

# Sustainability through

**S**USTAINABLE PUBLIC PROCUREMENT (SPP) is about improving the efficiency of public procurement and at the same time using public authority market power to bring about major environmental, social and economic benefits locally and globally. Communities all over the world are facing the dramatic consequences of climate change, excessive use of natural resources, threats to biodiversity and increasing poverty. These problems cannot be tackled without making the shift to more sustainable production and consumption practices. If the billions of public Canadian dollars, US dollars, Euros, Pounds or other were spent on products and services that foster sustainable development, a huge step forward could be made.<sup>1</sup>

Government procurement could have a large impact in Canada. It has been estimated that all levels of government in Canada purchase approximately C\$100 billion.<sup>2</sup> The federal government alone (excluding Crown corporations) is the single largest public sector purchaser in Canada with annual spending of over \$13 billion on products and services.<sup>3</sup> The public sector has significant purchasing power to drive the market towards the supply of sustainable products and services, however, this can only be achieved if the thousands of public sector actors work together to send a clear, unified signal to the market.

## ICLEI's Sustainable Procurement Campaign – Procura<sup>+</sup>

Procura<sup>+</sup> is an initiative designed to help support public authorities across Europe in implementing sustainable procurement – and help promote their achievements.

The campaign promotes sustainable procurement in order to bring about real change on the market in the supply of cost effective sustainable products and services, and drive innovation and provide a launching pad for new sustainable technologies. To achieve this, the campaign:

- provides practical assistance, criteria and tools on how to integrate sustainability into procurement;
- exchanges information on sustainable procurement;
- promotes sustainable procurement to international decision makers; and

- engages with manufactures and suppliers to develop sustainable products and services.

Procura<sup>+</sup> was developed to assist public authorities overcome barriers when implementing SPP including:

- lack of political support;
- perception that sustainable products cost more;
- lack of practical tools and information;
- the need for systematic implementation and integration into management systems;
- lack of training; and
- lack of co-operation between authorities.

One of the key barriers public authorities face when implementing SPP is how to include environmental criteria into the tendering process. Therefore Procura<sup>+</sup> is based around assisting public authorities to apply a set of ready prepared and easy-to-use sustainable criteria for six high-priority product groups – electricity, buses building construction and renovation, IT equipment, food, cleaning products and services. The criteria have been designed to be legally compliant and straightforward for any procurer to apply and verify, requiring

states (MS) is defined by the *EU Public Procurement Directives* from 2004, for purchases above a certain amount (threshold), and national procurement law, below these amounts. All MS public entities are obliged to respect the principles of the *European Commission Treaty* during their procurement no matter what size of contract is to be awarded or which laws govern it (national or European).

The most relevant principles of the *EC Treaty* for procurement are the following:

- the principle of freedom of movement of goods;
- the principle of freedom to provide services;
- the principle of non-discrimination;
- the principle of equal treatment;
- the principle of proportionality; and
- the principle of transparency.

Environmental criteria can be included in tender documents without contravening national legislation, as long as these principles are followed.

The *Procurement Directives* in Europe define clearly where and how environmental criteria can be introduced in tender documents. Those sections are also defined in most MS national laws and are as follows:

1. the subject matter of the contract;
2. the technical specifications for the product/work/service;

## The European public sector “greens” procurement with the support of the Procura<sup>+</sup> Campaign

minimum time and effort and not leading to a significant increase in costs.<sup>4</sup>

### Environmental Criteria in Tendering

Much of the Procura<sup>+</sup> work has been undertaken in Europe and is based on regulations in Europe. Accordingly, the focus of this article is generally restricted to including environmental criteria in tendering with regards to procurement regulations of Europe. This section provides a synopsis of the chapter “Including Environmental Criteria in Tendering” taken from *The Procura<sup>+</sup> Manual: A Guide to Cost Effective Sustainable Public Procurement*.<sup>5</sup>

The awarding of public procurement contracts is regulated by laws that aim to protect both the procurer and the contractor.

