



PROCUREGREEN

de grønne udbudsmorgener



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- Roberto Caranta, professor, University of Turin, Italy
- François Lichère, professor at the University of Jean Moulin Lyon 3, Director of the Chair on public contracts law, France
- Steven Van Garsse, professor at the Hasselt University, Belgium
- Pedro Telles, associate professor, Copenhagen Business School, Portugal



Denmark

Follow or explain on its way?

- The Minister of Business and Industry may adapt rules requiring that contracting authorities who, do not include environmental or climate considerations, must disclose the background for this in their tender materials.

Strategy for green procurement

- E.g. Elements regarding making labels mandatory
- <https://oes.dk/indkoeb/strategy-for-green-public-procurement/>

Guidance:

- <https://jura.ku.dk/sustainabilityhub/procuregreen/>

24th April 2024

GREEN PUBLIC PROCUREMENT IN FRANCE

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SUMMARY

- **Context: France's ranking in Europe in terms of green public procurement**
- **The situation in 2022 for green clauses**
- **Main obstacles to green public procurement in France**
- **Receipt of environmental objectives in France**
 - Traditional reluctance towards horizontal objectives in the French case law
 - Main obstacles to green public procurement in France
- **Recent legislative developments**
 - Law n°2021-1104, 22nd August 2021, to combat climate change and strengthen resilience to its effects, art. 35
 - Law n°2023-973, 23rd October 2023, on Green Industry
- **Results of the *Chaire de droit des contrats publics*'s research (2022)**
 - Observations on the green public procurement
 - Recommendations

Context: France's ranking in Europe in terms of green public procurement

- **France, one of European leaders in green public procurement**

Source: Jordi ROSELL, « Getting the green light on green public procurement: Macro and meso déterminants », Journal of Cleaner Production 279 (2021) 123710.

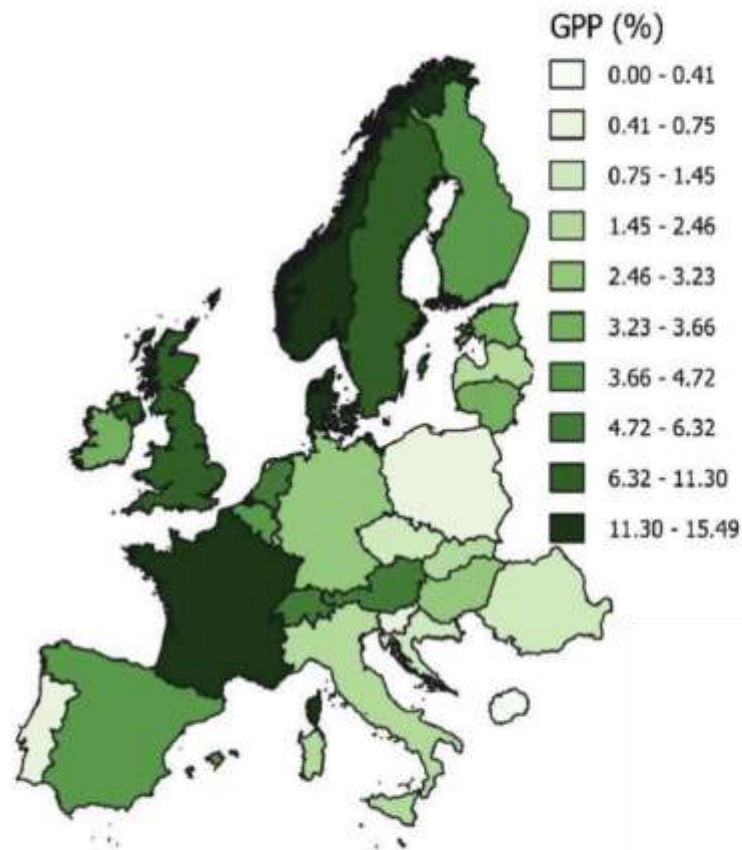


Fig. 1. GPP proportion by country.

