

Green Public Procurement: Analysis on the Use of Environmental Criteria in Contracts

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Increasing environmental concerns regarding the actions and policies of the EU have meant that green aspects have become an important factor in public procurement. Although green purchasing criteria are fostered by many EU level and national action plans, and thus are more often included in calls for tenders, it is not necessarily the case that they are integrated into the final contract clauses. Opportunities for incorporating environmental aspects into contract clauses are important in order to ensure that the environmental criteria of the tender documents are fulfilled by the purchased products and services during the contract period.

In this article we examine and analyse environmental criteria in public procurement contracts and calls for tenders, and focus on the relevance of environmental contractual terms, i.e. the existence and applicability of environmental criteria in the procurement contracts. We also discuss the comprehensiveness and enforceability of the drafted terms and conditions in the procurement contracts, highlighting the contract practices that we see as the most functional and practical from the procuring authorities' point of view.

INTRODUCTION

Environmental protection has played a role in European Community policy since the Treaty of Rome (1957),¹ but over 50 years later, it is much more clearly positioned in Community agreements² and policies.³

Particularly since the United Nations Conference on Environment and Development (Rio de Janeiro, 1992), the focus has been on the sustainability of actions while maintaining the EU's single market principles of free movement of goods, equal treatment and transparency.⁴ The public sector, as a major purchaser of goods, services and works, has gained much attention in recent years in terms of the sustainability of its procurement operations. For example, the Green Paper on Integrated Product Policy (IPP)⁵ raised interest in a product-oriented environmental focus aimed at reducing the environmental impacts of products throughout their life-cycle, emphasizing that public authorities must also act as 'leaders' in the process of changing consumption patterns towards greener products. The large volume of public purchases, covering 14–16% of the EU gross domestic product⁶ implies that great potential exists in environmental product improvements and innovation,⁷ and in opportunities for creating a market for eco-products and services through public procurement.⁸ To date, the potential of green product procurement (GPP) has only partially been exploited. Thus, the Commission proposed that, by the year 2010, environmental

Economic and Social Committee and the Committee of the Regions of 16 July 2008 on the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan, COM (2008) 397 final. See also H.A. Nash, 'The European Commission's Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan', 17:4 *Journal of Cleaner Production* (2009), 496.

⁴ See Treaty establishing the European Economic Community, n. 1 above, Articles 3 and 28.

⁵ Communication from the Commission to the Council and the European Parliament of 18 June 2003 on Integrated Product Policy, COM (2003) 302 final.

⁶ C. Erdmenger (ed.), *Buying into the Environment – Experiences, Opportunities and Potential for Eco-procurement* (Greenleaf Publishing, 2003).

⁷ See Communication on Public Procurement for a Better Environment, n. 3 above, at 9; and J. Edler and L. Georghiou, 'Public Procurement and Innovation – Resurrecting the Demand Side', 36:7 *Research Policy* (2007), 949; and L. Hommen and M. Rolfstam, 'Public Procurement and Innovation: Towards a taxonomy', 9:1 *Journal of Public Procurement* (2009), 17.

⁸ K. Larsen and Ö. Svane, *Routines and Communities of Practice in Public Environmental Procurement Process*, CESIS Electronic Working Paper Series, Paper No 44 (2005); and European Commission, *GPP – How Green is your Public Procurement?* (2 July 2007), available at <http://ec.europa.eu/environment/gpp/green_vs_sustainable.htm>.

¹ Treaty establishing the European Economic Community (Rome, 25 March 1957), Article 36.

² Treaty on European Union (Maastricht, 7 February 1992), Article 2; Treaty establishing the European Community (Amsterdam, 2 October 1997) (consolidated version), Article 6; and Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Lisbon, 13 December 2007), Article 2.

³ See, e.g., Communication from the Commission of 16 July 2008 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on Public Procurement for a Better Environment, COM (2008) 400 final; and Commission Interpretative Communication of 4 July 2001 on the Community Law Applicable to Public Procurement and the Possibilities for Integrating Environmental Considerations into Public Procurement, COM (2001) 274 final; and Communication from the Commission to the European Parliament, the Council, the European

issues should be considered in 50% of all tendering procedures.⁹

The principles of the single market aim at creating a competitive internal market within the EU.¹⁰ Thus, in effect, all public procurement¹¹ comes under the auspices of EU single-market regulations. The current legislation on public procurement is based on the European Commission procurement directives that were renewed and adopted by the European Parliament and Council on 31 March 2004, including Directive 2004/17/EC¹² coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC¹³ on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.¹⁴ The second recital of Directive 2004/18/EC expresses general principles related to the directive. These include the principles of the Treaty and, in particular, the principles of freedom of movement of goods, freedom of establishment and freedom to provide services and the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition of sustainable development in international and national law, the principle of proportionality and the principle of transparency.

