

Strelia ESG Series

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From Policy to Practice: ESG Integration in Public Procurement

Sustainability, environmental considerations, and public procurement. These are three of the hottest topics in the business world nowadays. They have prompted the EU and national legislatures and authorities to take steps towards transitioning to a sustainable economy in the field of public procurement, or what is also known as green public procurement.

At EU level, for example, these growing concerns were reflected in the recital of Directive 2014/24/EU on public procurement: *"Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life, the preservation of plant life or other environmental measures, in particular with a view to sustainable development, provided that those measures are in conformity with the TFEU."*

In Belgium, at national level, environmental concerns have also been addressed through various recommendations and measures. In this regard, federal authorities issued an action plan for a circular economy for 2021 to 2024. This plan aims to leverage the circular economy's potential for innovation, job creation, well-being, and competitiveness in Belgium while consolidating the country's position in this domain. Specifically, within the field of public procurement, the action plan seeks to enhance contracting authorities' knowledge of circular public procurement practices. In addition, the federal authorities also adopted a government circular on 6 May 2014 concerning the integration of sustainable development in the context of public contracts awarded by federal contracting authorities. Moreover, each of the three Belgian regions have taken different initiatives towards fostering a circular economy. For example, the Brussels-Capital Region enacted an ordinance on May 8, 2014, mandating the integration of environmental and ethical clauses in public contracts. Similarly, the Flemish Region implemented an action plan in 2016 to facilitate the transition towards 100% green public procurement by 2020. The Walloon Region has also developed various tools to assist public authorities in their adoption of circular purchases.

Sustainability concerns can be integrated into the public procurement process at various stages:

- First, the subject-matter of the public contract is described. If appropriate, a market consultation will be conducted before the call for tender is launched. This can help determine, for example, what innovative solutions exist in the market or can give a better estimate of the life-cycle cost analysis.
- Then, and if permitted, using award criteria and variants, for example in negotiation procedures can precisely help to strive for a more sustainable solution.
- During the procurement process, it is important to bear in mind that any violation of environmental law or labour and employment law can be grounds for exclusion. Additionally, sustainability-based selection criteria can be determined if: (i) they are not discriminatory, (ii) they relate to the subject-matter of the contract, and (iii) they are proportionate to the size of the contract. Some examples of such criteria include measures regarding environmental management in the context of contract performance if such aspects

are essential (e.g., ISO 14001 certificate or equivalent for asbestos removal) or the experience and training of personnel for the construction of "green" buildings. However, one point of attention is that such selection criteria can restrict the number of companies that will submit a tender and become selected. Additionally, the contracting authority must have the necessary means to verify compliance with these specifications.

- Sustainability (requirements) can also be incorporated into the precise technical specifications regarding the subject-matter of the contract. These range from contract performance to functional requirements regarding environmental characteristics. Contracting authorities must accompany the specifications with a clear description of the relevant evidence and ensure equal access for all bidders. Social and ethical considerations cannot be set as technical specifications because they usually do not have a direct connection with the subject-matter of the contract.
- The life-cycle cost criterion is a useful consideration for assessing sustainability. Although legitimate, this criterion is not always neutral if it concerns an incumbent bidder (especially one that has previously won a similar contract and may not incur placement costs in the context of the new contract) compared to other bidders. It also implies that the contracting authority can identify and check (and limit if necessary) these costs.

Sustainability requirements can also be reflected in other award criteria as long as (i) they relate to the public contract in question, (ii) they do not allow the contracting authority to have absolute discretion, (iii) they are mentioned in the procurement documents or the specifications, and (iv) the principles of equality, transparency, and competition are adhered to. However, sustainable award criteria are beneficial only if there is an actual pursuit towards more sustainability/innovation (e.g., a certain percentage of electricity sourced from renewable energy sources). It is more difficult to determine the social award criteria, however, except for contracts with a social dimension.

The weighting given to sustainable award criteria is important for the purpose of emphasizing this aspect effectively. However, it should be noted that the stricter the award criteria, the smaller the market segment. Another way to determine sustainable variants is to combine them with a sustainable award criterion.

Contract performance conditions can relate to economic, innovation, or environmental considerations, as well as to employment or labour considerations. Employment or labour considerations are usually appropriate here. Of course, contract performance conditions must not be disguised in the specifications, selection, or award criteria, and the contracting authority must be able to verify these conditions. For this verification process, it must possess appropriate know-how and knowledgeable staff.

All of this shows that sustainability can be considered in numerous aspects of public procurement. Depending on the circumstances, companies that propose sustainable and environmental aspects in their service or product offering might therefore have a better chance of winning the public contract. But the contracting authority will need to weigh the benefits against the drawbacks. Sustainability is positive for the environment and societal fabric. However, it usually comes at a higher price, and contracting authorities must have the necessary means to assess, control, and monitor the sustainable aspects of any public tender.



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