



Legal Framework for GPP

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Overview

- Objectives and relevant law for GPP
- Procurement procedures and stages
- Ecolabels and other certifications
- Information sharing and conflicts of interest
- Common challenges

Objectives
&
Relevant Law



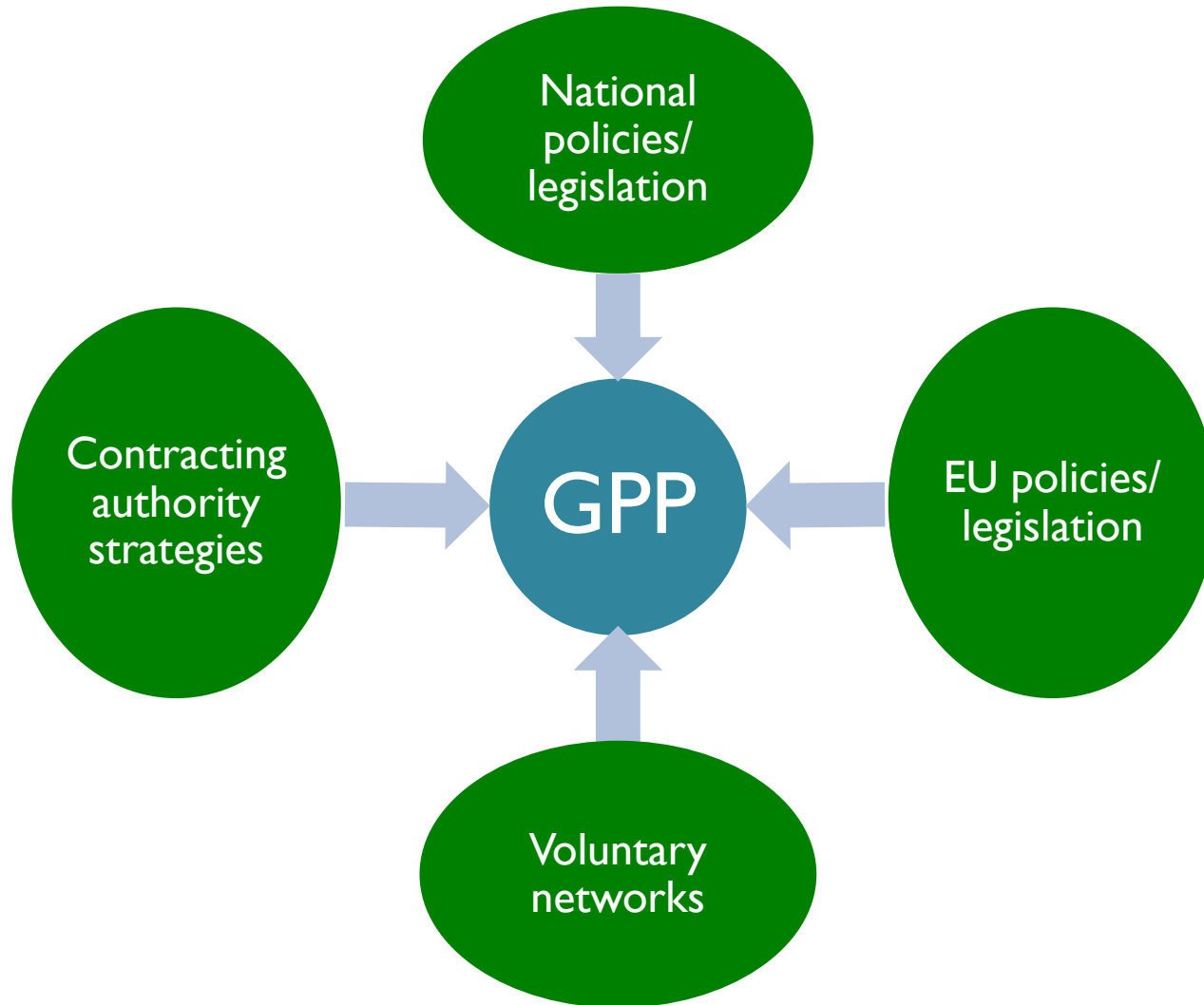
Objectives of GPP

- GPP is normally defined as procurement which aims to reduce the environmental impact of goods and services purchased by (or for) the public sector over their life-cycle.

