological public procurement (see figure below). Commonly mentioned courses included certificate courses offered by universities, the BKB/KBOB Conference on Sustainable Public Procurement,⁷⁷ and courses on sustainable public procurement offered by the PUSCH foundation, which aims to help implement environmental protection in municipalities, schools and private companies.⁷⁸ Most respondents (34) who participated in training courses were affiliated with cantonal and municipal authorities, and only a few (3) came from federal agencies.

F45: Training on sustainable public procurement



When asked which sources respondents used to inform themselves about sustainable public procurement, 21% said they consulted agency-internal purchasing guidelines, 17% participated in conferences, and 11%

75. See Désirée Klingler, *Efficiency, Quality, and Sustainability in Government Contracting: A Law and Economics Analysis*, University of St. Gallen, 2024, ch. 7.4.3.1.

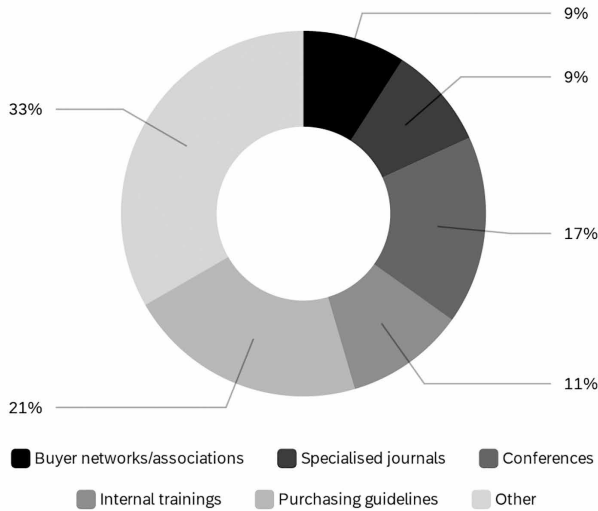
76. Désirée Klingler, *Efficiency, Quality, and Sustainability in Government Contracting: A Law and Economics Analysis*, University of St. Gallen, 2024, ch. 7.4.3.1.

77. Swiss Confederation, “Nachhaltige öffentliche Beschaffung,” *BKB*, June 7, 2024, <<https://www.bkb.admin.ch/de/nachhaltige-oeffentliche-beschaffung>>.

78. Pusch, “Nachhaltig öffentlich beschaffen für Gemeinden,” *Pusch*, n.d., <<https://www.pusch.ch/fuer-gemeinden/beschaffung>>.

took part in internal training. Nine percent said they consulted specialist journals, and another 9% said they obtained their information from buyer networks. Over a third of the participants reported that they obtained information on GPP from other sources, including the Federal Knowledge Platform for Sustainable Public Procurement (WöB),⁷⁹ the NGO Electronics Watch,⁸⁰ the Circular & Fair ICT Pact⁸¹ and the private Competence Centre for Circular Public Procurement *Prozirkula*.⁸²

F46: Sources on sustainable public procurement used



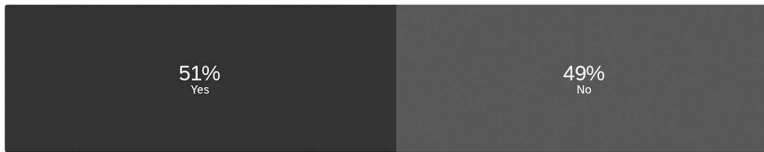
When asked whether they received advice on GPP from an agency-internal office, nearly 90% of respondents confirmed that they did (see figure F47).

79. Swiss Confederation, "Wissensplattform nachhaltige öffentliche Beschaffung," WöB, n.d., <<https://www.pap.swiss/de/>>.

80. Electronics watch, "Mission," <<https://electronicswatch.org/en>>.

81. Circular and Fair ICT Pact, <<https://circularandfairictpact.com/>>.

82. Prozirkula, "Kompetenzzentrum öffentliche Kreislaufbeschaffung," *Prozirkula*, n.d., <<https://prozirkula.ch/>>.

F47: Agency-internal consulting on GPP

The fact that 60% of participants took part in training sessions and 90% were advised by a specialist GPP office shows that the Swiss government has made considerable efforts to train and educate procurement officials on how to buy green. The findings also show the importance of universities, NGOs and foundations in making procurement officials more aware and skilled in applying and monitoring the implementation of eco-labels and standards. It is noteworthy that cantonal and municipal officials were the main participants in conferences and users of platforms offered by the federal government. The scarce participation of federal officials in GPP conferences could indicate that federal officials are getting their information from agency-internal resources, have already been trained or a lack of interest. With the risk that adding training sessions at the cantonal and municipal level might create redundancies and be costly, offering training on site is particularly important for municipal and cantonal procurement officials in remote regions, who cannot travel to the capital (where most trainings take place). In Switzerland, this role has mainly been filled by PUSCH, a foundation that focuses on the practical implementation of environmental protection in municipalities and public schools.⁸³ If we want to promote sustainable public procurement, training and expertise are key. As argued by Steiner & Klingler (2023), the paradigm shift towards more sustainable procurement is mainly a question of enforcement rather than regulation.⁸⁴

83. Pusch, "Nachhaltig öffentlich beschaffen für Gemeinden," *Pusch*, <<https://www.pusch.ch/fuer-gemeinden/beschaffung>>.

84. Marc Steiner and Désirée Klingler, "The revised Swiss Public Procurement Law: More quality and sustainability," *European Procurement & Public Private Partnership Law Review*, no. 1, 2023, p. 93.

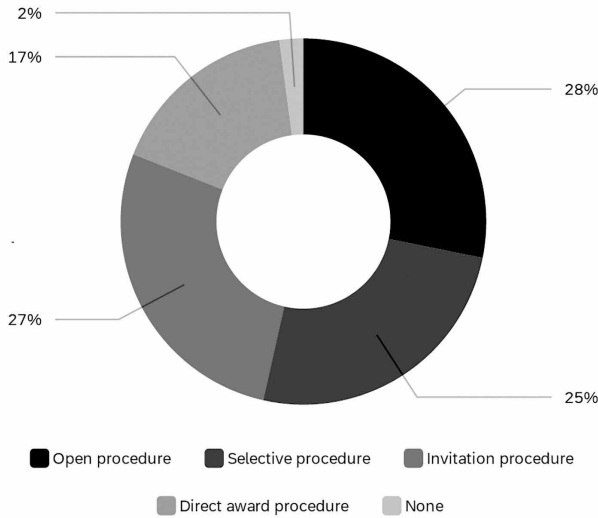
Procurement procedures to promote GPP uptake

An interesting aspect that is largely under-researched and caught the attention of some economists only recently⁸⁵ is the impact of procurement procedures on GPP uptake. While two empirical studies did not find a statistically significant impact of the award procedure on GPP uptake,⁸⁶ one study found that more flexible procurement procedures, like the restricted or competitive procedure, were better at integrating and promoting GPP.⁸⁷ A recent survey with Swiss procurement authorities and construction firms showed that most respondents found the selective procedure to be best suited to promote sustainability.⁸⁸

In the survey conducted for the purpose of this book, respondents indicated no clear superiority or preference for one procedure over another regarding their potential to promote GPP, which is in line with the empirical findings outlined above. Little over half of the participants (53%) found the open and selective (called restricted procedure in the EU) best to promote GPP, while the other half (44%) found that—in line with Klingler's findings⁸⁹—more flexible procedures with limited competition, such as the invitation and direct award procedure, perform best in terms of GPP promotion.

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- 85. Chunling Yu et al., "What Influences Adoption of Green Award Criteria in a Public Contract? An Empirical Analysis of 2018 European Public Procurement Contracts," *Sustainability*, vol. 12, no. 3, 2020; Isac Olave and Carine Staropoli, *Simple Auctions to Boost Green Public Procurement: Evidence From Colombia*, Université Paris Dauphine, 2021; Désirée Klingler *Efficiency, Quality, and Sustainability in Government Contracting: A Law and Economics Analysis*, University of St. Gallen, 2024.
 - 86. Isac Olave and Carine Staropoli, *Simple Auctions to Boost Green Public Procurement: Evidence From Colombia*, Université Paris Dauphine, 2021; Désirée Klingler, *Efficiency, Quality, and Sustainability in Government Contracting: A Law and Economics Analysis*, University of St. Gallen, 2024, ch. 7.4.4.
 - 87. Chunling Yu, "What Influences Adoption of Green Award Criteria in a Public Contract? An Empirical Analysis of 2018 European Public Procurement Contract Award Notices," *Sustainability*, vol. 12, no. 3, 2020.
 - 88. Désirée Klingler, *Efficiency, Quality, and Sustainability in Government Contracting: A Law and Economics Analysis*, University of St. Gallen, 2024, ch. 7.4.4.
 - 89. Désirée Klingler, *Efficiency, Quality, and Sustainability in Government Contracting: A Law and Economics Analysis*, University of St. Gallen, 2024, ch. 7.4.4.