The GPP focus on the environmental aspects of purchasing lies between the objectives of environmental protection and the maintenance of the integrity of the internal market¹⁵ being subject to single market principles. Aspects concerning promotion of competition and equality of procedure have taken a leading role, which, in turn, has caused environmental considerations to comply with these concerns. Although public procurement has been regulated by EU directives since

the early 1970s,¹⁶ it was not until the renewal of the public procurement directives in 2004 that the directives explicitly provided opportunities to take environmental aspects into account in the different phases of the public procurement process. These current EU procurement directives enable public organizations to integrate environmental considerations into their purchasing strategies and actual purchasing processes. The directives refer to Article 6 of the Treaty establishing the European Community (1997),¹⁷ which states that environmental protection requirements are to be integrated into the definition and implementation of Community policies and activities, with a view to promoting sustainable development in particular. These directives clarify how contracting authorities may contribute to the environmental aspects of a purchase, whilst obtaining the best value for money for their purchase¹⁸ and prohibiting discriminatory purchasing policies.¹⁹ They include two options on awarding contracts:²⁰ (1) lowest price only; or (2) most economically advantageous tender from the point of view of the contracting authority, giving the purchaser the chance to apply award criteria other than just the price, including, for example, quality, technical merit, aesthetic and functional characteristics, environmental characteristics,²¹ running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and period of completion.²²

In addition to the directives, public sector authorities are required to comply with national statutes and other

⁹ See Communication on Public Procurement for a Better Environment, n. 3 above, at 8.

¹⁰ See Treaty on European Union, n. 2 above, Article 3.

¹¹ There are a few exceptions, such as defence equipment. See S. Martin *et al.*, 'Public Procurement Directives in the European Union: A Study of Local Authority Purchasing', 77:2 *Public Administration* (1999), 387.

¹² European Parliament and Council Directive 2004/17/EC of 31 March 2004 on coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, [2004] OJ L134/1. Specific exclusions are mentioned in Articles 19–26.

¹³ European Parliament and Council Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, [2004] OJ L134/114. Specific exclusions are mentioned in Articles 12–18.

¹⁴ Both came into force on 30 April 2004.

¹⁵ P. Kunzlik, 'Case Law Analysis – Making the Market Work for the Environment: Acceptance of (Some) "Green" Contract Award Criteria in Public Procurement', 15:2 *Journal of Environmental Law* (2003), 188.

¹⁶ The early public procurement directives (European Commission Directive 70/32/EEC of 17 December 1969 on provision of goods to the State, [1970] OJ L13/1; European Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches, [1971] OJ L185/1; and European Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, [1977] OJ L13/1) took place in the 1970s focusing on prohibiting hidden protectionism in the form of national public purchasing regimes, and were followed by the public procurement directives issued in 1993. See D.L. McLachlan, 'Discriminatory Public Procurement, Economic Integration and the Role of Bureaucracy', 23:4 *Journal of Common Market Studies* (1985), 357. The directives of 1993 made all public procurement (except defence) subject to the EU legislation. See S. Martin *et al.*, n. 11 above.

¹⁷ Treaty establishing the European Community, n. 2 above.

¹⁸ See Directive 2004/17/EC, n. 12 above, Article 55; and Directive 2004/18/EC, n. 13 above, Article 53.

¹⁹ See S. Martin *et al.*, n. 11 above.

²⁰ See Directive 2004/17/EC, n. 12 above, Article 55; Directive 2004/18/EC, n. 13 above, Article 53; and see Public Procurement Act of Finland 2007 (Finnish Statute Series No 348/2007), Section 62.

²¹ The Finnish version of the directive translates environmental characteristics as 'environmental friendliness'. See Public Procurement Act of Finland, *ibid.*, Section 62.

²² See Directive 2004/18/EC, n. 13 above, Article 53.

regulations on contracts and purchasing; for example the Finnish²³ and Swedish²⁴ Procurement Acts. National legislation varies in detail, although the directives do not leave much space for national peculiarities or interpretations.²⁵ An example of a national modification or amendment is Section 2 of the Public Procurement Act of Finland, which came into force on 1 June 2007, requiring authorities to organize their public procurement so that purchases can be carried out as economically and systematically as possible and in appropriate completeness, taking into account environmental aspects. This section, named 'principles that should be taken into account in public procurement', is not binding, but is a 'principled provision', which is meant as a guide for the authorities. Indeed, it seems to be the only progressive provision in the Public Procurement Act of Finland. The Act follows the directive in all other respects.²⁶

