



Implementing GPP: Practical and Legal Considerations

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Overview

- Objectives and framework for GPP
- Procurement basics
- Reform of procurement rules
- Treaty principles
- Selection criteria
- Technical specifications
- Award criteria (including life-cycle costing)
- Means of proof (including labels)
- Contract performance clauses
- Questions and discussion

Background & Reform



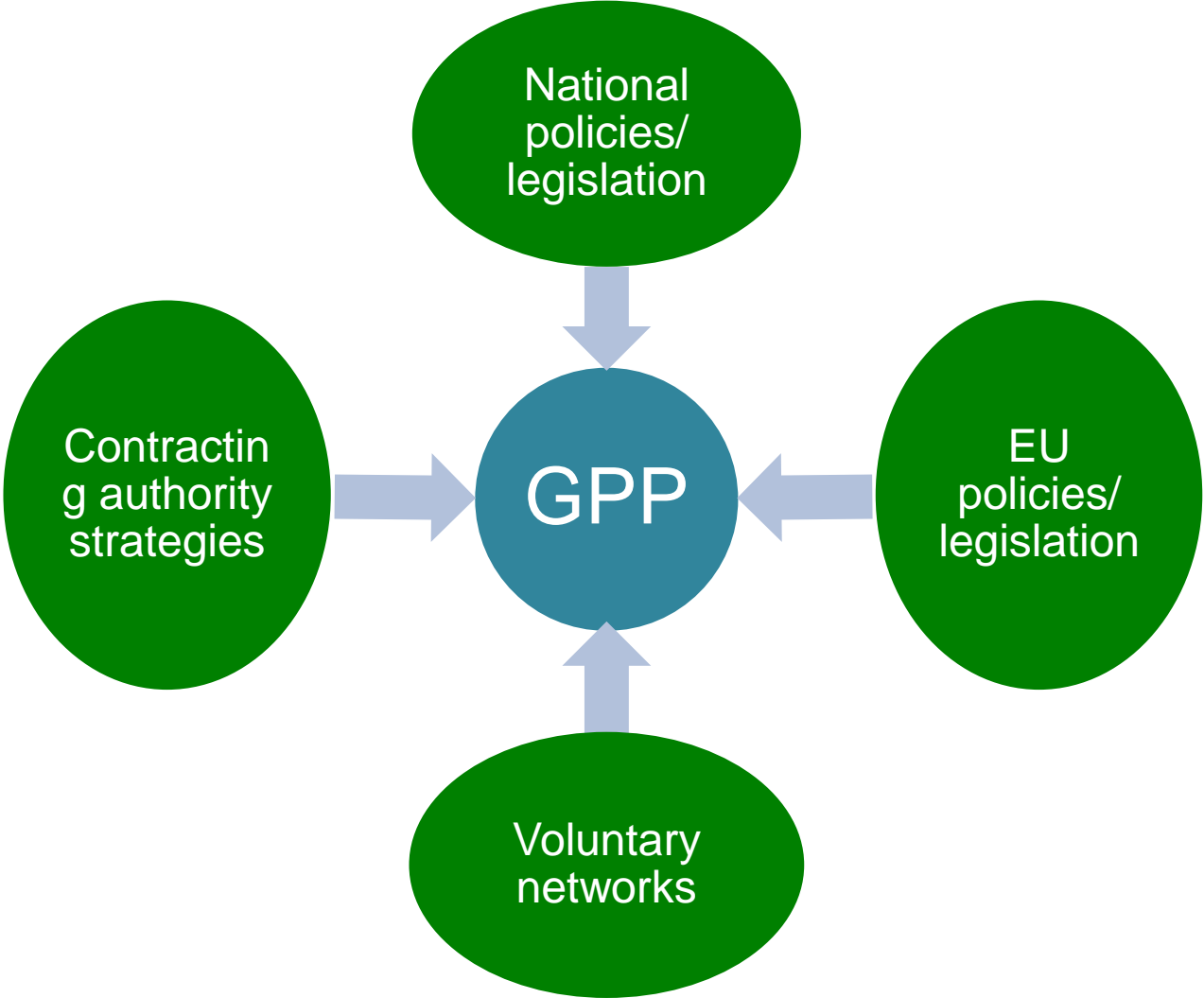
Objectives of GPP

- GPP is normally defined as procurement which aims to reduce the environmental impact of goods and services purchased by (or for) the public sector over their life-cycle.