F48: Most suitable award procedure to consider ecological aspects



The proposed reasoning for this finding is that agencies, when publicly tendering contracts, cannot require national eco-standards because such a limitation would discriminate against foreign suppliers.⁹⁰ In procedures in which parties are allowed to negotiate, however, agencies can choose to buy local products (with less transportation costs and emissions) and require national eco-labels and standards, which in turn helps promote sustainable public procurement. Another noteworthy finding of the survey conducted for this chapter is that only 1% of respondents answered that no procedure was suitable for promoting GPP. Similarly, in another survey conducted by Klingler, most participants agreed or strongly agreed that the procedure has a large impact on achieving the most advantageous project outcome, including sustainability.⁹¹

Another important aspect that was tested in the survey here was the use of design contests and study contracts with environmental criteria. Design contests are designed to promote innovative ideas and solutions in the procurement of architectural and engineering services and are often

90. Désirée Klingler, *Efficiency, Quality, and Sustainability in Government Contracting: A Law and Economics Analysis*, University of St. Gallen, 2024, ch. 7.4.6.
91. Désirée Klingler, *Efficiency, Quality, and Sustainability in Government Contracting: A Law and Economics Analysis*, University of St. Gallen, 2024, ch. 7.4.3.4.

tendered publicly.⁹² It is an anonymous procedure where an independent jury evaluates and assesses different projects that were submitted by contestants.⁹³ Study contracts are used for the procurement of complex contracts, are usually not anonymous, and tend to be awarded through the selective procedure.⁹⁴ Therefore, the question aimed at understanding whether design contests and study contracts were not only suited for promoting innovation, but also for promoting sustainability or eco-innovation.

Nearly half of the participants reported that they used design contests or study contracts with environmental criteria, while the other half said that they did not (see figure below). This result could either indicate that design contests and study contracts are neutral (i.e. have no effect) in promoting GPP or that their potential to promote GPP has not been fully utilized (or discovered) by Swiss contracting authorities.

F49: Use of design contests and study contracts with environmental criteria



For respondents who used design contests and study contracts with environmental criteria, the survey asked how *frequently* they used those procedures to award green contracts. None of the respondents replied “always,” but nearly 40% reported that they used those procedures frequently, 33% used them occasionally, and 30% used design contests and study contracts rarely (see figure F50). These results show that there is still some room for improvement in using design contests and study contracts to procure environmentally friendly solutions and eco-innovations. The new industry standards for sustainable construction projects issued by the largest Swiss architecture associations SIA (which are also used and referenced in Swiss public

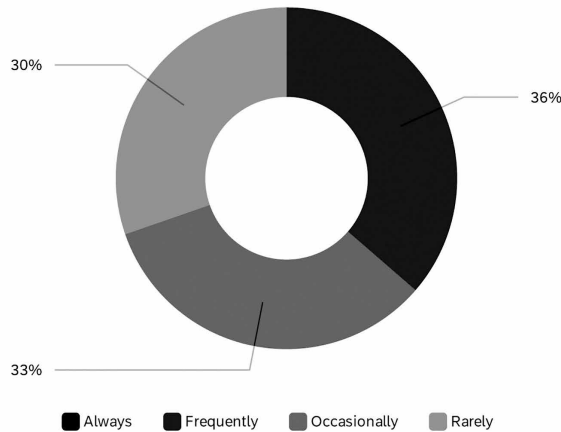
92. KBOB, *Guidelines for Conducting Competition and Study Contract Procedures*, Bern, 2021, p. 20-21.

93. KBOB, *Guidelines for Conducting Competition and Study Contract Procedures*, Bern, 2021, p. 22.

94. KBOB, *Guidelines for Conducting Competition and Study Contract Procedures*, Bern, 2021, p. 30-31.

procurement) may further promote agencies' use of design contests and study contracts to buy green architectural or engineering solutions.⁹⁵

F50: Use of design contests to award green contracts



The last question related to procurement procedures inquired whether participants used dialogues to award green contracts. At the federal level, the dialogue was introduced with the revised PPA, which came into effect in January 2021.⁹⁶ Different from EU public procurement law,⁹⁷ the dialogue is not a separate award procedure in Switzerland but is used *in addition* to one of the traditional procurement procedures. Agencies can use the dialogue to procure complex contracts, intellectual services or innovative solutions.⁹⁸ The dialogue allows contracting authorities to conduct successive negotiations with several suppliers to specify the subject matter of the contract or to establish new approaches.⁹⁹ When applying dialogues, agencies must treat all suppliers equally and should therefore have an equal number of discussions with each selected supplier.

95. *Sustainable Building Construction: Guidance for SIA Norm 112/1*, 2017, SN 530 112/1.

96. *Federal Act on Public Procurement*, 2019, no. 172.056.1.

97. European Union Law, "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 Text with EEA relevance," *Official Journal of the European Union*, 2014, p. 65-242.

98. *Federal Act on Public Procurement*, 2019, no. 172.056.1, art. 24(1) – Dialogue.

99. *Federal Act on Public Procurement*, 2019, no. 172.056.1, art. 24(1) – Dialogue.

For EU procurement awards, Yu et al. (2021) found that competitive dialogues were significantly and positively correlated with the promotion of GPP.¹⁰⁰ In the survey here, one third of participants reported using the dialogue to promote and award green contracts (see figure below). This percentage is relatively high, considering that the dialogue has been introduced into Swiss federal law only recently. As of May 2024, a large majority of cantons has now implemented the new law, which provides a legal basis to conduct dialogues also at the cantonal level.¹⁰¹ The fact that only a third of the procedures are making use of the dialogue can be further explained by its costliness (as it consists of multiple rounds of negotiations with all bidders) and the fact that dialogues are only suitable (and allowed) for complex or innovative procurements.

F51: Use of dialogues to award green contracts



In short, the survey indicates that procurement procedures play a role in GPP uptake, but that respondents were not able to identify one procedure that was clearly superior in promoting GPP over another. Generally, the survey results indicated that more flexible procedures, such as design contests and dialogues, can help promote GPP. Since only about one third of procurement officials currently use dialogues, there is potential to increase the use of dialogues to promote GPP uptake in Switzerland, especially at the cantonal and municipal levels.

Use and verification of green procurement criteria

This section focuses on the use and verification of green procurement criteria, either in the form of technical specifications or award criteria. In Swiss public procurement law, three main instruments exist to promote and integrate environmental criteria into government contracting: 1) selection

100. Chunling Yu, "What influences adoption of green award criteria in a public contract? An empirical analysis of 2018 European public procurement contract award notices," *Sustainability*, vol. 12, no. 3, 2020, p. 1261.

101. BPUK, "Revidierte IVöB (IVöB 2019)," BPUK, May 1, 2024, <<https://www.bpuk.ch/bpuk/konkordate/ivoeb/ivoeb-2019>>.

criteria to verify suppliers' environmental management systems, such as ISO Standard 14001; 2) technical specifications, such as the use of energy-efficient technologies; and 3) award criteria, which indicate the weight and importance of environmental criteria when agencies select the most advantageous tender. The survey focuses on technical specifications and award criteria identified as the two most common instruments to integrate environmental sustainability in government contracting.¹⁰²

An important aspect of GPP is the company's ability to prove and the agency's ability to verify the application of environmental criteria and specifications to avoid deceptive claims, also known as "greenwashing." The European Commission published a "Handbook on Buying Green,"¹⁰³ in which it defines GPP criteria and the necessary evidence to prove those criteria for different sectors.¹⁰⁴ Examples of such proofs include eco-labels and standards, measuring the energy consumption of products, and the amount of greenhouse gas (GHG) emissions generated by the project.¹⁰⁵ For the definition and proof of GPP criteria, Switzerland refers to the EU materials.¹⁰⁶

Accordingly, the survey asked Swiss procurement agencies if they used eco-labels, standards, or certificates to detail the project's technical specifications. The response was surprisingly positive: nearly 90% of procurement officials reported that they used eco-standards to formulate the project's technical specifications (see figure F52).

102. Roberto Caranta and Martin Trybus, *The Law of Green and Social Procurement in Europe*, DJØF Publishing Copenhagen, 2010, <https://eplgroup.eu/wp-content/uploads/2016/06/EPLS.Vol2_GreenSocialProcurement.pdf>.

103. European Commission, "Buying green! – A handbook on green public procurement," *Publications Office*, 2016, <<https://data.europa.eu/doi/10.2779/837689>>.

104. See, for example, European Commission, "Green Public Procurement Criteria and Requirements," *Energy, Climate Change, Environment*, 2016, <https://green-business.ec.europa.eu/green-public-procurement/gpp-criteria-and-requirements_en>.

105. See, for example, European Commission, "Green Public Procurement Criteria and Requirements," *Energy, Climate Change, Environment*, 2016, <https://green-business.ec.europa.eu/green-public-procurement/gpp-criteria-and-requirements_en>.

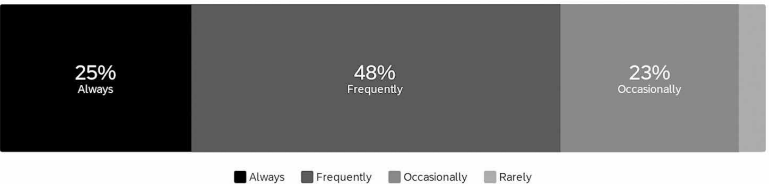
106. Swiss Confederation, "Nachhaltige öffentliche Beschaffung," *BKB*, June 7, 2024, <<https://www.bkb.admin.ch/de/nachhaltige-oeffentliche-beschaffung>>.