Table A1
Correlation matrix

All years (n = 552,139)	GPP	GPA	Type of contract	GDPpc (log)	Gov. revenues	Price(log)	Year
GPP	1.000						
GPA	0.0964*	1.000					
Type of contract	-0.0433*	-0.0091	1.000				
GDPpc (log)	0.1153*	0.3437*	0.0719*	1.000			
Gov. revenues	0.1427*	0.3073*	0.0208*	0.4740*	1.000		
Price(log)	0.0352*	0.0652*	0.0108	0.1030*	-0.1128*	1.000	
Year	0.0341*	-0.0037*	0.0303*	0.0830*	0.0746*	-0.0214*	1.000

*Significant at the 1 percent level. Type of contract: Purchases (1), Works (2) and Services (3). Note: All variables are normalized.

Proportion of green criteria in MEAT contracts is 7.2%
France, Norway, Denmark: leading countries,
Portugal, eastern europe and Italy present the lower rates

The situation in 2022 for green clauses

Source: Observatoire économique de la commande publique (OECF).

- **Survey:** green considerations increased by 10 % in one year.
- **22,3% of public procurement contracts above 90 000 euros** had a green clause (18,7 % 2021). 22 % of public works contracts had such a clause (19 % for social).
- **Source:**
https://www.economie.gouv.fr/files/files/directions_services/daj/marches_publics/oecp/recensement/Chiffres-recensement2022.pdf?v=1701799209.

Main obstacles to green public procurement in France

Source: Julie ROUAULT et Carine STAROPOLI, « Enquête Achat public durable », Chaire EPPP (2018).

- Finding the **lowest price**
- **Lack of awareness** of sustainable purchasing
- **Complexity** of bid evaluation
- **Weak political and service commitment**
- No external assistance
- Change resistance
- Increased risk of unsuccessful bids

Contraintes	Moyenne [entre 1 et 4]
Augmentation du risque d'infructueux	1.916488
Résistance au changement	2.124464
Manque de volonté politique	2.138593
Complexité ajoutée à l'évaluation des offres	2.485597
Recherche du coût minimal	2.659044
Absence de volonté des managers/supérieurs	2.20339
Absence d'assistance extérieure	2.028078
Présence d'un risque juridique	1.686022
Méconnaissance de l'achat durable	2.529652

Receipt of environmental objectives in France

- **Traditional reluctance towards horizontal objectives in the French case law**

- **Environmental and Social criteria and clauses**

- ❖ **Conseil d'État, 25th July 2001, 229666, Commune de Graveline:** Illegality of a social criterion as it is unrelated to the subject matter of the contract or its performance conditions.

- ❖ **Conseil d'État, 25th March 2013, 364950, Département de l'Isère:** Slight softening but due to the legislator : award criterion: 'performance in terms of professional integration of disadvantaged groups'; Conseil d'Etat : *"in the context of a procedure for awarding a contract which, given its purpose, is likely to be carried out, at least in part, by staff involved in an integration process, the contracting authority may legally provide for bids to be assessed in the light of the criterion of professional integration of people in difficulty, provided that this criterion is not discriminatory and enables it to assess these bids objectively"*.

- ❖ **Conseil d'État, 25th May 2018, 417580, Nantes Métropole:** Continuity of the need for a link with the subject matter of the contract or the conditions of performance. In this case, criterion included sub-criteria on corporate social and environmental responsibility requirements and was deemed illegal.

Recent legislative developments

▪ Law n°2021-1104, 22nd August 2021, to combat climate change and strengthen resilience to its effects, art. 35