In Sweden, the new public procurement legislation took effect on 1 January 2008. A previous Act had stated as a fundamental principle that all public procurement shall be made in the spirit of *good business practice* ('affärsmässighet'). This principle was given the same content in Swedish jurisprudence as the fundamental EU principles regarding public procurement. This term has now been abandoned in the new Act and has been replaced with an enumeration of all the fundamental EU principles.²⁷ Interestingly, this principle of 'affärsmässighet' used to be repeatedly referred to in complaints and legal reasoning of public procurement decisions in Sweden.²⁸ However, the government has

stated that no material change is intended by this amendment.²⁹

Preparation of the EU public procurement directives between 2001 and 2004 stimulated active debate on the possibility of adopting environmental criteria in public purchasing, but it was the case law that paved the way for GPP. From an environmental perspective, the milestone European Court of Justice (ECJ) cases are *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v. Helsingin kaupunki and HKL-Bussiliikenne* (2002)³⁰ (*Helsinki Bus Case*), and *EVN AG and Wienstrom GmbH v. Republic of Austria* (2003)³¹ (*Wienstrom Case*). In the *Helsinki Bus Case*, the Court, for the first time, confirmed the possibility of taking environmental award criteria into consideration when assessing the most economically advantageous tender. An important statement was that environmental requirements should be linked to the subject matter of the contract and should not give the contracting authority unrestricted freedom of choice. Referring to Article 6 of the Treaty, the Court emphasized that environmental requirements, like other requirements, have to comply with the general principles of the EU. The ruling has been considered as significant for environmental protection because it diminishes, for example, the Commission's demand that environmental aspects should be economical by nature. In the *Wienstrom Case*, concerning the procurement of renewable energy, the Court found it was acceptable to make use of environmental award criteria, even if they did not provide an immediate economic benefit to the contracting authority. In this case, the bidders had to prove that they would supply at least a minimum amount of electricity per year from renewable energy sources equivalent to the estimated annual consumption of the federal services. The Court also decided that it was clearly admissible to establish an award criterion that was related to the production method of the purchased product, if this was relevant for the product. In some cases, distinctiveness of products according to their environmental characteristics will not be possible without criteria that go into production processes as well. One example is paper products, which contain many unseen but potentially harmful environmental

²³ See Public Procurement Act of Finland, n. 20 above.

²⁴ Public Procurement Act of Sweden 2007, SFS 2007:1091.

²⁵ A. Ekroos, 'EC Legislation on Public Procurement and Sustainable Development', in H.C. Bugge and C. Voigt (eds), *Sustainable Development in International and National Law*, The Avosetta Series 8 (Europa Law Publishing, 2008), 436.

²⁶ In the legislative process in Parliament, the Environment Committee proposed in its statement to the Economic Committee, that the draft be modified (Finnish Government, Ympäristövaliokunnan lausunto 29/2006, at 4, available at <http://www.eduskunta.fi/fakttamp/utatmp/akxtmp/ymvl_29_2006_p.shtml>) as follows. Section 2.1 should be modified so as to direct more strongly the taking of environmental aspects into account. They suggested deleting at the end of sub-item 2 'taking into account environmental aspects' whilst adding a new sentence, 'In public procurements environmental aspects must always be taken into account when possible'. The committee argued that, modified as proposed, the section would guide more effectively to include environmental aspects in procurement. See A. Ekroos, *ibid.*, at 437.

²⁷ J. Hane and P.-O. Bergqvist, 'New Legislation on Public Procurement in Sweden', *Legal Developments Worldwide – Corporate and Commercial* (May 2008), available at <<http://www.legal500.com/developments/3858>>.

²⁸ L. Carlsson and K. Åström, 'Court Decisions in Public Procurement: Delineating the Grey Zone', 53 *Scandinavian Studies in Law* (2008), 407.

²⁹ See J. Hane and P.-O. Bergqvist, n. 27 above. See also Regeringens Proposition, 2006/07:128, Ny lagstiftning om offentlig upphandling och upphandling inom områdena vatten, energi, transporter och posttjänster. Finansdepartement (19 June 2007), at 156.

³⁰ ECJ 17 September 2002, Case C-513/99, *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v. Helsingin kaupunki and HKL-Bussiliikenne*, [2002] ECR I-7213.

³¹ ECJ 4 December 2003, Case C-448/01, *EVN AG and Wienstrom GmbH v. Republic of Austria*, [2003] ECR I-14527.

substances.³² It could be said, however, that in technical specifications, which are obligatory requirements, production-process-related requirements are possible³³ as long as they comply with the general principles, for example equal treatment, transparency and proportionality.³⁴ The possible violation of these principles must be considered on a case-by-case basis.