F52: Use of eco-labels, standards, and certificates



For participants who answered the question in the affirmative, the survey also asked how frequently procurement agencies awarded contracts with environmental technical specifications. Again, the response was overly positive: one fourth of the participants reported that they always used environmental specifications, nearly 50% used them frequently, and about one fourth used technical specifications occasionally (see figure below).

F53: Use of environmental technical specifications



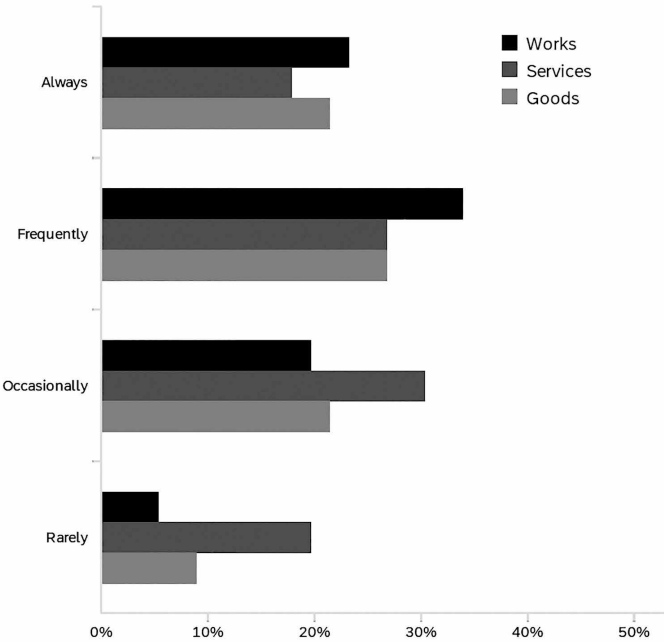
Respondents who used environmental technical specifications reported that they frequently used them for the procurement of sustainable construction works and information technology and communication (ITC) services, and sometimes for the purchase of environmentally friendly furniture, clothing and office supplies.

The survey further inquired about procurement agencies' use and frequency of green award criteria. Around two thirds of respondents reported that they always or frequently used green award criteria, especially for the procurement of construction works (see figure F54). However, these survey results contradict procurement data from the Simap tender platform. Based on an empirical study, only a single-digit percentage of construction tenders required sustainable award criteria.¹⁰⁷ The different results can be explained

107. Désirée Klingler, *Efficiency, Quality, and Sustainability in Government Contracting: A Law and Economics Analysis*, University of St. Gallen, 2024, ch. 7.4.3.1.

by respondents’ reporting bias, where they overestimate the use of green award criteria, or by a selection bias of the survey, which may have been completed by procurement officials that were already sensitized towards sustainable public procurement.

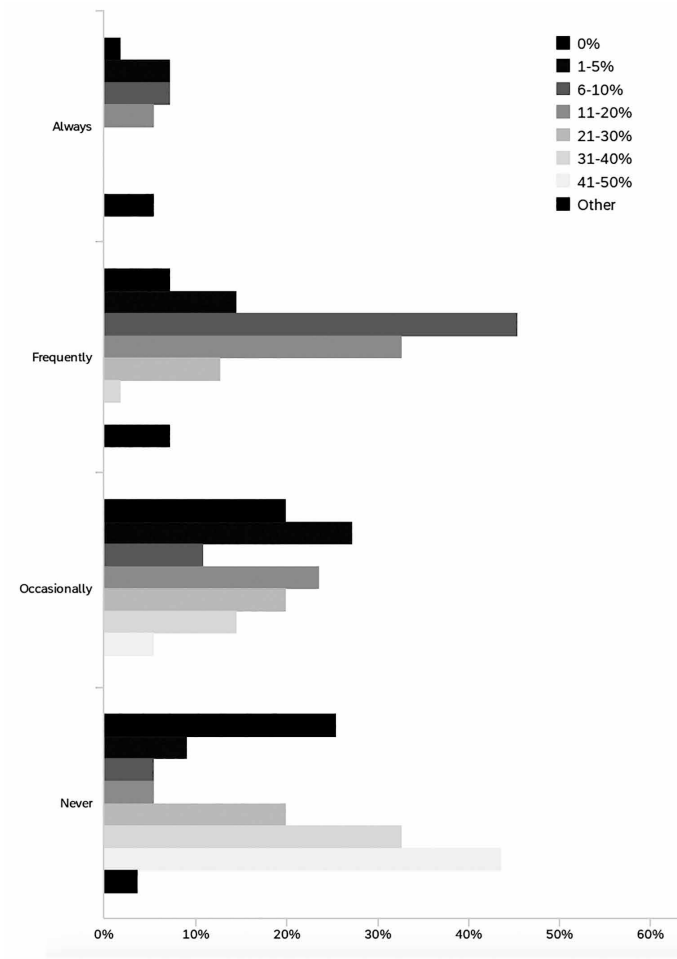
F54: Use of green award criteria



The survey further inquired how high procurement officials weighted green award criteria in public tenders. In Switzerland, most public tenders are assessed based on price (which tends to make up the largest percentage) and some quality aspects, including quality of the proposal and competence of the bidder.¹⁰⁸ Over one third of respondents reported that they frequently assigned the weighting of 6% to 20% to green award criteria, and nearly half of the respondents did never assign the weighting of more than 40% to green award criteria (see figure F55).

108. Désirée Klingler, *Efficiency, Quality and Sustainability in Government Contracting: A Law and Economics Analysis*, University of St. Gallen, 2024, ch. 7.4.3.1.

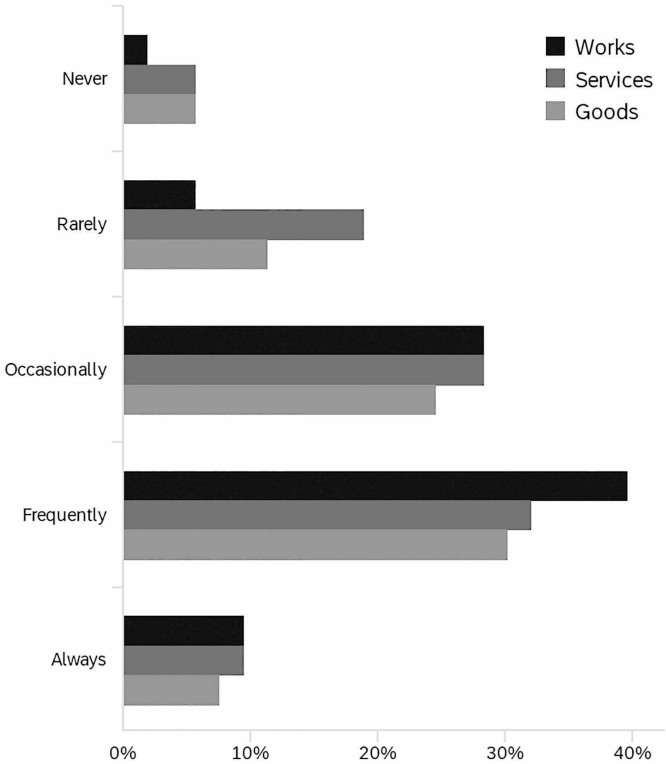
F55: Weighting of green award criteria



Finally, the survey asked participants about their ability to verify the accuracy of the environmental information in the offers. Around 40% of respondents answered that they were frequently able to assess the accuracy of the information, especially for construction works (see figure F56). This result indicates that procurement agencies feel confident in their ability to verify environmental criteria that suppliers submit as proof, and that environmental criteria are slightly easier to verify for construction projects compared with goods and services procurement. This finding can be explained by eco-standards that were specifically developed to support

sustainable construction works, such as the Swiss Standard for Sustainable Construction (SNSB),¹⁰⁹ the Minergie Standard for sustainable buildings¹¹⁰ or the SIA Standard 112 for sustainable buildings and civil engineering.¹¹¹

F56: Ability to verify environmental information in offers



Overall, procurement agencies in Switzerland report that they make frequent use of environmental award criteria and technical specifications, and that they feel confident in verifying the accuracy of these criteria. While these results paint a rather positive picture, the author cautions readers to

109. “Standard Nachhaltiges Bauen Schweiz,” *SNSB*, n.d., <<https://www.snbs-hochbau.ch/>>.

110. “Better building. Better living,” *Minergie*, n.d., <<https://www.minergie.com/>>.

111. SIA Standard 112/1, “Nachhaltiges Bauen – Hochbau” and SIA Standard 112/2, “Nachhaltiges Bauen – Tiefbau und Infrastrukturen,” n.d., <<https://shop.sia.ch/Groups/>>.

take these results with a grain of salt, since they may be impacted by reporting or selection biases, meaning that the survey results do not reflect the practices across *all* Swiss procurement agencies, but only of those agencies that are already sensitized to promoting green public procurement.

