



**SAPIENS
NETWORK**

Enforcing Sustainability in Public Procurement through Effective Contract Management

11 July 2024

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WP1 Sustainable Public Procurement: from the international agenda to actual buying
practices



This project has received funding from the European Union's Horizon 2020 research and innovation programme under the Marie Skłodowska-Curie grant agreement No 956696.

ENFORCING SUSTAINABILITY IN PUBLIC PROCUREMENT THROUGH EFFECTIVE CONTRACT MANAGEMENT

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July 2024

Target Audience: This policy brief is predominantly addressed to public buyers at all levels incorporating sustainability considerations in their procurement contracts. Additionally, it may also prove helpful for public procurement practitioners.

Executive Summary

Public procurement in Europe holds immense potential for positive change, however, the gap between “what was promised” and “what is delivered” undermines this potential. Contracting authorities should be aware that failure to enforce sustainability commitments promised under submitted tenders may be detrimental to the competitive procedure. In designing their contracts, public buyers should adopt a “three-step enforcement” -consisting of (i) contract monitoring, (ii) relational enforcement and (iii) termination as a last resort- .

Introduction

Sustainability has become a crucial pillar of responsible business conduct in today's world. As most recently seen in the legislative process leading to the Corporate Sustainability Due Diligence Directive¹, businesses face increasing demands to uphold social and environmental responsibility. As recently reiterated by the Court of Auditors, in Europe, public procurement amounts to approximately €2 trillion per year; this accounts for 14% of the GDP of the Union.² Under these circumstances, public buyers in Europe hold the capacity to answer some of the challenges faced by today's society through their procurement and to contribute to a better future. Nevertheless,

¹ Directive 2024/1760 of the European Parliament and of the Council of 13 June 2024 on on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L 2024/1760, 5.7.2024.

² European Court of Auditors, ‘Special Report Public procurement in the EU Less competition for contracts awarded for works, goods and services in the 10 years up to 2021’ 28/2023 (2023).



the potential of integrating sustainability into public procurement is undermined when contracts are not coupled with efforts focusing on the contract management phase.

Definition of the Problem

By procuring products and services aligned with sustainability goals, public buyers send a compelling message that sustainability is not a choice but an essential driver of responsible business conduct. However, tenderers may submit generous tenders without genuine intent to fulfil them; and the actual cost of these promises is not reflected in respective tenders, once the contract is awarded either they rely on future contract changes or hope that failure to keep up to their promises goes unnoticed. Unless public buyers can ensure that contracts awarded to the most economically advantageous tenders maintain their status post-award, SPP merely becomes an enabler of greenwashing and social washing. Resorting to litigation for failure to comply with horizontal considerations is neither practical nor upholds the underlying aim of SPP. The uptake of the potential impact of sustainability commitments undertaken by the successful tenderers depends on strict adherence to the standards during the execution of a public procurement contract.

How does this Research Contribute?

- Compares the use of sustainability considerations in private procurement to public procurement
- Clarifies the obligations incumbent on public buyers in the contract performance stage

Key Findings and Recommendations

The contract performance phase of a public procurement contract is not explicitly regulated under the Public Sector Directive. However, non-compliance with sustainability criteria may be detrimental to the procurement procedure. The failure of the contracting authorities to enforce sustainability criteria in contract performance not only falls short in delivering SPP goals but also such implicit waiver of sustainability obligations breaches the principle of equal treatment leaving contracting authorities vulnerable to litigation from interested parties.³

In the enforcement of sustainability clauses in business contracts, three-step enforcement is suggested as best practice⁴ For SPP to deliver its potential, sustainability criteria used in

³ Ezgi Uysal, 'Contract Compliance for Sustainable Public Procurement – To Monitor or Not to Monitor' SAPIENS Working Paper April 2024 (2024).

⁴ Kateřina Peterková Mitkidis, 'Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirements' [2014] Nordic Journal of Commercial Law 2, 2.



procurement contracts *should* be coupled with three-step enforcement tools *i.e.* monitoring (soft enforcement), relational/informal enforcement and termination. Contract monitoring through different tools allows transparency throughout the execution of the contract. Yet, regardless of the chosen monitoring tool, monitoring cannot, alone, guarantee compliance throughout the contract performance. This requires relational enforcement tools to be used in case of non-compliance and resort to termination where necessary.

Three-Step Best Practice for Contract Management

	STEPS	PURPOSE	TOOLS
STEP 1	Monitoring	Transparency Prevention	Self-declarations Audits by contracting authority Third party labels and certification
STEP 2	Relational/Informal Enforcement	Correction Progress Collaboration	Meetings/Guidance and KPIs Self- Cleaning and Corrective Action Plans Improvement/Staircase Clauses Financial Incentives Penalty Clauses
STEP 3	Termination	Disengagement	Termination clauses triggered upon persistent breaches Potential Loss of Future Contracts