The Commission has further clarified how to take the production process and other life-cycle-based environmental impacts into account in the tendering process. Currently, all production-process-related criteria (of eco-labelling schemes for instance) can be considered as appropriate for defining a product in a tendering procedure provided that the criteria are measurable and verifiable, so as to treat bidders in the same way and allow effective verification of bids against tender documents, and that the criteria concern the production of the products which are to be supplied to the purchasing authority.³⁵

Decisions given by the ECJ enable the consideration of environmental aspects in the context of public contracts but also set an obligation for the procurement authorities to ensure that the criteria used for environmental aspects are clearly specified and are measurable, such as for emissions and noise. Consequently, the consideration of general and immeasurable environmental aspects is restricted in order to make sure that transparency and requirements concerning equality of tenders are not compromised.

In the following sections, we discuss the possibility of including environmental clauses in contracts to ensure that the environmental criteria defined in the calls for tenders are implemented. We examine and compare environmental criteria in Finnish and Swedish public contracts and calls for tenders, and focus on the

relevance of environmental contractual terms in the actual public procurement contracts, i.e. the existence and applicability of environmental criteria in the contracts. The experimental aspects of the analysis covered 156 document sets, such as calls for tenders with subsequent public procurement contracts over the EU-threshold values in Finland and Sweden. The documents that were used were identified in the European Commission's database (TED) and requested by email from the purchasers. In the assessment of the documents, the occurrence of environmental criteria was studied, as well as the formulation of the contracts. We also discuss the comprehensiveness and enforceability of the drafted terms and conditions in the contracts, highlighting contract practices that we see as the most functional and practical from the procuring authorities' point of view.

ENVIRONMENTAL CRITERIA IN TENDER COMPETITIONS

Contracting authorities that wish to define environmental requirements for their purchases must set out the environmental characteristics in the call for tenders. If a public purchaser uses 'the most economically advantageous' as the contract award criterion, the contracting authority shall specify in the contract notice or in the contract documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.³⁶ Weighting can be expressed by providing for a range with an appropriate maximum spread. In many cases, the authority prepares a list of requirements with their weighting in numbers (very often called points), which are set out in order of importance to the product or service. After receiving the tenders, the authority compares tenders with this list and the bidder whose total number of 'award points' is highest will get the contract. Where weighting is not possible for demonstrable reasons, the contracting authority shall indicate the criteria in descending order of importance.³⁷

In addition to award criteria, environmental criteria can be set as a prequalification of bidders, or they can be applied as mandatory requirements for the contract, or as contractual terms; in other words, special terms for the execution of environmental considerations. Technical specifications are detailed prescriptions of

³² European Commission-Environment, *Ecolabelled Products, Paper Products* (European Commission, undated), available at <http://ec.europa.eu/environment/ecolabel/ecolabelled_products/categories/tissue_paper_en.htm>. Other examples include renewable electricity, organic food and sustainable and legally-logged timber. See Commission of the European Communities, *Buying Green! A handbook on environmental public procurement*, SEC (2004) 1050, at 23.

³³ See Directive 2004/18/EC, n. 13 above, Article 23; Directive 2004/17/EC, n. 12 above, Article 34; the Public Procurement Act of Finland, n. 20 above, Section 44.

³⁴ A. Ekroos and A. Nissinen, 'Voidaanko tuotantomenetelmää koskevia ympäristönsuojelullisia perusteita käyttää julkisten hankintojen vertailuperusteina?', 31 *Edilex* (2007), available at <<http://www.edilex.fi/lakikirjasto/asiantuntijakirjoitukset/4842>>.

³⁵ Commission Staff Working Document accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Public Procurement for a Better Environment, SEC (2008) 2126/2, 4.

³⁶ See Directive 2004/18/EC, n. 13 above, Article 53(2).

³⁷ See A. Ekroos, n. 25 above, at 436.

the characteristics that the product or service must perform without which it will be rejected. These include, for instance, material selection, chemical content and characteristics of products.³⁸ The required environmental characteristics shall not, however, be discriminatory to the potential bidders.³⁹ For example, requiring an environmental certificate that is barely used and that is purely national may be discriminatory towards bidders from other EU States. Thus, the contracting authorities may, for example, indicate that the products and services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents, but they must accept any other appropriate means of proof as well.⁴⁰

Environmental performance demands that are included in, for instance, the environmental management system, the quality system or a similar system, can be presented as qualifications for contractors (i.e. qualitative selection criteria). According to Article 48(2)(f) of Directive 2004/18/EC, evidence of the economic operator's technical abilities may be furnished by the indication of the environmental management measures that the economic operator will be able to apply when performing the contract. Article 50 of Directive 2004/18/EC accepts the EU's eco-management and audit scheme (EMAS)⁴¹ and environmental management standards certified by bodies conforming to Community law or the relevant European or international standards concerning certification (in practice this normally means ISO 14001), but other evidence of equivalent environmental management measures should be accepted too.⁴²