Environmental contract clauses to enforce GPP

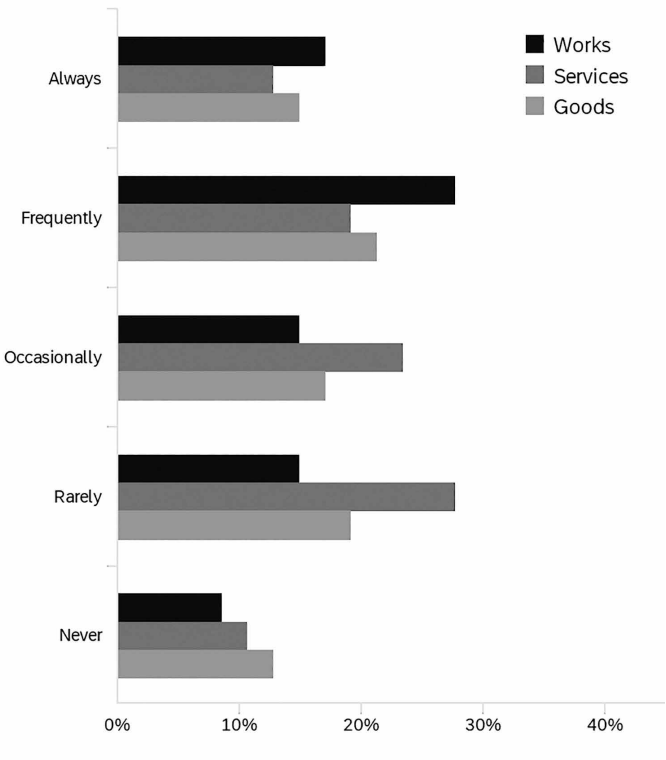
A very important and often neglected aspect in promoting GPP is the contract performance stage. In most jurisdictions around the globe, particularly in Europe, public procurement laws only regulate the procurement of goods, works and services until the awarding of the contract, but not regulate contract performance, which is often governed by private contract law and enforced by civil courts.¹¹² This section and the survey results helped enlighten this rather obscure area by asking participants about the inclusion and enforcement of environmental contract clauses. The author submits that environmental tender criteria are only as good and useful as they are integrated into the government contracts and enforceable in court. Otherwise, environmental criteria remain “paper tigers” without any real-world effect.

Green contract clauses. First, the survey asked participants whether they made use of environmental contract clauses. Around 40% of participants reported that they always or frequently made use of environmental contract clauses (especially for construction works), around 40% used them occasionally or rarely (especially for service procurement), and 20% never used environmental contract clauses (see figure F57). The large share of agencies using environmental contract clauses is a positive development, but surprising at the same time. The KBOB model contracts, which are often used by federal and cantonal procurement agencies as a template to draft government contracts, do not include such an environmental contract clause.¹¹³ This means that agencies design and define their own green contract clauses, which is a challenging endeavour, since sustainable outcomes are not only difficult to define and measure but also difficult to enforce in courts, and might lead to a fragmented enforcement of green contract clauses by the various cantons and municipalities.

112. Désirée Klingler and Pedro Telles, “Non-compliance with government contract terms: A comparative view on procurement regulation and contractual remedies,” in Dacian C. Gragos et al., *Contract Changes: The Dark Side of the EU Public Procurement Law*, *European Procurement Law Series*, Edward Elgar, 2023.

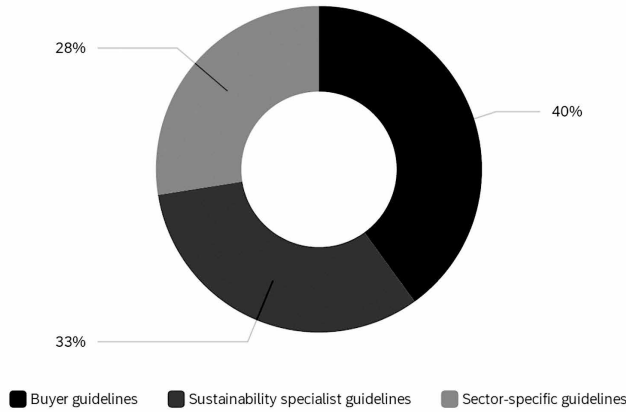
113. Swiss Confederation, “Musterverträge und Dokumentensammlung,” *KBOB*, 2024, <<https://www.kbob.admin.ch/kbob/de/home/themen-leistungen/dokumente-entlang-des-beschaffungsablaufs.html>>.

F57: Use of environmental contract clauses



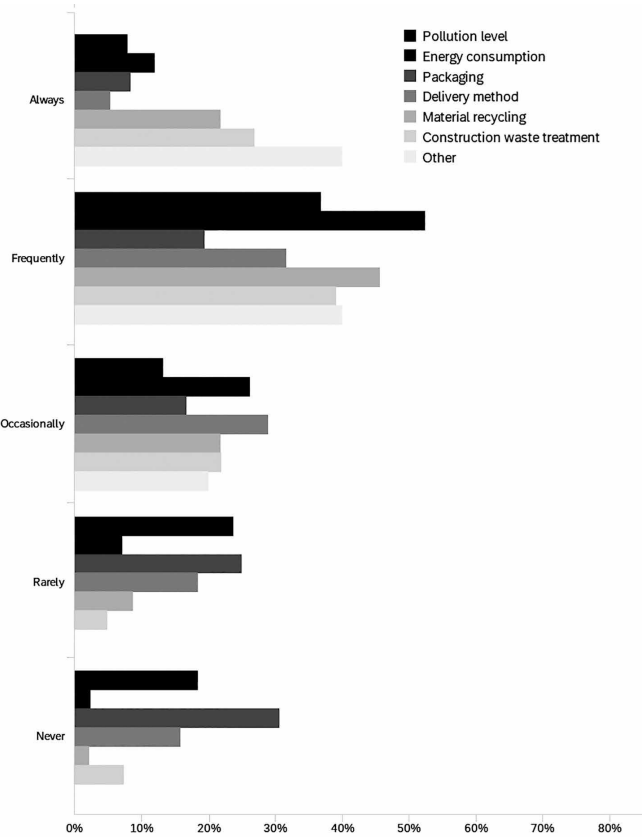
Second, when asked about the resources agencies used to draft environmental contract clauses, around 40% answered that they used buyer guidelines. One third said they used sustainability guidelines, and another third said they used sector-specific guidelines. These guidelines must be internal agency guidelines, since none of them are made public on websites. For future research and to ensure consistency, it would be interesting to see the environmental contract clauses those agencies drafted and examine to what extent the clauses were or can be enforced in court.

F58: Resources used to draft environmental contract clauses



Third, the survey asked participants about the content of environmental contract clauses, including pollution level, energy consumption, packaging, delivery method, material recycling and construction waste treatment, and how frequently they were used. Even though the survey did not ask for the language of these clauses, it at least shows what aspects agencies focused on. The survey results show that construction waste treatment and material recycling are always used by about 20% to 30% of respondents, and pollution level (e.g. measuring GHG emissions) and energy consumption are frequently used by 40% to 50% of respondents (see figure F59). The survey responses also show that around 40% of contracting authorities always use “other” content in their environmental contract clauses. For future research, it would be interesting to know what “other” content those agencies use, considering that the list of examples included the most common contents of environmental contract clauses.

F59: Content of environmental contract clauses



Despite the frequent use of environmental contract clauses by procurement agencies, there is still room for improvement. For one, it would be important for future research and practice to see and compare the language of environmental contract clauses to ensure consistency in the enforcement and to examine the enforceability of those clauses. Since defining and measuring environmental sustainability is a rather challenging endeavour,¹¹⁴ it would be helpful if the strategic procurement committees, such as KBOB and BKB, provided examples of green model contract clauses, similar to the

114. For some suggestions on how to measure environmental and social sustainability in government contracting, see Désirée Klingler, *Efficiency, Quality, and Sustainability in Government Contracting: A Law and Economics Analysis*, University of St. Gallen, 2024, ch. 8.4.3.6.

BKB integrity clause.¹¹⁵ Another helpful example is provided in the Guidance on Social Clauses in Procurement issued by the Danish Competition and Consumer Authority in 2018.¹¹⁶ The examples of social clauses specify the number of apprentices that the contractor will employ for a specific project, the tasks that those apprentices will perform, and for how long.¹¹⁷ Similarly, the Swiss government could provide best practice examples or environmental model clauses, in which contractors would need to specify the energy consumption or amount of GHG emissions of a public project.

Market-led initiatives, such as the Science-Based Targets initiative (SBTi)¹¹⁸ can provide helpful guidance for companies to formulate net-zero targets. This example shows the importance of market-led initiatives and how they can support companies and the government in defining and monitoring environmental sustainability in the companies' own operations and supply chains. While these initiatives are commendable and can help promote GPP, the author cautions that the agencies' use of different market-led initiatives can make it difficult to compare the attainment of sustainability goals. A possible solution to avoid this issue is for strategic procurement committees to provide clear guidance and sample language on how to draft environmental contract clauses, how to enforce them, how to assess the attainment of environmental goals, and how contractors must report and disclose environmental sustainability matters.