- **Greening public procurement:** By taking into account the factoring sustainable development objectives into technical specifications, the environmental characteristics of the offer into the award criteria and into the performance conditions of the contract.
 - **New article L. 3-1 in Code de la commande publique** to integrate the economic, social and environmental dimensions of sustainable development objectives
- **Mandatory to set up a Scheme to promote socially and environmentally responsible purchase (SPSERP):** For all public authorities with an annual purchase volume in excess of 50 million € (*Order n° 2022-767, 2nd May 2022*).
- **Exclusion grounds:** Admits the possibility for a contracting authority or a contracting entity to exclude a bidder who does not comply with the obligation to draw up a due diligence plan for the year preceding that in which the consultation is launched.
- **Others:** Obligation to **use bio-sourced or low-carbon materials** in at least 25% of major renovations and new buildings commissioned by the public sector (art. 39) ; the French government will provide buyers with **operational tools for defining and analyzing the life-cycle cost** of goods for the main purchasing segments.
- **Main problems :** article L.3.1 unlikely to have binding effect ; green criterion or green sub-criterion?; lack of precision of the content of environmental clauses, deadline for entry into force (August 2026).
- **CCAG 2021 (model clauses for public procurement contracts) :** They clarify the concept of environmental clauses and are seen as the preferred tool for greening public purchasing, but the penalties provided for in the CCAG are not dissuasive and green clause can be reduced to a minimum (examples of 'crapaupode").

▪ Law n°2023-973, 23rd October 2023, on Green Industry

- **Promoting environmentally-friendly products :** possibility of being excluded from public procurement contracts of economic operators who fail to meet their obligations to publish a greenhouse gas emissions report and a transition plan (a duty only for big firms) ; extension of the duty to establish a SPSERP to any contracting authorities or entities; precision of its content : 'notably reduce greenhouse gas emissions and the consumption of energy, water and materials'
- **New definition of green criterion :** 'criterion including qualitative, environmental or social aspects'; not sure it clarifies the ambiguity

Results of the *Chaire des contrats publics*'s research (2022)

■ Observations on the green public procurement

- **Increased use of the *Scheme to promote socially and environmentally responsible purchasing (SPSERP)* by local public purchasers:** definition of a public environmental purchasing policy, determination of environmental objectives, establishment of environmental governance.
- **Local purchasing:** using environmental considerations to encourage local purchasing.
- **Importance of defining needs:** skills required of public officials.
- **Varied practices regarding environmental criteria in works contracts:** imprecise content of criteria, own rating criterion or sub-criterion of technical value, difficulties for drafting and monitoring (lack of means to check the effectiveness of measures implemented by bidders).
- **Obstacles:** lack of time and skills to design environmental criteria and clauses, legal obligation to link an environmental criterion to the subject of the contract.

■ Recommendations

- **Include quantified indicators in the SPSERP for:**
 - the number of social and environmental award criteria included annually in contracts awarded by the local authority or purchaser;
 - the number of social and environmental clauses included annually in the contracts awarded by the local authority or purchaser.
- **Set up a governance council:** for each local public purchaser to monitor the effectiveness of the SPSERP.
- **Reinforce employee training.**



➢ [Read the research.](#)

24th April 2024

THANK YOU!

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**SAPIENS
NETWORK**

Overview

- Intro
- Hard Law
- Soft Law
- Conclusions

Intro

- Belgium – Flanders
- Frontrunner in green public procurement
 - Why:
 - Interesting case law? No....
 - Interesting hard law (for example sectoral obligations). No...



- Federale country - Regions
 - Sectoral Hard Law: complicated: because competences are divided between federal state and regions
 - But, federal government is responsible for general public procurement law: transposition of art 18 directive....

Respect du droit environnemental, social et du travail

- Art. 7. Les opérateurs économiques sont tenus de respecter et de faire respecter par toute personne agissant en qualité de sous-traitant à quelque stade que ce soit et par toute personne mettant du personnel à disposition pour l'exécution du marché, toutes les obligations applicables dans les domaines du droit environnemental, social et du travail établies par le droit de l'Union européenne, le droit national, les conventions collectives ou par les dispositions internationales en matière de droit environnemental, social et du travail énumérées à l'annexe II.
- Sans préjudice de l'application des sanctions visées dans d'autres dispositions légales, réglementaires ou conventionnelles, les manquements aux obligations visées à l'alinéa 1er sont constatés par l'adjudicateur et donnent lieu, si nécessaire, à l'application des mesures prévues en cas de manquement aux clauses du marché.