This implies various objectives, for example:

- Reducing the volume of goods or services procured/avoiding waste
- Purchasing goods/services with lower embodied impacts
- Purchasing goods/services with lower in-use impacts
- Purchasing goods which are more durable, reusable or recyclable
- Rewarding companies with positive environmental records and/or penalising those with negative records

Framework for GPP



National and EU public procurement rules

Relevant law

- EU procurement directives and national implementing laws
- Sector-specific legislation e.g. Energy Star, Clean Vehicles, Timber Regulation, Energy Efficiency Directive
- Treaty on the Functioning of the European Union
- Case law of the European Court of Justice and national courts



Principles of procurement

- Non-discrimination and equal treatment (‘not treating similar situations differently, or different situations in the same way, unless such treatment is objectively justified.’)
- Transparency – particularly relevant for advertising, criteria, weightings, specifications, notification of procedures & results
- Proportionality – is a measure appropriate to achieve its objectives and does it go beyond what is needed?
- Mutual recognition – of standards, qualifications, labels

All of these have been developed under the Treaty to support free movement of goods and services, freedom of establishment

Effect of ECJ case law

Case C-243/89 *Storebaelt* – tenders which do not comply with mandatory conditions must be rejected (reaffirmed in Case C-561/12 *Nordecon*)



Case C-513/99 *Concordia Bus Finland* – environmental criteria can also form part of the evaluation of MEAT, provided they are linked to the subject-matter and adequately transparent

Case C-448/01 *EVN and Wienstrom* – Court held that award criterion based on renewable energy capacity was not LtSM

Case C-368/10 *Commission v The Netherlands (Dutch Coffee)* – Court approved social criteria (fair trade) in principle, but these need to respect rules on transparency and equal treatment.

Procurement Procedures



Choice of procedures

Directives give **contracting authorities** choice of 5 procedures:

- Open procedure
 - Restricted procedure
 - Competitive procedure with negotiation
 - Competitive dialogue
 - Innovation partnership
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- Open and restricted procedure can be used for any contract
 - CPN, CD and IP can be used for contracts which are not “off the shelf”, e.g. they involve design, adaptation of solutions, complexity or not possible to define technical specifications

Choice of contracting technique

In addition to the procedures, Directives lay down a number of techniques which may be used to award contracts:

- Framework agreements (single or multi-operator)
- Dynamic purchasing systems
- Use of lots
- Use of centralised purchasing bodies
- Electronic auctions
- Electronic catalogues
- Design contests

Open Procedure

- Single stage procedure - any operator may submit a tender
- Most commonly used procedure and is default procedure for many organisations
- Exclusion and eligibility criteria may be applied on a pass/fail basis, either before or after evaluation of tenders
- Appropriate for low risk and simple contracts. For more complex contracts, work required to submit a full tender may discourage competition
- Quantity vs. quality?



Restricted Procedure

- Two stage procedure:
 - i. Expressions of interest (evaluated against exclusion and selection criteria)
 - ii. Tenders (evaluated against award criteria)
- Suitable for contracts which require more effort to submit/evaluate tenders
- Bidders selected based on objective criteria relating to financial, technical & professional capacity
- Minimum of five invited to tender, unless a smaller number of qualified firms apply





Competitive Procedure w/ Negotiation

- Starts with expression of interest - minimum of three invited to tender (assuming at least that many qualify)
- One or more rounds of tender submissions – bidders all respond to a common specification
- Negotiations can be held before/after submission of tenders and bidders may be eliminated using award criteria
- May help to achieve best value or best technical offer, including pushing for enhanced environmental performance
- Requires more expertise to conduct negotiations



