



Enforcement and development of green contract conditions

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PROCUREGREEN



Enforcement of GPP

WP 3

"Will analyse contract clauses and monitoring arrangements to establish whether contracting authorities follow up on the green requirements and how they do so and examine how contractual measures can be applied in the event of non-compliance with green criteria in the contracts."

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

Paper – draft – for Nottingham – Global Revolution – June 2024

Enforcement and development of green contract conditions

- **Enforcement of green contract conditions**
- Making sure the contracting authority gets what the tenders promised
 - “Procurement greenwashing”
 - Contract modification – can lead to ineffectiveness
- **Development of green contract conditions**
- How the contract can develop over time to take into account new green elements and innovation
 - Innovation clauses
 - Contract review clauses

Contract modifications in Article 72

1) Enforcement of green contract conditions

- **Green contract conditions**

- 1. **Contract performance conditions art. 70**

- “Linked to the subject matter”
 - Must be stated in the procurement documents
 - Procurement principles

- 2. **Procurement conditions**

- Technical specifications standards, labels etc.
 - Award criteria
 - Exclusion and selection (particular attentions to termination requirements)

- **Examples:**

- Waste minimisation or resource efficiency
 - The delivery of goods in large boxes instead of delivery as individual goods
 - That the contract requires the recycling of waste produced during or after the use of a product.
 - Conditions linked to so-called "last-mile" transport, where the transport of goods for the final trip to the contracting authority's location must be done by emission-free vehicles
 - Many, many more...

1) Enforcement of green contract conditions

- **To enforce:**
- Need to know what applies in the contract
 - Contract management - compliance
 - Investigations/checks/new documentations
 - Contract law - interpretation
 - Labels..
- What is the consequence?
 - Penalty? Termination?
 - Not necessarily good for cooperation/contractual relationship – but it can potentially be necessary to avoid it being a contract modification



1) Enforcement of green contract conditions

- **Danish practice**
- Not enforcing minimum criteria leads to ineffectiveness
- Decision of 19 May 2020, Alsvognen I/S mod Fynbus, Sydtrafik og Midttrafik
- Decision of 27 October 2020, Øens Taxa v. Fynbus, Sydtrafik og Midttrafik
- February 1m 2023, DKK Plastics ApS v. AffaldPlus I/S
- **NB. Ineffectiveness**
- Direct award
- Not automatic – need to complaint
- Economic sanction

2) Development of green contract conditions

Review Clauses

Art. 72, not a modification of the contract if:

the modifications (...) have been provided for in the initial procurement documents in **clear, precise and unequivocal** review clauses

Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used.

They shall not provide for modifications or options that would alter the overall nature of the contract or the framework agreement;

Decision of 27 June 2017, *CFD v. Den Nationale Tolkemyndighed*,

a reference to general rules on debtor change was not sufficient

SKI example:

”Change of product must take place as a result of certifications, standards, sustainability or technological development of the Products, if the Supplier sells/markets a new variant/configuration/version/model/generation of a Product that is in the Framework Agreement's assortment

The Supplier may, however, maximally expand the Framework Agreement's range of Products with 10 percent new Products in relation to the number of Products in the Supplier's offer.

2) Development of green contract conditions

Innovation clauses

Not regulated in the procurement rules

How the contract can develop over time to take into account new green elements and innovation

Cooperation in the contract phase – a requirement that e.g. the supplier develops certain elements of the contract over time (in a green context)

Examples:

Cooperation to reduce food waste, to clean more green



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Penalties

Bonuses

Contract modifications in Article 72

Questions & comments?