This implies various objectives, for example:

- Reducing the volume of goods or services procured/avoiding waste
- Purchasing goods/services with lower embodied impacts
- Purchasing goods/services with lower in-use impacts
- Purchasing goods which are more durable, reusable or recyclable
- Rewarding companies with positive environmental records and/or penalising those with negative records

Framework for GPP



National and EU public procurement rules

Relevant law

- EU procurement directives and national implementing laws
- Sector-specific legislation e.g. Energy Star, Clean Vehicles, Timber Regulation, Energy Efficiency Directive
- Treaty on the Functioning of the European Union
- Case law of the European Court of Justice and national courts



Procurement basics

- EU procurement rules apply to central and local government and bodies governed by public law (“contracting authorities”)
- Also apply to entities (whether public or private) operating in the utilities sector (“contracting entities”)
- Directives apply above €135,000/€209,000/€5,225,000 but Treaty principles apply to all contracts which are of cross-border interest
- Contracts may be fully or partially covered by the Directives
- Exemptions apply for purchase/rental of land, employment contracts, certain legal and financial services etc.

Procurement basics continued

- Covered contracts must be advertised in the Official Journal
- Contract notice or PIN published at beginning of procedure, and award notice published at the end
- From 2016, **procurement documents** must also be published
- Choice of procedures, most common are **open** (any company may tender) and **restricted** (bidders are selected to tender)
- Framework agreements and dynamic purchasing systems may be used to award multiple contracts, particularly by **central purchasing bodies**

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Directives 2014/23/EU, 2014/24/EU and 2014/25/EU adopted after three year revision process.

Major changes to:

- Scope of coverage (e.g. concessions; social services)
- Time limits (shorter)
- Choice of procedure (two new procedures)
- Publication requirements for documents
- Reservation of contracts
- Transition to e-procurement
- Environmental and social criteria

Principles of Procurement



Principles of procurement

- Non-discrimination and equal treatment (‘not treating similar situations differently, or different situations in the same way, unless such treatment is objectively justified.’)
- Transparency – particularly relevant for advertising, criteria, weightings, specifications, notification of procedures & results
- Proportionality – is a measure appropriate to achieve its objectives and does it go beyond what is needed?
- Mutual recognition – of standards, qualifications, labels

All of these have been developed under the Treaty to support free movement of goods and services, freedom of establishment

Effect of ECJ case law

Case C-243/89 *Storebaelt* – tenders which do not comply with mandatory conditions must be rejected (reaffirmed in Case C-561/12 *Nordecon*)



Case C-513/99 *Concordia Bus Finland* – environmental criteria can also form part of the evaluation of MEAT, provided they are linked to the subject-matter and adequately transparent

Case C-448/01 *EVN and Wienstrom* – Court held that award criterion based on renewable energy capacity was not LtSM

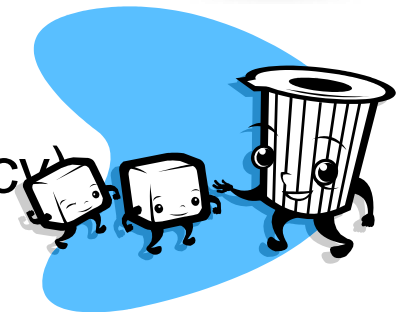
Case C-368/10 *Commission v The Netherlands (Dutch Coffee)* – Court approved social and environmental criteria in principle, but these need to respect rules on specifications/award criteria