Competitive Dialogue

- Starts with expression of interest - minimum of three invited to tender (assuming at least that many qualify)
- Descriptive document issued to outline public authority's needs, this is not a technical specification
- Bidders normally prepare an outline solution which the authority provides feedback on, and face-to-face dialogue
- Detailed solutions are then prepared, after one or more rounds of dialogue – some bidders may be eliminated
- Final offers are evaluated against award criteria, further fine-tuning with the successful bidder is possible

Innovation Partnership

- New procedure under 2014 directives – aims at developing new products or services to meet public sector needs
- Phased partnership with one or more companies to conduct R&D and develop solutions, interim payments are made

Example: SNCF (French rail operator) advertised an innovation partnership on 5.5.17 to develop new high-speed trains

Phase I – R&D to develop detailed specification, taking account of environmental, cost and performance requirements

Phase II – Design and prototype

Phase III – Production and delivery, including maintenance

Exclusion grounds

Art. 57 – divided into **mandatory** and **discretionary** grounds
(Member States can make discretionary grounds mandatory)

Most relevant for GPP are probably

- Compliance with Art. 18(2) environmental laws
- Grave professional misconduct which renders integrity questionable
- Significant/persistent deficiencies in performance of substantive requirement under prior public contract which led to sanctions
- Inability to submit supporting documents

*Note that above exclusion criteria are subject to ability to **self-clean** and maximum exclusion period of **three years***

Qualitative selection

Art. 58/Annex XII set out exhaustive list of selection criteria.

Most relevant for GPP are probably:

Technical and professional ability

- Human and technical resources
- Experience and references
- Supply chain management/tracking systems
- Environmental management standards (e.g. EMAS, ISO 14001)
- Educational and professional qualifications of staff (if not evaluated as award criterion)
- Samples of products
- Quality control/conformity certificates

Award criteria

All contracts must now be awarded on the basis of MEAT – but it is still possible to exclude factors other than price/cost from evaluation, unless national law has restricted this.

- Choice of criteria relating to quality, environmental and social characteristics, delivery process, etc.
- Choice of approaches to evaluate price/cost (incl LCC)

Award criteria must be:

- linked to the subject-matter of the contract
- not confer an unrestricted freedom of choice on the CA
- ensure the possibility of effective competition
- be accompanied by verification provisions.

Award criteria target performance above the minimum levels set out in the technical specifications, and must be weighted and scored

Analysing GPP measures

Example: In a contract for catering services, a public body may wish to evaluate efforts made by companies to reduce their carbon footprint.

Questions to ask:

1. Does this form part of selection criteria, specification, award criteria or contract performance clauses? Different rules apply at each stage.
2. Is the criterion linked to the subject matter of what you are buying?
3. Is it proportionate, transparent and non-discriminatory?
4. What kind of evidence might bidders provide and can you verify it (to avoid greenwash)? Are ecolabels, certifications or EMS relevant?
5. Is the criterion an effective way to achieve environmental gains, or should it be combined with more specific requirements/incentives?

**Ecolabels and
other
certifications**



Using (eco)labels

To define and verify compliance with technical specifications, award criteria or contract clauses



Cannot require a **specific** label but **can require third-party certification** unless operators have no opportunity to obtain this for reasons not attributable to them









Labels must be:

- based on objectively verifiable and non-discriminatory criteria **linked to the subject matter of the contract;**
- established in open and transparent procedure in which all relevant stakeholders may participate;
- accessible to all interested parties;
- requirements set by a third party over which operators applying for the label cannot exercise a decisive influence.

IE-CDE-99
Place of Farming



Using ecolabels - examples

-  Only paper carrying the FSC label will be accepted
-  Bidders will be awarded additional marks if they have the EU Ecolabel or equivalent for all of their products
-  Tenders may be rejected if they do not have an ecolabel
-  Paper carrying the FSC label or equivalent will be accepted
-  Bidders will be awarded additional marks if they have the EU Ecolabel or equivalent for the products covered by this tender
-  Tenders may be rejected if they do not have a third-party ecolabel which meets the relevant criteria, unless this is due to factors which are not attributable to the bidder.