Hard Law

- Economic Operators are required to respect all obligations applicable in the areas of environmental, social, and labor law established by European Union law, national law, collective agreements, or by international provisions in the field of environmental law etc... They also have to see to it and take all necessary measures that any person acting as a subcontractor at any stage and any person providing staff for the execution of the contract, respects those provisions
- Without prejudice to the application of sanctions provided for in other legal, regulatory, or contractual provisions, failures to comply with the obligations referred to in the first paragraph shall be noted by the contracting authority and shall, if necessary, give rise to the application of measures provided for in the event of non-compliance with the contract clauses.

Soft Law,...

- Soft Law: ministerial circular

Omzendbrief. - Integratie van duurzame ontwikkeling, met inbegrip van sociale clausules en maatregelen ten voordele van kleine en middelgrote ondernemingen, in het kader van overheidsopdrachten geplaatst door federale aanbestedende instanties, 16 mei 2014.

- Coordination: because of its importance BE and regions invested a lot in coordination of SPP & knowledge & capacity building

Soft law & other initiatives

- Interdepartmental commission for sustainable development
 - Working group on SPP
- Integrated policy/policies for public procurement, ex. created in Flanders
- Standard clauses created, for example on packaging
- Sector Risk & maturity analysis, sectoral documents to share knowledge in specific sectors, hands on info on how to draft specs, , award criteria, etc.

Soft law & other initiatives

- Very specific initiatives taken to support innovation and capacity building
- Example Flanders Circular
 - Framework policy program, very successful, later on transformed into a PPP
 - Under this program subsidies were granted, assistance was provided to set up and to stimulate circular economy including circular public procurement, legal obstacles were identified as were solutions to solve them...

OVAM/Flanders Circular (pictures)



- Within Circular Flanders a public-private partnership model was created involving contracting authorities, civil society, economic operators.
- Guided by a steering group
- Operational governance structured around six strategic agendas, in line with the priorities of the EU Green Deal: • circular construction; • chemistry and plastics; • water cycles; • bio-economy; • food chain; • manufacturing.
- A state of the Union event is organised annually, through which CE progress is monitored

Conclusions

- Case Law?
- Hard Law ?
- Soft law? Yes, but mostly other initiatives: coordination, capacity building, guidance, awareness raising, subsidies = key
- Policy with long and short term ambitions= key
- Stakeholdersengagement= key

Thank you

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Pedro Telles

- Pedro Telles' powerpoint can be accessed on the following link:
 - <https://sway.cloud.microsoft/vSnEuFyMWhYAXJZ8?ref=Link>

Requirements for green procurement

– The Norwegian approach

● Background



The importance of green procurement



The Norwegian public sector procures for approx. 740 billion NOK each year



Green procurement has been seen as an important tool for Norway to reach its climate and environmental goals



A development from the question *why* to *how* to take green considerations in procurement

Green requirements introduced in 2017

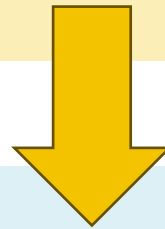
- General requirements to the procurement practices, where relevant
 - Shall be organized so that they contribute to reducing harmful environmental impact and promote climate-friendly solutions where relevant
 - CA may set appropriate requirements and criteria related to different stages of the procurement process
 - Any requirements shall be linked to the subject-matter of the contract
- Applies only to contracting authorities (CAs)
 - Not to contracting entities in the utilities sectors that are not CAs

PP Act § 5

*"State, county, and municipal authorities, as well as bodies governed by public law, **shall** arrange their procurement practices in such a way that they **contribute to reducing harmful environmental impact and promote climate-friendly solutions where relevant**. This shall, inter alia, be achieved by the contracting authority taking into account life cycle costs. (...) The contracting authority **may** set suitable **requirements and criteria related to different stages** in the procurement process, so that public contracts are carried out in a manner that **promotes environmental considerations**, innovation, labor conditions, and social conditions, provided that the requirements and criteria are **linked to the subject-matter of the contract**."*

All three PP Regulations (*FOA § 7-9 / FIF § 7-9/ KKF § 7-6*)