Enforcement. More recently, scholars have started thinking about private law enforcement of sustainable clauses in private and public contracts.¹¹⁹ In many European countries, including Switzerland, private law enforcement of government contracts is vital because performance of government contracts is not regulated by public procurement law, but governed by private contract law and enforced by civil courts. While Gausdal (2021) found that social clauses that integrated fair labour standards were

115. Swiss Confederation, "Allgemeine Geschäftsbedingungen des Bundes," *BBL*, 2024, <<https://www.bbl.admin.ch/bbl/de/home/dokumentation/allgemeine-geschaeftsbedingungen-des-bundes.html>>.

116. Danish Competition and Consumer Authority, *Guidance on Social Clauses in Procurement* (Valby, December 19, 2018).

117. Danish Competition and Consumer Authority, *Guidance on Social Clauses in Procurement* (Valby, December 19, 2018), p. 17.

118. Science Based Targets, "The Corporate Net-Zero Standard," <<https://sciencebasedtargets.org/net-zero>>.

119. Kateřina Mitkidis, "Enforcement of sustainability contractual clauses in supply chains by third parties," in *Law and Responsible Supply Chain Management*, Routledge, 2019, chapter 4; Maria Gausdal, "Soft law business as usual? Fundamental labour standards in private and public commercial contracts," PhD University of Copenhagen, 2021.

effectively enforced in civil courts,¹²⁰ Mitkidis (2019) showed that this was not the case for environmental contract clauses, and that they were less enforced (or enforceable) compared with traditional contract clauses.¹²¹ One explanation for these findings is that civil courts are more familiar with the interpretation and enforcement of employment law, but less familiar with environmental clauses that have emerged only recently. Another explanation is that environmental contract clauses are more difficult to draft, let alone enforce. For example, even if agencies required companies to achieve a certain environmental target (e.g. a certain amount of GHG emission reductions), it is often difficult to accurately define the scope (including or excluding supply chain emissions) and measure those emissions, let alone verify them. Furthermore, litigating compliance with contract terms is costly, which might be another reason why the government rarely enforces such clauses.

To understand how effectively environmental contract clauses were implemented in practice, the survey asked participants whether they monitored and verified the implementation of environmental contract clauses. A little over half of the respondents answered that they monitored and verified the implementation, whereas the other half said they did not (see figure below).

F60: Implementation of environmental clauses monitored and verified



When asked with what instruments those agencies monitored and verified the implementation of environmental contract clauses, most respondents answered that they conducted audits and construction site inspections, either through agency-internal staff or through third parties.

120. Maria Gausdal, “Soft law business as usual? Fundamental labour standards in private and public commercial contracts,” PhD University of Copenhagen, 2021.

121. Kateřina Mitkidis, “Enforcement of sustainability contractual clauses in supply chains by third parties,” in *Law and Responsible Supply Chain Management*, Routledge, 2019, chapter 4.

Conducting regular audits is one of the most effective oversight instruments to verify whether contractors effectively implemented what they promised. Another instrument that is often used is self-declarations, where suppliers declare that they comply with labour and environmental laws “at the place of performance.”¹²² The author argues that self-declarations are a “crutch” to be used while finding better alternatives to verify supplier compliance. The effectiveness of self-declarations largely depends on how seriously suppliers take their promises, and on how rigorously agencies deal with violations against misrepresentations by issuing administrative sanctions or putting the infringing company on an exclusion list (as stated in the BKB self-declaration form).¹²³ More recently, procurement agencies have started cooperating with non-governmental organizations that specialize in monitoring human rights in supply chains, such as Electronics Watch,¹²⁴ or that provide business sustainability ratings, such as EcoVadis.¹²⁵ These external monitoring and rating can bring some more standardization and independent verification of the contractor’s sustainability claims.

Another instrument to deal with contractors’ non-compliance with contract terms are contractual penalties (*Konventionalstrafen*), known as liquidated damages clauses in the U.S. Even though the KBOB model contracts¹²⁶ and the general terms and conditions (GTC) of the Swiss federal government (which are integrated into government contracts by reference)¹²⁷ foresee contractual penalties for delays in government projects, those penalties are rarely enforced in practice.¹²⁸ The survey results confirm this observation for environmental contract clauses. Most respondents (88%) answered that they did not issue contractual penalties to address non-compliance with environmental contract clauses (see figure F61).

122. See BKB self-declaration form: Swiss Confederation, “Selbstdeklarationen,” *BKB*, 2024, <<https://www.bkb.admin.ch/de/selbstdeklarationen>>.

123. BBL, *Self-declaration* (Bern, September 28, 2022).

124. Electronics watch, “Mission,” <<https://electronicswatch.org/en>>.

125. Ecovadis, <<https://ecovadis.com/>>.

126. Swiss Confederation, “Musterverträge und Dokumentensammlung,” *KBOB*, 2024, <<https://www.kbob.admin.ch/kbob/de/home/themen-leistungen/dokumente-entlang-des-beschaffungsablaufs.html>>.

127. Swiss Confederation, “Allgemeine Geschäftsbedingungen des Bundes,” *BKB*, 2024, <<https://www.bbl.admin.ch/bbl/de/home/dokumentation/allgemeine-geschaeftsbedingungen-des-bundes.html>>.

128. Hermann Winkler, “BBL Procurement Practice,” interview by Désirée Klingler, March 14, 2023.

F61: Use of contractual penalties for non-compliance
with environmental clauses



Incentives. Another aspect that is largely under-researched and underestimated, especially in European government contracting, is the use of economic incentive schemes to reduce costs, improve timely delivery or achieve certain performance targets.¹²⁹ While incentive contracts form part of the U.S. federal acquisition regulation (FAR),¹³⁰ contract types are generally not regulated in European procurement law, but are governed by private contract law.¹³¹

To determine the incentives (other than the contractual incentives) that drive procurement agencies to promote GPP, the survey asked participants by which factors they were motivated, including legislative and political incentives, internal directives and personal beliefs, and to what degree they were motivated by said incentives. Around 50% of participants answered that they were frequently motivated by political incentives (or pressure), and 45% were frequently motivated by internal directives. Around 35% each were frequently motivated by the law or by personal beliefs (see figure F62). These results show two important points: first, non-legal factors, such as politics and personal beliefs, play an important role in the promotion of GPP and, second, implementation (in the form of internal directives) is more important than black-letter law. This last point has also been argued by Steiner & Klingler (2023), who found that the “paradigm shift” in the revised

129. As promoted by Désirée Klingler, *Efficiency, Quality, and Sustainability in Government Contracting: A Law and Economics Analysis*, University of St. Gallen, 2024, ch. 7.3.

130. *Federal Acquisition Regulation*, 1984, 48 C.F.R., ch. 1, section 16.4.

131. See, for example, Désirée Klingler and Pedro Telles, “Non-compliance with government contract terms: A comparative view on procurement regulation and contractual remedies,” in Dacian C. Gragos et al., *Contract Changes: The Dark Side of the EU Public Procurement Law*, European Procurement Law, Edward Elgar, 2023, p. 48-67.

Swiss procurement law was mainly achieved through implementation rather than legislation.¹³²

The incentive that was missing from the answer list (and that would have been interesting to observe) was economic incentives, as foreseen in U.S. federal contracting and as mentioned above. Participants might have reported those economic incentives under the category “other.” But, as the results show, participants did not find that incentives other than the ones listed in the questionnaire played a significant role in promoting GPP. This finding reflects the overlooked importance of performance incentives to promote green procurement. As Klingler suggests elsewhere, procurement agencies should make more frequent use of performance incentives, such as the reduction of GHG emissions, that tie the contractor’s profit to goal attainment.¹³³

But buying green also makes sense from a cost reduction perspective. While some authors argue that green products often come with a “price premium,” i.e. the purchase price for green products is higher than for traditional “brown” products,¹³⁴ others have convincingly argued that, in the long run and when taking into account life-cycle costs (as allowed by the revised Swiss¹³⁵ and EU¹³⁶ public procurement laws), green products are often cheaper.¹³⁷ For example, a building that is built in an energy-efficient manner (with the necessary insulation) helps reduce heating and cooling costs over the building’s lifespan.

132. Marc Steiner and Désirée Klingler, “The revised Swiss public procurement law: More quality and sustainability,” *European Procurement & Public Private Partnership Law Review*, no. 1, 2023, p. 93.

133. Désirée Klingler, *Efficiency, Quality, and Sustainability in Government Contracting: A Law and Economics Analysis*, University of St. Gallen, 2024, ch. 7.3.5.