Origins

“Since a tender necessarily relates to the subject-matter of the contract, it follows that the award criteria which may be applied in accordance with [the provisions on award criteria set out in the directives] must themselves also be linked to the subject-matter of the contract.” (*Concordia*, para 59)

EVN and Wienstrom Renewable energy capacity criteria was NOT linked to the subject-matter

Case C-368/10 *Commission v the Netherlands*
Fair trade/organic criteria **were** linked to the subject-matter (but lacked adequate transparency)



Definition

Art. 67(3): Award criteria shall be considered to be linked to the subject-matter of the public contract where they *relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle*, including factors involved in:

- (a) the specific process of production, provision or trading of those works, supplies or services; or
- (b) a specific process for another stage of their life cycle even where such factors do not form part of their material substance.

Recital 97: “...excludes criteria and conditions relating to *general corporate policy*, which cannot be considered as a factor characterising the specific process of production or provision of the purchased works, supplies or services. Contracting authorities should hence not be allowed to require tenderers to have a *certain corporate social or environmental responsibility policy* in place.”

Effect on GPP

Example: In a contract for catering services, a public body may wish to evaluate efforts made by companies to reduce their carbon footprint.

Questions to ask:

1. Does this form part of selection criteria, specification, award criteria or contract performance clauses? Different rules apply at each stage.
2. Is the criterion linked to the subject matter of what you are buying?
3. Is it proportionate, transparent and non-discriminatory?
4. What kind of evidence might bidders provide and can you verify it (to avoid greenwash)?
5. Is the criterion an effective way to achieve environmental gains,

Exclusion & Selection Criteria



Exclusion grounds

Art. 57 – divided into **mandatory** and **discretionary** grounds (Member States can make discretionary grounds mandatory)

Most relevant for GPP are probably

- Compliance with Art. 18(2) environmental laws
- Grave professional misconduct which renders integrity questionable
- Significant/persistent deficiencies in performance of substantive requirement under prior public contract which led to sanctions
- Inability to submit supporting documents

*Note that above exclusion criteria are subject to ability to **self-clean** and maximum exclusion period of **three years***

Article 18(2)

“Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with **applicable** obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.”

Annex X:

- Eight core ILO Conventions
- Vienna Convention on ozone layer
- Basel Convention on hazardous waste
- Stockholm Convention on persistent organic pollutants
- PIC Convention (hazardous chemicals/pesticides)

Article 18(2) continued

If an operator does not comply with Article 18(2), CA can:

1. Exclude from procedure (subject to self-cleaning and time limits) – this *may* be made mandatory under national law
2. Reject a tender which does not comply (discretionary)
3. Reject a tender which is abnormally low due to non-compliance (mandatory)
4. Enforce compliance by subcontractors and require replacement of a subcontractor which does not comply



Qualitative selection

Art. 58/Annex XII set out exhaustive list of selection criteria.
Most relevant for GPP are probably:

Technical and professional ability

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

Technical specifications



Definition

Article 42/ Annex VIII Directive 2014/24/EU technical specifications may relate to:

“...the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle *even where such factors do not form part of their material substance* provided that they are *linked to the subject-matter of the contract* and *proportionate* to its value and its objectives.”

“...required characteristics of a product or a service, such as quality levels, **environmental and climate performance levels...**”

This confirms that it is possible to specify **organic food** or **electricity from renewable sources**, provided this is done in a way which ***affords equal access to tenderers***

Where reference is made to particular process/standard, must allow **equivalents**.