Test reports and certificates

Test reports and certificates of conformity may be relevant for GPP, either instead of or in addition to a product label

Art. 44 of Directive 2014/24/EU rules on certificates:

- May 'require' certificate from conformity assessment body, but must accept equivalents
- Must accept technical dossier **if** operator was not able to obtain certificate within relevant time limits **and** the dossier proves compliance with the specifications, award criteria or contract performance clauses

No explicit LtSM requirement for certificates and test reports, but they can only be **required** for verification of criteria which must have LtSM

- Systems such as EMAS and ISO 14001 may be particularly important for works and services contracts
- Address processes and cover multiple criteria, e.g. energy and water usage, waste handling, training of staff
- May be requested at selection stage or award stage (but not both)
- Same rules apply as to ecolabels, i.e. equivalent systems must be accepted and cannot insist on a third-party certified system if bidder had no access to this for reasons not attributable to it

Information
sharing and
conflicts of
interest



Confidentiality vs. Transparency

- Procurement directives require transparency for many aspects of procedures, e.g. publication of notices, tender documents, informing candidates and bidders of outcome of procedure
- However some aspects are also subject to confidentiality requirements, e.g. commercial details of tenders
- Contracting authorities may be reluctant to discuss live procedures due to possibility of prejudicing competition and fear of legal challenges
- Best time to engage with public authorities is at the early planning stages, when they have the most control and freedom to define their requirements
- Trend is towards more open contracting, but this is still not the case in most EU countries

Conflicts of Interest

- Public authorities have a duty to prevent, identify and remedy conflicts of interest which may affect procurement procedures
- This applies to staff of contracting authority but also any person acting on its behalf
- If an NGO advises both private companies and public sector bodies on environmental aspects of tenders, this may cause problems
- Similarly, if an NGO bids for public sector contracts (or grants) it may be excluded if it has been involved in preliminary advice and there is no other way to ensure equal treatment
- Ensure that your role in engaging with public authorities is clear

Pre-procurement & Conflicts

- Directives specifically allow preliminary market consultations – seeking advice from private sector, NGOs etc
- Obligation on contracting authority to ensure this doesn't distort competition

Main steps to achieve this are:

1. Ensure consultation is well advertised and is open to all interested parties.
2. All parties should receive the same information during the consultation, and this should then be included in the tender documents.
3. Need to 'draw a line' between consultation and start of formal procedure. During procedure, stricter rules apply e.g. to communication and timing of submissions.

Common challenges



What stops GPP from happening?

- Lack of commitment/obligation on the part of public bodies to include environmental criteria in tenders
- Concerns about costs, availability of green products/services and their functionality
- Time constraints and use of standard documents
- Concern that environmental criteria will exclude SMEs or local suppliers
- Previous negative experiences with green products
- Lack of political leadership/culture which encourages green purchasing

How NGOs can help

Challenge	Solution
Lack of commitment/obligation	Make link to broader public sector commitments e.g. on GHG reductions
Concerns about costs and availability of green products/services or previous negative experiences	Help arrange 'meet the supplier/buyer' events focused on green products or send a regular e-mail summarising new products
Time constraints and use of standard documents	Ask about tenders planned over next 6-18 months; help identify appropriate criteria and templates
Concerns about excluding SMEs and local suppliers	Contact local suppliers/SMEs to understand how they can deliver GPP requirements or what barriers they face
Lack of political leadership or culture to support GPP	Identify supportive politicians, promote networking/visibility e.g. Procura+

- *Buying Green Handbook* (3rd edition, 2016), EU GPP website
<http://ec.europa.eu/environment/gpp>
- *Procura+ Manual* (3rd edition, 2016) www.procuraplus.org
- Many online tools and criteria – most can be accessed via the Sustainable Procurement Resource Centre
www.sustainable-procurement.org or SCP clearing house
www.scpclearinghouse.org
- Ask for help on the Procurement Forum
www.procurement-forum.eu or via GPP Helpdesk

Thank you.

Questions/Discussion



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Parallel sessions

Objective: As a group, decide on the 3 most important things for NGOs to know about the topic you have discussed.

Give at least one example of how it works in practice.

Identify any areas of legal uncertainty or where you would like to know more.