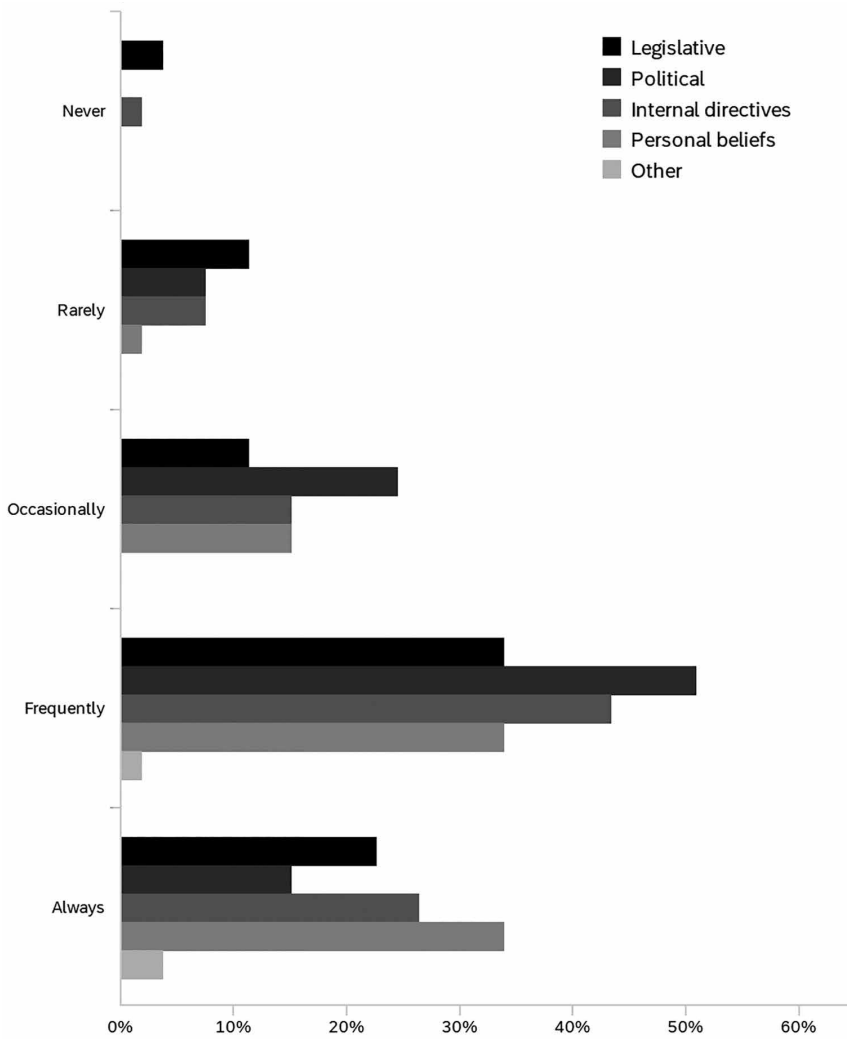
134. Donald B. Marron, “Buying green: Government procurement as an instrument of environmental policy,” *Public Finance Review*, vol. 25, no. 3, 1997, p. 23.

135. *Federal Act on Public Procurement*, 2019, no. 172.056.1, art. 29(1) – Award criteria.

136. Directive 2014/24/EU on Public Procurement, OJ L 94/243, art. 68 – Life-cycle costing (February 26, 2014).

137. Marta Andhov et al., “The European Union Law of life-cycle costing,” in Marta Andhov, Roberto Caranta and Anja Wiesbrock (Eds.), *Cost and EU Public Procurement Law: Life-Cycle Costing for Sustainability*, Routledge, 2018, p. 721-728; Jason J. Czarnezki and Steven Van Garsse, “What is life-cycle costing?” in Marta Andhov, Roberto Caranta and Anja Wiesbrock (Eds.), *Cost and EU Public Procurement Law: Life-Cycle Costing for Sustainability*, Routledge, 2018, p. 3-19.

F62: Incentives to implement environmental aspects in contracts



Energy performance contracts and partnerships

Energy performance contracts (EPC) were originally developed in the United States in the 1990s.¹³⁸ They are an alternative private sector financing mechanism that permits agencies to use energy and water cost savings from reduced energy or water consumption to repay the cost of installing energy conservation measures.¹³⁹ In simple terms: “EPC can pay for today’s facility upgrades with tomorrow’s energy and/or water savings.”¹⁴⁰ Similarly, the EU introduced the Energy Efficiency Directive (last amended in 2023),¹⁴¹ which mandates governments to set national energy efficiency targets and to monitor energy consumption in the public sector. EU Member States, such as the UK,¹⁴² implemented the directive by issuing procurement policy notes that direct government departments to comply with the energy efficiency standards when purchasing goods, services and works.

Aside from the Swiss federal energy policy (which focuses on energy efficiency and renewable energies)¹⁴³ and the option of Swiss procurement agencies to procure energy-efficient technologies, EPCs are used to some extent in Swiss procurement practice. Nearly one third of procurement agencies (mostly municipal) reported that they used energy performance contracts (see figure F63).

138. *Energy Policy Act*, 1992, 42 U.S.C., ch. 134.

139. Energy.gov, “Energy Savings Performance Contracts for Federal Agencies,” *Federal Energy Management Program*, 2024, <<https://www.energy.gov/femp/energy-savings-performance-contracts-federal-agencies>>.

140. U.S. Department of Housing and Urban Development, “Energy Performance Contract,” 2024, <https://www.hud.gov/program_offices/public_indian_housing/programs/ph/pheb/eperformance>.

141. European Union law, “Directive (EU) 2023/1791 of the European Parliament and of the Council of 13 September 2023 on energy efficiency and amending Regulation (EU) 2023/955 (recast),” *Official Journal of the European Union*, 2023.

142. Gov.uk, “Procurement Policy Note – Implementing Article 6 of the Energy Efficiency Directive,” *Cabinet Office*, 2014, <<https://www.gov.uk/government/publications/procurement-policy-note-0714-implementing-energy-efficiency-directive-article-6>>.

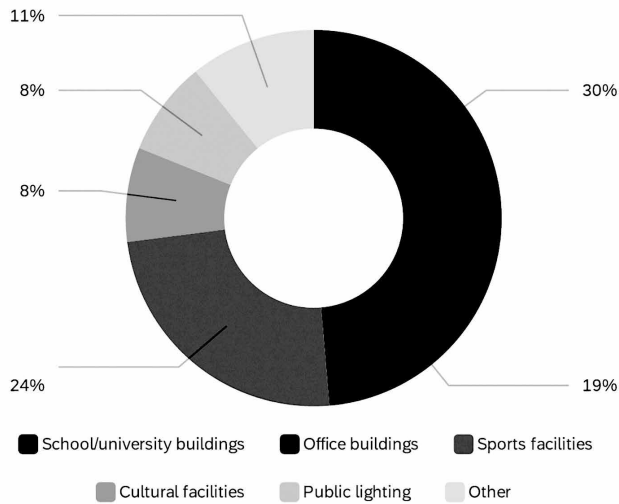
143. Swiss Confederation, “Annual reports,” *Swiss Federal Office of Energy*, 2020, <<https://www.bfe.admin.ch/bfe/en/home/swiss-federal-office-of-energy/the-swissenergy-programme/annual-reports.exturl.html>>.

F63: Use of energy performance contracts



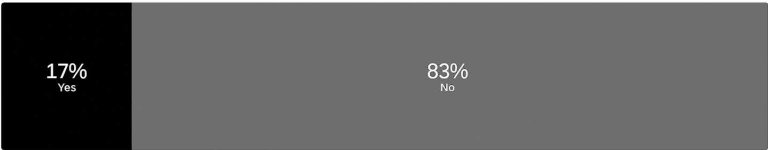
The agencies that use energy performance contracts mostly use them for school and university buildings (30%), sports facilities (24%) and office buildings (19%). Sometimes ECPs are also used for cultural facilities and public lighting (see figure F64). Around 11% of respondents reported to use ECPs for “other” projects, including electricity from hydropower plants and solar panels.

F64: Projects for which energy performance contracts were used



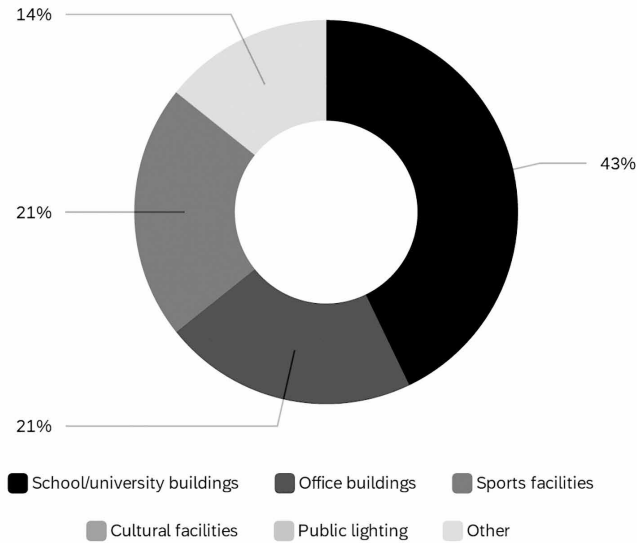
An energy performance partnership is a partnership between a public agency and an energy service company.¹⁴⁴ Unlike with an EPC, the relationship is not contractual, but has a more corporate structure, where financial responsibilities are shared among the public and private partners. This construct is less common in Switzerland than ECPs. Only 17% of agencies reported that they used such partnerships (see figure below).

F65: Use of energy performance partnerships



As with ECPs, energy performance partnerships are mainly used for school and university buildings (43%), office buildings (21%), sport facilities (21%) and other, mainly infrastructure projects (see figure F66).

F66: Projects for which energy performance partnerships were used



144. Energy.gov, “Energy savings performance contracts for federal agencies,” *Federal Energy Management Program*, 2024, <<https://www.energy.gov/femp/energy-savings-performance-contracts-federal-agencies>>.