Types of specifications

Input-based or traditional specifications, which describe the product, service or work, e.g by reference to materials used (“double-glazed windows”)

Performance-based or functional specifications which describe the desired outcome of the contract (e.g. “indoor temperature range of 18-20°C”)

Hybrid specifications which combine elements of both, e.g. “building with double-glazed windows and solar shading to achieve indoor temperature range of 18-20°C”)



Variants

Variants (Art. 45) can be useful for GPP because they allow greater flexibility with regard to technical specifications

Example: In a tender for vehicles, variants might be authorised in order to evaluate the viability of electric or alternative-fuelled vehicles, in addition to petrol/diesel

Minimum requirements must be set, e.g. “vehicle must be able to refuel or recharge within X minutes and have a range of at least X kilometres on a full tank”

Variants are then assessed against the selection award criteria as all other bids, to determine the best overall solution



Award criteria



All contracts must now be awarded on the basis of MEAT – but it is still possible to exclude factors other than price/cost from evaluation, unless national law has restricted this.

- Choice of criteria relating to quality, environmental and social characteristics, delivery process, etc.
- Choice of approaches to evaluate price/cost (incl LCC)

Award criteria must **not confer an unrestricted freedom of choice** on the CA;
they must ensure the possibility of **effective competition**;
and
be **accompanied by verification provisions**.

Award criteria target performance above the minimum levels set out in the technical specifications, and must be

Weightings

Weightings for award criteria must be identified in advance, unless this is impossible for 'objective reasons'

Any sub-criteria and their weightings should also normally be indicated (Case C-331/04 *ATI*)



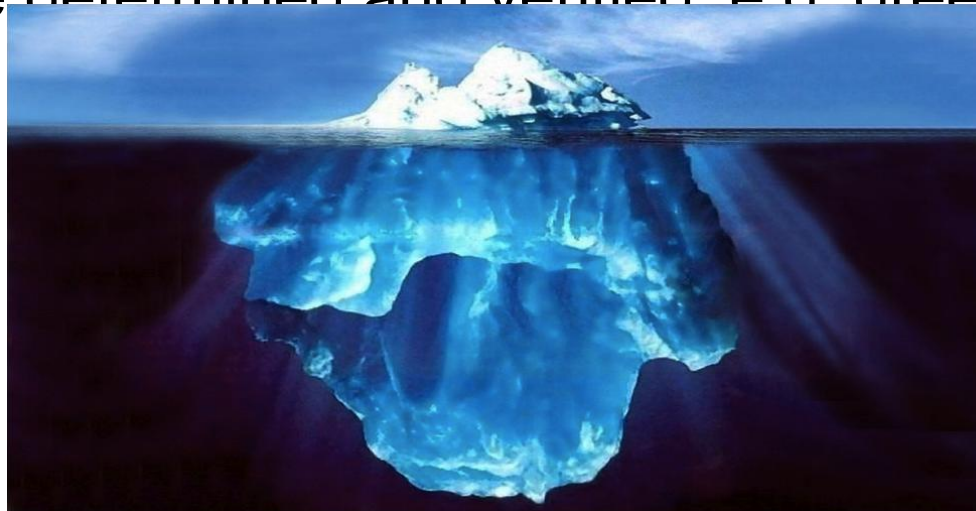
Different approaches/scales are taken to evaluate qualitative and cost criteria – it is important to view award criteria **as a whole** rather than individually, in order to determine weightings

As important as the weighting will be the approach taken to scoring – it should be possible to use the **full range of marks**

Otherwise if 'environmental performance' is given **15%**, but each bid scores at least 10/15, it is actually only 'worth' **5%**

Life-cycle costing

- Possible under 2004 directives where MEAT is used
- New procedural rules for life-cycle costing set out in Article 68:
 - Covers costs borne by contracting authority or other users, e.g. acquisition, use, maintenance and end-of-life
 - Also environmental externalities, provided their monetary value can be determined and verified, e.g. greenhouse gas emissions



LCC continued

Must indicate method to be applied and data required from tenderers in the procurement documents. Method must be:

- Based on objectively verifiable & non-discriminatory criteria;
- Accessible to all interested parties;
- Data required can be provided with reasonable effort by normally diligent economic operators, including operators from third countries.