The terms and conditions governing the performance of a contract may, in particular, concern social and environmental considerations.⁴³ Contract clauses are indeed seen as a way of setting relevant additional environmental conditions to the green contract. The contract clauses related to environmental consideration can involve the level and execution of environmental protection in the performance phase of the goods or service (see Table 1 below). The contracting authority

can, for instance, specify the way the goods are to be supplied and even the method of transport, or it may require that the supplier takes back and recycles or re-uses any packaging that comes with the product.⁴⁴ The contract clauses can also be general in form concerning, for example, the environmental management system of the supplier (Table 1). Contract clauses should not, however, play a role in determining which bidder gets the contract, so any of the bidders should, in principle, be able to follow them. In addition, environmental contractual terms must follow the principle of proportionality. In other words, sanctions against a possible environmental breach cannot be disproportionate when compared to the overall size of the contract and the environmental benefits that would have been gained without the breach. The proportionality principle is important because it is not always clear when the environmental requirement is linked to the subject matter of the contract, or the link is not well argued. It is vital that public authorities pay sufficient attention to proportionality, because these issues are legally sensitive, and proportionality has played an important role in ECJ practice.⁴⁵ This principle does not mean, however, that environmental issues should be ignored, but it is more like a boundary condition of the environmental contract clauses.

Common environmental criteria have been established in the European Commission's Training Toolkit on Green Public Procurement⁴⁶ for ten key sectors, which have been identified as most suitable for implementing GPP.⁴⁷ These criteria have been based on existing European and national eco-labels, as well as on information collected from industry experts.⁴⁸ In addition, formulation of environmental criteria for eight other product groups has been initiated and published by the Nordic Council of Ministers.⁴⁹

One of the means that the procurement authority has to ensure the implementation of environmental aspects is the right to exclude from the procedure a bidder that has previously been found guilty of grave professional

³⁸ See, e.g., M. Bouwer et al., *Green Public Procurement in Europe 2005 – Status Overview* (Virage Milieu & Management, 2005), available at <http://ec.europa.eu/environment/gpp/pdf/Stateofplaysurvey2005_en.pdf>.

³⁹ See, e.g., A. Ekroos and A. Nissinen, n. 34 above.

⁴⁰ See Directive 2004/18/EC, n. 13 above, Article 23(6). See also Guidelines on Greening Public Procurement by Using the European Eco-label Criteria (European Union Eco-Labeling Board, November 2001).

⁴¹ Regulation (EC) 761/2001 of the European Parliament and of the Council of 19 March 2001 allowing voluntary participation by organizations in a Community eco-management and audit scheme (EMAS), [2001] OJ L114/1.

⁴² See A. Ekroos, n. 25 above, at 435.

⁴³ See Directive 2004/18/EC, n. 13 above, Article 26.

⁴⁴ See *Buying Green! A handbook on environmental public procurement*, n. 32 above.

⁴⁵ See A. Ekroos, n. 25 above, at 430.

⁴⁶ European Commission, *How Green is your Public Procurement? Training toolkit on GPP* (European Commission, 2009), available at <http://ec.europa.eu/environment/gpp/toolkit_en.htm>.

⁴⁷ The sectors include (1) construction; (2) food and catering services; (3) transport and transport services; (4) energy; (5) office machinery and computers; (6) clothing, uniforms and other textiles; (7) paper and printing services; (8) furniture; (9) cleaning products and services; and (10) equipment used in the health sector.

⁴⁸ See Communication on Public Procurement for a Better Environment, n. 3 above, at 5.

⁴⁹ A. Nissinen, S. Oystein, and K. Ongre (eds), *Nordic Cooperation on Green Public Procurement: The First Set of Criteria Examples* (TemaNord, 2009).

TABLE 1. EXAMPLES OF CONTRACT PERFORMANCE CLAUSES**General**⁵⁰

Environmental management system (EMS) in place within two years of contract commencement.

Environmental policy at the commencement of the contract. The policy shall deal at least with climate change issues, chemical substances and waste issues relating to the subject of the contract.

Annual sharing of experiences on how to advance sustainability issues relating to the products and services provided under the contract.

Services**Transport services**

The contractor must selectively collect used lubricant oils and tyres and have a contract with one or several authorized waste management companies for the correct treatment of different types of waste.⁵¹

Vehicles, machinery and equipment used for this contract shall meet the Euro 5 emissions standard and for vans and cars CO₂ emissions near or below 120g/km.⁵²

Cleaning services⁵³

After the first six months of the contract, and thereafter at the end of every year of the contract, a balance must be submitted by the contractor indicating the name and quantity of the cleaning products used. For any products not mentioned in the initial bid, proof of compliance with the specifications must be submitted.

Within six months of the start of the contract, the contractor will provide a report to the contracting authority on the practicality of using micro-fibre cloths, and dry-cleaning techniques for linoleum flooring. The contractor should also be able to justify the cleaning frequency and range of products used.