In the European Union (EU), the legal framework for procurement in member

3. the selection criteria for candidates;
4. the contract award criteria; and
5. the contract performance clauses.

### 1. Definition of the subject matter of the contract

The subject matter of a contract is what is going to be purchased by the public authority. Procurement laws define how to carry out public procurement but they do not define what to buy, allowing freedom for authorities to choose what they wish to procure.

To include environmental requirements in tendering then, this needs to be in the subject matter so that the process is completely transparent. The only safeguard that needs to be taken is that the definition of the subject-matter cannot be discriminatory, i.e., goes against the *EC Treaty* principles. For example, you can state that you want to buy “energy-efficient computers,” but you cannot state that you want to buy “Energy Star certified

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by Mark Hidson

computers” as you are discriminating, not giving equal treatment to all proposals because you demand a specific certification.

## 2. Drawing up technical specifications

Contracting authorities must translate the subject matter into measurable technical specifications that the product/service must fulfil. These requirements are compulsory; if an offer does not comply with them, it will be automatically rejected. Technical specifications can be defined in terms of:

### a) Environmental technical standards and ecolabel criteria

This is the most common approach. There are several European or national technical standards or specifications such as the ones developed by the CEN (European Committee for Standardisation) and ecolabels. In this case, each reference shall be accompanied by the words ‘or equivalent’, as the procurer cannot reject a tenderer who can prove that their product or service meets the standards mentioned in an equivalent manner. You cannot demand that the product possesses a certain ecolabel (this is considered discriminatory) – only that it complies with the criteria.

### b) Performance or functional requirements

Technical specifications do not need to be expressed in too much detail. An example of such a specification could be the following:

*“Indoor air conditions in a building: inside temperature between 18-22°C during winter and 26-28°C during summer and a relative humidity of 50%.”*

In this case, the bidder may choose any method for achieving the requirement without having to follow very specific technical specifications for the heating/cooling systems that will be used.

### c) Production and process methods

When purchasing products, contracting authorities can also set criteria based on specific materials that should or should not be included in them, as well as the process and production method of the products.

For example, you can demand that:

- paper is produced without the use of chlorine (TCF);

- food is organically produced (without the use of chemical pesticides and fertilizers) in compliance with EEC Regulation 2092/91 of 24 June 1991 and 1804/99/EC; and
- electricity is generated from renewable sources.

### d) Use of variants

When the award criterion used is the most economically advantageous offer (see Awarding the contract below), contracting authorities can ask tenderers to submit “variants.” These allow the comparison of products meeting different sets of technical specifications, using the same evaluation criteria.

This is a very useful tool, especially if the contracting authorities are not sure whether the services/works/products they want to purchase are available on the market or if they are not sure about their quality or price. The use of variants must be indicated in the published tender.

The contracting authorities can use variants by:

1. Setting the minimum (non-environmental) requirements of the product/service to be bought. This represents Variant 1 – the “neutral” offer;
2. Setting additional environmental specifications (as well as the minimum requirements from Variant 1) for the product/service to be bought. This represents Variant 2 – the “green” offer.

Only offers that fulfil at least the minimum requirement are taken into consideration. When the bids are opened, the contracting authorities can compare between conventional solutions and environmentally friendly options based on the same set of award criteria.

### 3. Selection criteria for the candidates

The selection criteria that a public authority can specify in tenders are threefold: exclusion criteria, technical capacity criteria and financial capacity criteria. Only in the first two can environmental aspects be included:

#### a) Exclusion criteria

For example, if the company is bankrupt or has been wound up, has been found guilty of corruption or of fraud

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or has not paid taxes or social security contributions. Companies can also be excluded for environmental reasons.

#### b) **Technical capacity criteria**

These usually include proof of the experience of the tenderer, a list of relevant projects implemented, a description of technical facilities, etc. Such criteria must always be linked to the subject matter or the execution of the contract at stake.