Where common EU methodology developed, must apply this:
Currently only applies under Directive 2009/33/EU (Clean Vehicles Directive)

This provides monetary values and lifetime mileage assumptions to be applied in the calculation of life-cycle cost for road transport vehicles (passenger cars, vans, buses)

Means of
proof



What can you check?

In general, it is up to the contracting authority to satisfy itself that its requirements have been met and to evaluate cost/quality

The principles of **equal treatment** and **transparency** apply:

- If you accept/reject evidence from one bidder, the same should be done in relation to others *unless they are objectively in a different situation*
- You must follow the rules you have set out in procurement documents – *be careful about including mandatory conditions!*

Exhaustive list of evidence which can be requested for exclusion/ selection criteria, verification of award criteria is more open

Using (eco)labels

To define and verify compliance with technical specifications, award criteria or contract clauses

Cannot require a **specific** label but can require third-party certification unless operators have no opportunity to obtain this for reasons not attributable to them

Labels must be:

- based on objectively verifiable and non-discriminatory criteria **linked to the subject matter of the contract**;
- established in open and transparent procedure in which all relevant stakeholders may participate;
- accessible to all interested parties;
- requirements set by a third party over which operators applying for the label cannot exercise a



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Place of Farming



Test reports and certificates

Test reports and certificates of conformity may be relevant for GPP, either instead of or in addition to a product label

Art. 44 of Directive 2014/24/EU rules on certificates:

- May 'require' certificate from conformity assessment body, but must accept equivalents
- Must accept technical dossier **if** operator was not able to obtain certificate within relevant time limits **and** the dossier proves compliance with the specifications, award criteria or contract performance clauses

No explicit LtSM requirement for certificates and test reports, but they can only be **required** for verification of criteria which must have LtSM

Contract
performance
clauses



Art. 70 of Directive 2014/24/EU, contract clauses “may include economic, innovation-related, environmental, social or employment-related considerations.”

Must be linked to the subject-matter and explicitly mentioned in procurement documents

Rules apply to modifications to contracts (Art. 72) – but in practice *not all contract terms can be fully known in advance*

If it is proposed to allow negotiation on contract terms or to evaluate variants (e.g. to test the effect on price or quality of different delivery periods), this needs to be clear from outset

Otherwise, conditional bids should be rejected

Application

GPP contract clauses may:

1. Enforce bid commitments
2. Allow for monitoring, penalties or incentives
3. Encourage continuous improvement and innovation



Examples

In a catering service contract, a requirement to monitor food waste and achieve a percentage reduction against benchmark

In a data centre contract, a shared incentive relating to energy efficiency, e.g. client keeps first 10%, contractor anything above

Contract clauses are seldom self-fulfilling prophecies – most need supervision and good working relations between

Summary

- ✓ Legal and practical concerns (costs, competition, time) often drive procurement processes
- ✓ For GPP to be successful, these concerns need to be understood both by contracting authorities and NGOs
- ✓ 2014 EU procurement directives reinforce possibilities for GPP – but very few mandatory requirements
- ✓ Main effect may be increase in transparency of procurement processes due to new publication requirements
- ✓ Future CJEU judgments may help to clarify and support GPP

- *Buying Green Handbook* (3rd edition, 2016), EU GPP website <http://ec.europa.eu/environment/gpp>
- *Procura+ Manual* (3rd edition, 2016)
www.procuraplus.org
- Many online tools and criteria – most can be accessed via the Sustainable Procurement Resource Centre
www.sustainable-procurement.org or SCP clearing house
www.scpclearinghouse.org
- Ask for help on the Procurement Forum
www.procurement-forum.eu or via GPP Helpdesk

Thank you.

Questions/Discussion



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Roundtable Topics

1. Communicating on GPP (Estela)
2. Measuring the environmental impact of GPP (Péter)
3. Identifying opportunities for GPP (Abby)
4. Connection between GPP and sustainable economy (Livia)
5. How to identify green products/services (Simon)