Food and catering⁵⁴

Food and beverages must be served using cutlery, glassware, crockery and tablecloths, which are renewable or based on renewable raw materials.

Waste produced in carrying out the service will be collected separately according to the collection system of the public administration, which includes the types of waste to be separately collected, depending on local administrative rules.

The vehicles to be used in carrying out the service shall at least fulfil the exhaust emission requirements of Euro 4 or IV.

Suppliers must provide a list of vehicles to be used in carrying out the service and the respective technical sheets of these vehicles, which state the relevant emission levels.

Products**Information Technology equipment**
(e.g. computers, copying machines)

The bidder must guarantee the availability of spare parts for at least three years from the time that production ceases. Verification: all products carrying any Type I eco-label fulfilling this criterion will be deemed to comply. Alternatively the bidder must provide a written guarantee that this criterion will be met.

Packaging shall be recyclable and consist of elements that can easily be recycled. The contractor shall avoid multi-materials, mixed plastics, and should use water-based glues and inks.⁵⁵

Electricity⁵⁶

At the end of each year of the contract, the contractor must disclose the origin of the electricity supplied to the contracting authority to demonstrate that at least 50% came from renewable energy sources and/or high efficiency cogeneration. Guarantees of Origin (GoO) or equivalent proof must be provided. This is not required from certified suppliers of 100% green electricity (i.e. carrying a Type I eco-label which uses a definition of RES-E at least as strict as that of Directive 2001/77/EC).⁵⁷

⁵⁰ H. Lusser and K. Willsher, 'Greening your Contracts' (ICLEI, 26 March 2009), available at <http://www.iclei-europe.org/fileadmin/template/events/ecoprocura2009/files/PDF/B6_Helmut_LusserPT.pdf>.

⁵¹ See *Training Toolkit on GPP*, n. 46 above.

⁵² See H. Lusser and K. Willsher, n. 50 above.

⁵³ See *Training toolkit on GPP*, n. 46 above.

⁵⁴ Ibid.

⁵⁵ See H. Lusser and K. Willsher, n. 50 above.

⁵⁶ See *Training Toolkit on GPP*, n. 46 above.

⁵⁷ European Parliament and Council Directive 2001/77/EC of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, [2001] OJ L283/33.

misconduct.⁵⁸ Grave misconduct may be seen in previous public works which have been carried out unprofessionally and indicate that the candidate is not technically or otherwise capable of executing the contract.⁵⁹ According to the Commission's interpretative communication,⁶⁰ non-compliance with environmental legislation may also qualify as an offence concerning professional conduct, based on which the procurement authority may exclude a candidate from participation.

The requirements of transparency and equal treatment require, however, that it must be specified in the decision regarding the awarding of the contract, what kind of information has been used in making the decision and of what relevance it has been.⁶¹ Thus, the previous experiences that the procurement authority has of the bidder's way of fulfilling environmental obligations may be seen as permissible only when it has been stated that environmental criteria will be used in the comparison of tenders. Previous experiences can then be taken into account through references or statements from the authorities realizing the procurement.⁶² Accordingly, the breach of environmental obligations in a previous contract may be taken into account when making subsequent decisions. Hence, companies have an incentive to respect their environmental obligations as cited in the contract, at least to a certain extent.

However, it seems unlikely that the neglect of environmental aspects in a previous contract would constitute a basis for excluding a bidder from participation. Based on the Commission's interpretative communication,⁶³ the criteria for exclusion from the procedure may be considered relatively strict. Thus, the exclusion of a bidder would probably be possible only in such cases where it can be clearly shown that the environmental aspects have been a particularly important part of the previous contract and the breach has been substantial.⁶⁴ However, this should be considered exceptional

because environmental aspects often comprise a part of the contract that is merely of minor importance.⁶⁵

MATERIALS AND METHODS

In this section of the article, we describe the materials and methods that we used in our study of the environmental criteria in Finnish and Swedish public contracts and calls for tenders. The empirical material of this study was gathered from the documents of tender competitions over the EU threshold values in Finland and Sweden. In the assessment of the documents, the occurrence of environmental criteria in the documents was studied, as well as the formulation of the contracts. The experimental material of the analysis covered 156 document sets, i.e. calls for tenders with subsequent public procurement contracts between the purchasers and winning bidders.⁶⁶ Public organizations such as those of central government, local authorities, bodies governed by public law and organizations from special sectors, such as public water and energy supply, were included as a source of the purchasing documents, the received documents being mostly, however, procurements by municipalities.

The documents were collected in two phases. In the first phase, 78 document sets were collected regarding calls for tenders that were published between April and September 2005. In the second phase, 78 document sets were collected regarding calls for tenders that were published between May and October 2007 in the Tenders Electronic Daily (TED) database⁶⁷ in the order they were published. The TED database is created and updated by the EU, and it contains all active calls for tenders published in the Supplement to the Official Journal (OJ S)⁶⁸ and provides access also to the OJ S archives.