As far as environmental selection criteria are concerned, these can only be used if specific environmental experience is needed to fulfil the contract.

#### 4. Awarding the contract

The last stage of the procurement procedure is the contract award. In this stage, the contracting authorities evaluate the quality of the offers that complied with the technical specifications in order to choose the most appropriate one. There are two ways of awarding a contract, based on:

##### a) **Lowest price**

The final decision is based solely upon the price of the bids. Therefore, if no environmental criteria have been defined in previous stages, you will not have the opportunity to include them in this stage.

##### b) **Most economically advantageous offer**

Other award criteria can be taken into account, along with the price. These criteria may concern quality, delivery date, technical merit or environmental characteristics for example. It is very important that environmental award criteria are:

- related to the subject-matter;

- objectively quantifiable;
- weighted in relation to the other award criteria (arranging them in decreasing order); and
- clearly defined in the tender documents in order to guarantee transparency.

It is possible to include environmental award criteria even if you have also included environmental minimum standards in the specifications – this provides an opportunity to reward even better performance.

#### 5. Defining contract performance clauses

Finally, public authorities can also introduce environmental criteria in the contract performance clauses – i.e., the rules for how a contract must be carried out. These clauses do not have any influence on the awarding of the contract, however, they need to be set out explicitly in the call for tender and clearly related to the performance of the contract.

The contract performance clauses can only relate to the manner in which the contract is carried out. This means that they cannot be “disguised” technical specifications, award criteria or selection criteria and all potential bidders should in principle be capable of complying with them. No means of proof can be requested during the tendering phase.

The contractor is obliged to follow these conditions when carrying out the work or supplying the contracts. If they fail to do so, the contracting authority can either set a financial penalty or even seek the cancellation of the contract.

#### **The Procura<sup>+</sup> Manual**

The above text is a summary of one of the chapters taken from an implementation guide for authorities called *The Procura<sup>+</sup> Manual: A Guide to Cost-Effective Sustainable*

*Public Procurement*. The manual presents guidance on how sustainability concerns can be integrated into the procurement process, providing both a model for developing and managing the process and the purchasing criteria for the six high-priority product groups.

Procura<sup>+</sup> has provided a platform to raise the profile and importance of SPP as well, playing a part in setting the framework at a European level. It has allowed a greater increase in exchange and networking through information, events, tools and publications, as well through freely available guidance on implementing SPP.

Given the increasing political support for sustainable procurement, there should be high expectation that procurement will be used as a quick and practical way of tackling many of the environmental, social and economic problems we face today. However, it is still only a minority of public authorities that are implementing SPP and the potential is far from being fully utilized. Procura<sup>+</sup> can be used as a stimulus for starting and further developing this potential.

If you are interested in further information or joining the Procura<sup>+</sup> Campaign, contact the Campaign Manager Mark Hidson. The manual is available in English, Catalan, French, German, Greek and Italian at [www.procuraplus.org](http://www.procuraplus.org).

<sup>1</sup> *The EcoProcura Call for Action – Moving the Market*, Barcelona, September 2006.

<sup>2</sup> *Overview of Canadian Government Procurement Law* by Robert C. Taylor And Lisa M. Bolton Number 42 • Volume 1 • Fall 2006 • American Bar Association • *The Procurement Lawyer*.

<sup>3</sup> <http://www.greeninggovernment.gc.ca/default.asp?lang=En&n=256986C5-1>.

<sup>4</sup> Clement, S; Defrancheschi, P; Hidson, M. (2007) *The Procura<sup>+</sup> Campaign – Driving sustainability through public procurement*, ICLEI – Local Governments for Sustainability, Freiburg Germany.

<sup>5</sup> Clement, S et al (2007) “*The Procura<sup>+</sup> Manual: A Guide to Cost Effective Sustainable Public Procurement*”. ICLEI – European Secretariat GmbH, Freiburg, Germany.

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