“The contracting authority shall emphasize minimizing environmental impact and promoting climate-friendly solutions in its procurements and may set environmental requirements and criteria in all stages of the procurement process where it is relevant and related to the subject-matter of the contract. **Where environmental criteria are used as award criteria, they should, as a general rule, be given a weight of at least 30%.**”



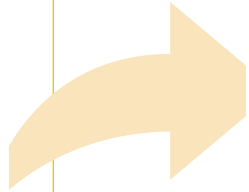
- “Soft” regulations
- But too little progress was made

Political aspirations: Competing for the environment

- The political platform of the government (Hurdalsplattformen) from 2021
 - «The government will: (...)
 - *Weight climate and environmental criteria with a minimum of 30% in PP, and higher where relevant»*
 - [Hurdalsplattformen - regjeringen.no](https://regjeringen.no)
- Report from the Office of the Auditor General (Riksrevisjonen) 3 February 2022
 - [Offentlig sektor bruker ikke innkjøpsmakten til å redusere klimagassutslipp \(riksrevisjonen.no\)](https://riksrevisjonen.no)



Report from the Office of the Auditor General

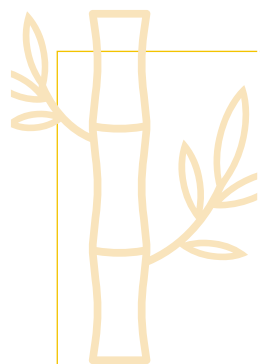


""The procurement practices of contracting authorities do not contribute sufficiently to minimizing environmental impact and promoting climate-friendly solutions"

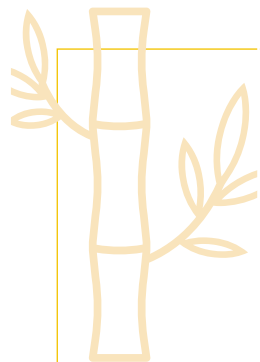


"Many contracting authorities lack a comprehensive approach to address climate and environmental considerations in procurement"

Report from the Office of the Auditor General



40% of the investigated procurements used environment as an award criterion



In only 21% of these (i.e. just under 10% in total), the environmental criteria were given a weight of at least 30%.

● The new rules – an overview

New regulations as of January 1 2024

- **Main rule: Green award criteria to be weighted at least 30%**

*(1) Requirements and criteria under this provision shall **aim to reduce the total climate footprint or environmental impact** of the procurement.*

(2) The contracting authority shall give climate and environmental considerations a weight of minimum of 30%

(3) Where the contracting authority specifies the award criteria in a prioritized order, climate and environmental considerations should be among the top three priorities.

(4) Award criteria according to the second and third paragraphs may be replaced by climate and environmental requirements in the specifications if it is clear that this will result in a better climate and environmental effect, and this is justified in the procurement documents. If the contracting authority does not prioritize in accordance with the third paragraph, climate and environmental requirements must be set in the specifications, and this must be justified in the procurement documents.

- **Exceptions from green requirements**

(5) The obligation to set requirements or criteria under this provision does not apply if the procurement by its nature has an insignificant climate footprint and environmental impact, and this is justified in the procurement documents.

Award criteria

*“The contracting authority **shall** award the contract based on **the best price/cost-quality ratio**. If climate and environmental considerations are not used as award criteria according to § 7-9 (2), the contracting authority may also award the contract based on the lowest price or the lowest cost.”*

- As a main rule, it is no longer allowed to use «lowest price/cost» as the sole award criterion
- The same regulations apply to all sectors and to all contracting authorities and contracting entities

- **The main rule – weighting of at least 30%**



The main rule

- Weighting of green award criteria of at least 30%
 - All procurements
- Where criteria are not weighted, but indicated in order of importance → **Should** be among the three highest prioritized

Above EU/EEA-thresholds:

- Main rule: 30%
- Narrow exception: Prioritizing “*where weighting is not possible for objective reasons*” (Art. 67 (5))

Below EU/EEA-thresholds:

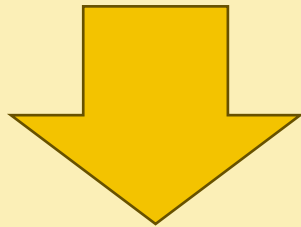
- Main rule: Award criteria to be given in order of importance
 - If CA chooses to weight → the 30%-rule apply
 - Will CAs choose to prioritize rather than weight?