The categories of purchased goods and services (Table 2) were diverse. They included purchases of vehicles, transportation equipment, information technology (IT) equipment, cleaning services, office furniture, catering, clothing, lamps, medical devices and renovation works. In 2005, seven of the 15 services in Finland were consultancy, financial or insurance

⁵⁸ See Public Procurement Act of Finland, n. 20 above, Section 54(2)(4).

⁵⁹ In addition, e.g., an essential breach of the rules of professional conduct might be considered grave misconduct. See I. Aalto-Setälä *et al.*, *Kilpailulait ja laki julkisista hankinnoista*, 3rd edn (Tietosanoma, 2003), 596.

⁶⁰ Commission Interpretative Communication of 4 July 2001 on the Community Law applicable to Public Procurement and the Possibilities for Integrating Environmental Considerations into Public Procurement, COM (2001) 274 final.

⁶¹ See Directive 2004/18/EC, n. 13 above, Article 53(2).

⁶² Finnish Government Bill of 28 April 2006 50/2006, Hallituksen esitys Eduskunnalle laeiksi julkisista hankinnoista sekä vesi- ja energiahuollon, liikenteen ja postipalvelujen alalla toimivien yksiköiden hankinnoista, at 100–103.

⁶³ See Commission Interpretative Communication, n. 60 above.

⁶⁴ M. Hemmo, *Sopimusoikeus II* (Talentum, 2003), 116–117.

⁶⁵ K. Parikka-Alhola *et al.*, 'Green Award Criteria in the most Economically Advantageous Tender in Public Purchasing', in K.V. Thai and G. Piga (eds), *Advancing Public Procurement* (PrAcademics Press, 2006), at 257.

⁶⁶ The terms of the contracts were often determined in the calls for tenders, in which they were often used as an appendix.

⁶⁷ The official website of the European Union, Tenders Electronic Daily – Supplement to the Official Journal of the European Union, available at <<http://ted.publications.eu.int>>.

⁶⁸ Calls for tenders for products, services and works meeting specific threshold values according to the directives must be made available throughout the EU. This is done through the Supplement to the Official Journal (OJ S).

TABLE 2. COLLECTED DOCUMENTS BY TYPES OF PURCHASE

YEAR	GOODS		SERVICES		ENERGY		TRANSPORT		TOTAL	
	2005	2007	2005	2007	2005	2007	2005	2007	2005	2007
Finland	22	19	15	16	5	2	5	3	47	40
Sweden	12	16	10	18	1	0	8	4	31	38
Total	34	35	25	34	6	2	13	7	78	78

TABLE 3. USE OF GREEN CRITERIA IN THE CONTRACTS AND CALLS FOR TENDERS

GREEN CRITERIA IN:	YEAR 2005		YEAR 2007	
	CALLS FOR TENDER	CONTRACTS	CALLS FOR TENDER	CONTRACTS
Finland	47%	19%	55%	30%
Sweden	81%	42%	79%	66%

services, which did not have apparent green criteria.⁶⁹ Respectively, only two of the Swedish service contracts were similar services. In 2007, these services numbered six in Finland and four in Sweden. The document samples did not differ substantially between these years, i.e. the distribution between different groups of goods and services was similar, which improved the possibility of analysing development over these years.

For the analysis of 'green contracts' we define the purchase as 'green' when the contract includes one or more environmental criteria, which indicates that the supplier of the goods or services will have to surpass the minimum level of prevailing environmental standards set by legislation. For example, public procurement regarding transport services is considered 'green' when the procuring agency sets the prerequisite that the provider of the transport services is under an obligation to use buses or trucks that surpass the requirements of emission standards (e.g. Euro IV or V). Similarly, the procurement is also considered 'green' when, for example, in the case of cleaning services, the use of environmentally friendly cleaning products is required. The amount of green contract criteria only provides a guideline for the use of environmental criteria, but the effectiveness and accuracy of the criteria calls for a more thorough analysis of the contract clauses.

RESULTS

Our study aimed to examine and compare environmental criteria in Finnish and Swedish public procurement contracts and calls for tenders, and focus on the relevance of environmental contractual terms in the actual public procurement contracts, i.e. the existence and applicability of environmental criteria in the contracts. The results show that, in the year 2005, environmental criteria were presented in 19% of the Finnish contracts and 42% of the Swedish contracts. The percentages in the year 2007 were 30% and 66%, respectively⁷⁰ (see Table 3). Similarly, the percentages for green criteria in the calls for tenders in 2005 were 47% for Finland and 81% for Sweden. In 2007, green criteria were found in 55% of the studied Finnish calls for tenders and in 79% of the studied Swedish calls for tenders (Table 3). Approximately one half of the criteria appearing in the calls for tenders were presented as award criteria, and the other half was divided into selection criteria and technical specifications. In the calls for tenders where environmental criteria were taken into account, their weight was between 5 and 10% in Finland, and from 5 to 30% in Sweden.