While ECPs and partnerships are a valuable instrument to promote energy efficiency (the U.S. government has reported several success stories¹⁴⁵), those with the use of such instruments in Swiss procurement practice is still relatively moderate. To expand the use and examine whether ECPs are a reliable option for procurement practice at the federal and regional levels, increased awareness, political support and further research seem necessary.

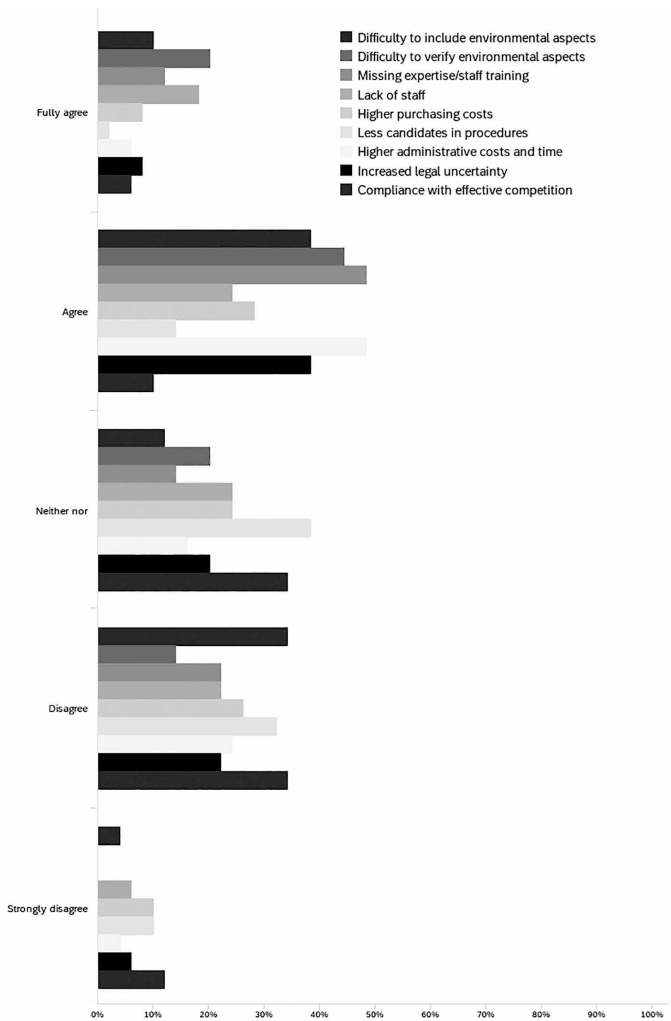
Obstacles and solutions to promote GPP uptake

Finally, the survey asked participants about the most common obstacles encountered when promoting GPP. Participants agreed that the top three obstacles were: 1) missing expertise and training; 2) higher administrative effort in terms of costs and time; and 3) difficulty verifying environmental aspects (see figure F67).

The author argues that these obstacles are connected and ultimately originate from authorities' lack of expertise in environmental technologies and defining and implementing environmental criteria in government contracts. Considering that the revised Swiss public procurement law with the new sustainability objective was only introduced three years ago, and that new policies take time to be implemented by the various government agencies, we can and should see these findings as an opportunity, rather than a risk. By scaling up training and improving the environmental expertise of procurement officials, the implementation and promotion of GPP will likely accelerate. The more expertise and experience contracting authorities gather on green procurement criteria, the more skillfully and faster they can implement those criteria into their procurement practice and assess the accuracy of contractors' environmental claims, especially with the help of market-led initiatives that monitor and rate the sustainability of companies and products. To improve authorities' environmental expertise, it is not only vital to expand training opportunities at the federal, regional and local levels, but also to acknowledge a "phase-in" period where agencies can experiment in a safe "regulatory sandbox" and are allowed to test new approaches to promote GPP without fearing political backlash or lawsuits from competitors if the approaches need improvement. But, most importantly, for as long as

145. Such as the San Antonio Military Base, NASA's Jet Propulsion Laboratory, and the U.S. Food and Drug Administration's White Oak Campus, see Energy.gov, "Energy savings performance contract success stories," *Federal Energy Management Program*, 2024, <<https://www.energy.gov/femp/energy-savings-performance-contract-success-stories>>.

F67: Reported obstacles to green public procurement



we measure agencies' performance based on the standard of minimizing costs and awarding the contract to the lowest bidder, promoting sustainable public procurement is doomed. If we want to promote GPP, we need to take a long-term perspective, which allows agencies to consider life-cycle costs and balance various public interests, including social and environmental sustainability, and not solely focus on cost-efficiency.

Similarly, survey participants have suggested the following means to further promote GPP: 1) mandatory and clear requirements; 2) training and awareness campaigns; 3) model award criteria; and 4) integration of environmental sustainability into the agency's operative goals. The question of introducing mandatory sustainability requirements is a hotly debated topic—in the EU¹⁴⁶ and worldwide.¹⁴⁷ Currently, the Swiss and EU public procurement laws allow, but do not mandate, contracting authorities to consider environmental and social aspects when awarding a contract.¹⁴⁸ While some are sceptical about whether the law should be dictating contracting authorities “what to buy,” others argue that the law already provides contracting agencies with the option to include sustainability requirements in tenders, which are binding for suppliers who want to win the bid. Another group (including the interviewed procurement officials in this survey) believes that mandatory sustainability requirements are necessary and that authorities' freedom to consider GPP has not led to the desired change or to the attainment of the sustainability goals.

Model award criteria provide for another interesting solution, which would alleviate agencies' uncertainty about how to formulate environmental and social award criteria in tenders and bring more uniformity to the implementation of such criteria. Going one step further would be to formulate model sustainable contract clauses, a topic that has gone unnoticed, since Swiss public procurement law only regulates the tender and award phase, but not the contract performance phase. The fourth solution mentioned in the survey is of great, but overlooked importance and includes elements such as agency-specific sustainability goals and may include economic incentives (bonus payments) to procurement officials for awarding a certain number of sustainable contracts.

Another important aspect that was mentioned in the survey is the promotion of “green champions.” The U.S. General Services Administration, which buys commercial products and services for federal purchasers,¹⁴⁹

146. Willem Janssen and Roberto Caranta, *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Shift*, Bloomsbury Publishing, 2023.

147. DOD, GSA, NASA, Federal Acquisition Regulation: Sustainable Procurement (Washington, D.C., April 22, 2024).

148. *Federal Act on Public Procurement*, 2019, no. 172.056.1, art. 29(1) – Award criteria; Directive 2014/24/EU on Public Procurement, OJ L 94/243, art. 67(2) – Contract award criteria (February 26, 2014).

149. GSA, “Purchasing programs,” U.S.A. General Services Administration, 2024, <<https://www.gsa.gov/buy-through-us/purchasing-programs>>.

established the “Federal Contractor Climate Action Scorecard,”¹⁵⁰ which rates contractors’ public sustainability disclosures via CDP,¹⁵¹ contractors’ GHG inventories, their GHG emission targets and their science-based targets.¹⁵² Klingler & Schooner (2022) suggest similar, behavioural economics-inspired policy instruments that complement procurement regulation and help nudge contracting authorities to buy green.¹⁵³ Aside from the peer effect, which makes people more likely to follow observable choices of their peers (such as green champions),¹⁵⁴ they suggest making use of “green defaults” by making green contracts the default option for commercial off-the-shelf items (such as the purchase of office supplies and toilet paper) and opting out costlier.¹⁵⁵ Another approach is to increase the salience of the desired option (e.g. green contracts)¹⁵⁶ by making them more visible to contractors, either by creating a separate section for green contracts in the tender platform, or by placing green contracts at the top of the tender platform.

IMPLEMENTATION OF GPP BY SPECIALIST OFFICES

The second survey was conducted with offices specialized in GPP. Because the revised Swiss public procurement law with its new sustainability objective came into effect only three years ago, specialized GPP offices are still a rather new development in Switzerland—which explains the relatively small number of 16 responses. Five respondents were from federal institutions, three from cantonal agencies, and eight from municipalities or cities. Most of these officials reported that they were generalists with no specific sector focus (79%), while 21% of them provide advice for a specific sector, such as infrastructure (see figure F68).

150. GSA, “GSA Federal Contractor Climate Action Scorecard,” 2024, <<https://d2d.gsa.gov/report/gsa-federal-contractor-climate-action-scorecard>>.

151. Disclosure Insight Action, <<https://www.cdp.net/en>>.

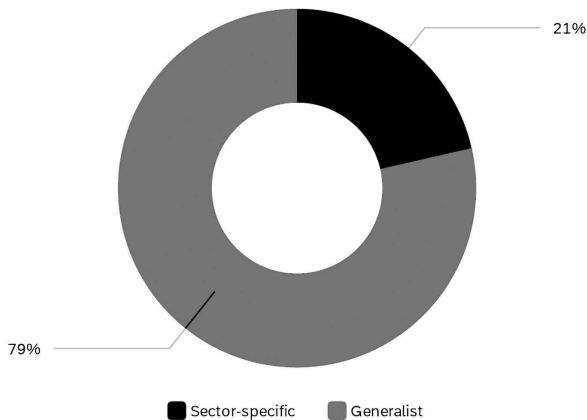
152. Science Based Targets, <<https://sciencebasedtargets.org/how-it-works>>.