*(2) The contracting authority **shall** give climate and environmental considerations a weight of **minimum of 30%***

*(3) Where the contracting authority specifies the award criteria in a **prioritized order**, climate and environmental considerations **should** be among the top three priorities.*

Which green criteria to use?

- Freedom to choose which criteria to use?
- Possible to link only to parts of the procurement?



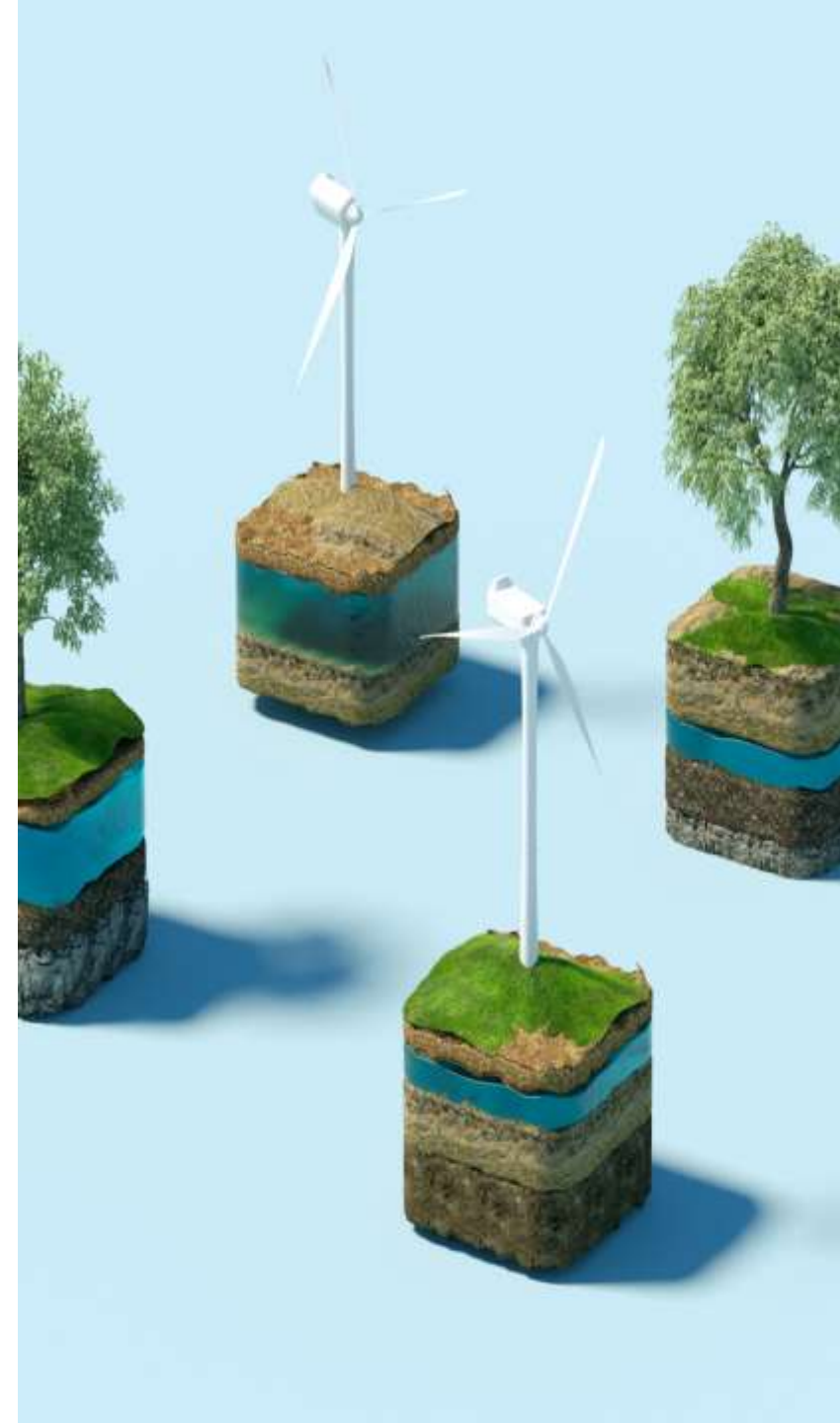
Define what constitutes the greatest environmental impact and define desirable goals

- **Possible criteria, e.g.:**

- Reduction of greenhouse gas emissions
- Low fuel consumption / low energy consumption
- Reduction of other environmentally harmful substances
- Reduction of pressure on the use of non-renewable resources
- Possibility of reuse
- Products that are manufactured in an environmentally friendly way (e.g. proportion of recycled material, proportion of bio-based material)
- Reduction of waste / waste management
- Preservation of biodiversity
- Prevent the spread of alien species
- Noise level

How to finance green procurement?

- So far, the signals are that CAs will not receive additional funding
- How to avoid terminated procedures due to too high prices?
 - Rejection of tenders exceeding the budget?
 - Termination of procedures where all tenders exceed the budget?
 - How to balance the requirement of green criteria with the lack of willingness to pay?



● Exceptions



The technical specification exception

CAs can use technical specifications when it is clear that this will provide a better climate and environmental impact

But when is it clear?

- Not a requirement for a clearly better impact
«Sufficient if setting climate and environmental requirements in the requirements specification will have a marginally better effect»
- “Apply or explain” – a «*relatively strict requirement of proof*»
- For example, where the suppliers delivers the same level of compliance – using award criteria entails a risk that a tender with no green elements wins on price

*(4) Award criteria according to the second and third paragraphs may be **replaced by climate and environmental requirements in the specifications if it is clear that this will result in a better climate and environmental effect, and this is justified in the procurement documents***

Exception where insignificant impact

- No green requirements where the procurement by its nature has a climate footprint and an environmental impact that is **insignificant**
- When is the impact insignificant?
- Primarily office-based services where the human resources are the main element, e.g.
 - Legal services
 - Consulting services
 - Accounting services
 - Training and education services
 - Archive and documentation services
 - Security services

*(5) The obligation to set requirements or criteria under this provision does not apply **if the procurement by its nature has an insignificant climate footprint and environmental impact, and this is justified in the procurement documents.***

● Guidance



Online guidance from the Norwegian Agency for Public and Financial Management (DFØ)

5.05.2024



[Veileder til regler om klima- og miljøhensyn i offentlige anskaffelser | Anskaffelser.no](https://anskaffelser.no)

[Kriterieveiviseren \(anskaffelser.no\)](https://anskaffelser.no)

1. Innledning
2. Regelverkets formål og sentrale momenter
3. Anskaffelsesforskriften – reglene som gjelder
4. Forsyningsforskriften – reglene som gjelder
5. Konsesjonskontraktforskriften – reglene som gjelder
6. Klima- og miljøkrav i kravspesifikasjonen
7. Anskaffelser som etter sin art har uvesentlig klimaavtrykk og miljøbelastning
8. Utforming av krav og kriterier, evaluering og kunngjøring
9. Bygg, anlegg og eiendom – bruk av reglene
10. Veigående transport – bruk av reglene
11. IKT-utstyr – bruk av reglene
12. Mat og måltidstjenester – bruk av reglene
13. Møbler – bruk av reglene
Vedlegg 1 Evalueringsmetodikk

● **Is this going too far?**



Proposal for new legislation

- CAs shall map the overall climate footprint and environmental impact and assess how the procurement can be structured to limit the overall impacts
- CAs shall impose green requirements in the technical specifications
 - Should provide a real climate/environmental benefit, without incurring disproportionate additional costs for the CA
 - Does not apply if insignificant climate footprint and environmental impact
- CAs shall also impose green requirements or criteria in other stages, if it provides additional green benefits without incurring disproportionate costs for the CA

Ny lov om offentlige anskaffelser

Første delutredning



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