153. Désirée Klingler and Steven L. Schooner, “Promoting sustainable public procurement through economic policy tools: From moral suasion to nudging,” *European Journal of Public Procurement Markets*, vol. 4, no. 4, 2022, p. 68-80.

154. Désirée Klingler and Steven L. Schooner, “Promoting sustainable public procurement through economic policy tools: From moral suasion to nudging,” *European Journal of Public Procurement Markets*, vol. 4, no. 4, 2022, p. 75.

155. Désirée Klingler and Steven L. Schooner, “Promoting sustainable public procurement through economic policy tools: From moral suasion to nudging,” *European Journal of Public Procurement Markets*, vol. 4, no. 4, 2022, p. 74.

156. Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness*, Yale University Press, 2008.

F68: Generalist vs. sector-specialist GPP offices

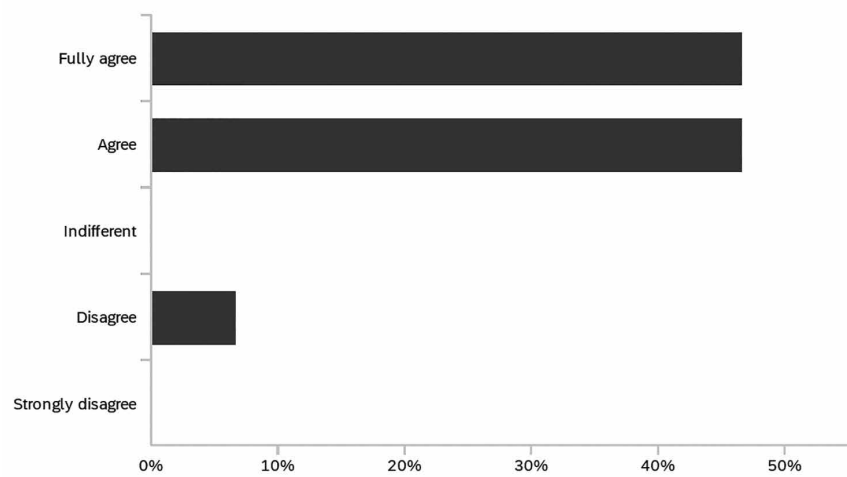
While generalist GPP offices such as the Specialist Office for Ecological Public Procurement¹⁵⁷ at the Swiss Federal Office for the Environment (BAFU) have the advantage of serving as a “one-stop-shop” providing environmental guidance to all federal agencies, they also face the risk that the tools they offer are not tailored to sector-specific needs. For example, the eco-standards for construction work (such as the SNSB) are very different from eco-labels used for paper or uniforms (such as FSC). To account for sector-specific needs and at the same time benefit from economies of scale and knowledge sharing, the author suggests the option of having a generalist GPP office with expert groups that are specialized in environmental practices in different sectors.

The first aspect that the survey tested was contracting authorities’ awareness of GPP. Over 90% of specialized GPP offices agreed or fully agreed that there is a need for greater environmental awareness among procurement agencies. The importance of authorities’ GPP awareness was also highlighted in an empirical study of Italian procurement contracts, which found that “the existing awareness of GPP practices, tools and regulations does support public authorities to develop GPP strategies.”¹⁵⁸

157. Swiss Confederation, “Ökologische öffentliche Beschaffung,” BAFU, 2021, <<https://www.bafu.admin.ch/bafu/de/home/themen/wirtschaft-konsum/fachinformationen/oekologische-oeffentliche-beschaffung.html>> [consulted in 2023, document now inaccessible].

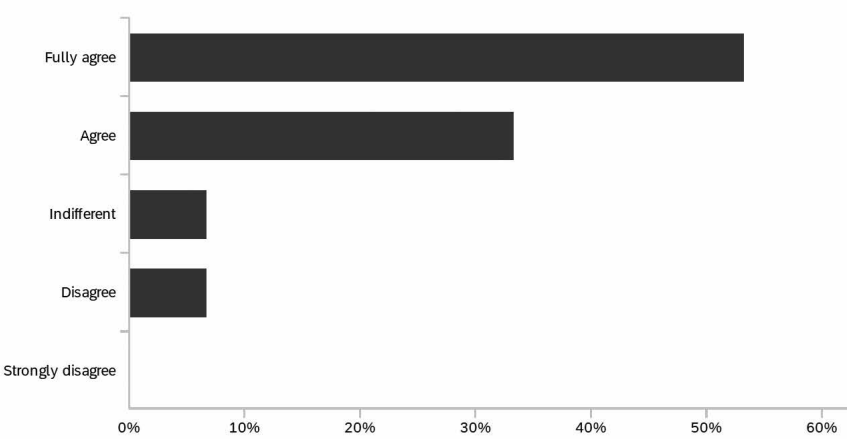
158. Francesco Testa et al., “What factors influence the uptake of GPP (Green Public Procurement) practices? New evidence from an Italian survey,” *Ecological Economics*, no. 82, 2012, p. 88-96.

F69: Need for agencies increased GPP awareness



When asked whether the support of specialist GPP offices—in the form of guidelines and consulting—is necessary to promote and implement green public procurement, all respondents fully agreed. The second question asked whether mandatory monitoring of environmental criteria should be introduced. Most respondents (over 70%) fully agreed or agreed that mandatory monitoring is necessary.

F70: Mandatory monitoring of environmental criteria



Finally, the survey asked specialist GPP offices about solutions to further promote GPP uptake. The specialist offices' suggestions can be divided into five groups: 1) establish GPP offices at the cantonal level; 2) introduce mandatory sustainable criteria and monitor their implementation; 3) provide clear strategies and guidance for sustainable procurement; 4) offer more training to procurement officials and project managers, especially at the municipal level, and to suppliers to increase their GPP awareness; and 5) establish networks to exchange experience, especially at the municipal level. Most of these suggestions are in line with the findings from the first survey with procurement agencies.

Notable, however, is the emphasis on establishing GPP offices and networks at the cantonal and municipal levels—which speaks to the fact that many cantons and municipalities may not have specialist GPP offices in place. The lack of GPP offices at the cantonal and municipal levels may be due to budget constraints, which could, however, be alleviated by designating one GPP specialist for each canton/municipality (rather than an entire office) or by institutionalizing knowledge-sharing (through networks) between the federal GPP office and the various cantons and municipalities. Another important aspect that specialist GPP offices brought up is to increase the GPP awareness of not only procurement agencies, but also of suppliers. Only when companies have the necessary environmental awareness can or will suppliers offer high-quality environmental products.

CONCLUSION

This part is among the first¹⁵⁹ publications to quantitatively examine the implementation of green public procurement law in Switzerland. While an increasing amount of literature has been written on the revised Swiss public procurement law and its new sustainability objective,¹⁶⁰ little has been done to understand the implementation and obstacles of GPP in practice. This part has been aimed at filling this gap by means of a structured survey with Swiss procurement agencies and specialist GPP offices. The results are unequivocal: while the revised Swiss public procurement law and its sustainability objective heralded a paradigm shift and increased environmental

159. With the exception of: Désirée Klingler, *Efficiency, Quality, and Sustainability in Contracting Procurement: A Law and Economics Analysis*, University of St. Gallen, 2024.

160. See, for example, Marc Steiner and Désirée Klingler, "The revised Swiss Public Procurement Law: More quality and sustainability," *European Procurement & Public Private Partnership Law Review*, no. 1, 2023, p. 87-93.

awareness among contracting authorities, we have not arrived at the end of the road. Considerable effort is needed to effectively implement social and environmental sustainability requirements in government contracting and to fight climate change. One key driver of GPP is increasing the awareness and skills of procurement officials—and suppliers—by offering training, tools, networks and best practice examples. The author also suggests that agencies make more frequent use of sustainable contract clauses and contracts with environmental performance incentives to financially motivate companies to comply with environmental targets, such as GHG emission reductions. Asking for proof of the product's sustainability attributes and verifying contractors' environmental information by monitoring the attainment of environmental targets is not only desirable, but necessary if we are to take sustainability seriously. Also, to provide best practice examples and to ensure a more uniform implementation of sustainable award criteria and enforcement of sustainable contract clauses, model criteria and clauses can offer helpful guidance to procurement officials who are looking to buy green. Overall, the part encourages procurement officials and legal experts to think outside the box and to make use of data analytics and behavioural economics-inspired tools nudging procurement authorities into buying green.

Integrating environmental considerations into public contracts is now largely possible, enabling public purchasers to become real players in the fight against the ecological emergency and to influence the practices and behaviour of economic operators. However, major difficulties remain and, in practice, environmental aspects are often not implemented to any great extent. The aim of this book is to highlight and understand the practical obstacles preventing a genuine environmentalization of public procurement. Starting with the regulations in force in Canada, France, Italy, the Netherlands, Portugal and Switzerland, the research then focuses, through field surveys, on the various national obstacles preventing the development of green public procurement.

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