The use of green criteria in the calls for tenders and contracts seems to be in line. Both Finland and Sweden had more green criteria in the calls for tenders than in the actual contracts. In 2005, there were around twice as many environmental criteria in the calls for tender than in the contract documents. However, it seems that

⁶⁹ See A. Nissinen *et al.*, 'Environmental Criteria in the Public Purchases above the EU Threshold Values by Three Nordic Countries: 2003 and 2005', 68:6 *Ecological Economics* (2009), 1843.

⁷⁰ If services with no apparent green criteria (see A. Nissinen *et al.*, *ibid.*) were excluded, the results for contracts would be: Finland 23% and Sweden 45% in 2005, and in 2007, 35% and 74%, respectively.

in 2007, the number of green criteria in the contracts increased more than the use of green criteria in the calls for tenders (Table 3).

Around two-thirds of the analysed calls for tenders and related contracts were among the priority sectors for GPP defined by the EU,⁷¹ and around 70% of purchases concerning these sectors included environmental criteria in calls for tenders and/or contract terms. However, the environmental contract clauses differed to some extent to those that were given as examples in the Commission's GPP toolkit.⁷² Contract clauses concerning transportation, packaging and environmental management systems were most in accordance with the GPP toolkit advice, whereas other contract terms were much more general in nature compared to those mentioned in the GPP toolkit.

The analysed calls for tenders included environmental criteria regarding chemical content, choice of materials, energy use, machine norm or standard or environmental policy or management systems. In the corresponding contracts, however, environmental criteria most often concerned recycling and reuse of packaging, reporting and monitoring of environmental data (e.g. environmental management systems) and waste treatment (see Table 4). In addition, and particularly for services, the contract clauses included special terms concerning the environmental performance of the service. For example, transportation and cleaning services contracts often included criteria regarding the materials and vehicles used for the service (Table 4). The Swedish transportation contracts, in particular, were carefully drafted with respect to the environmental criteria. They also often included the opportunity for the procurement authority to verify regularly that the agreed environmental criteria had been met. In addition, they included liquidated damages for non-compliance. The amount of the liquidated damages was in the range of 500 to 1500 euros, which seemed reasonable with respect to the contract values.

In some cases, the terms regarding environmental requirements were very general in nature, stating, for example, that the supplier must follow current environmental requirements (Table 4). They were described more as an environmental principle without necessitating contractors to take any particular measures to improve the environmental friendliness of their products or services. However, no contract came up in which the terms of contract would have contained any apparent discriminatory environmental characteristics, such as an obligation to attain a national eco-label. In those

TABLE 4. EXAMPLES OF ENVIRONMENTAL CRITERIA IN THE ANALYSED CONTRACT CLAUSES

The supplier takes care of the transportation and proper handling of waste. (Office equipment)
The service provider must practise eco-friendly driving. (Transportation)
The fuel that is used must comply with EU Directive 93/12/EEC ⁷³ so that the sulphur content of the diesel fuel must not exceed 0.05 pp. (Vehicle)
The average age of the vehicles in the fleet shall not exceed a set age (see the calculation formula attached). (Transportation)
The vehicle fleet must follow the Euro III + CRT or similar filter. (Vehicle)
Environmental management system ISO 14001 or a similar system is either available or under completion. (Medical equipment)
The supplier must be aware of the purchaser's environmental policy. (Construction)
The purchaser (or his/her representative) is allowed to verify at the supplier's or its subcontractor's place that the purchased service complies with requirements, and execute environmental revisions. (Maintenance and cleaning services)
The supplier should work actively to reduce the service's negative environmental impact. (Cleaning services)
All solid waste from the supplier's or its sub-contractor's facilities shall be sorted for recycling, composting or disposal. (Transportation of waste)
The hull shall not be treated with bottom paint that contains tin or copper pollutants. (Vessel)
Requirements for packing are followed. (Food and dairy products)
The supplier must commit to buying and removing the existing copying machines that will be replaced with new ones. The supplier has to describe how environmental impacts will be taken care of when abandoning the old and replaced machines. (Office equipment)
The vendor follows current environmental requirements. (Construction materials)
A vehicle with oil, diesel, glycol, etc. leaks is not allowed to run. (Transportation of waste)
The supplier shall comply with the appropriate environmental and safety requirements that are pursuant to international conventions, EU law and national regulations. (Construction)
The seller shall limit the consumption of the material to what is unavoidably necessary. (Maintenance and cleaning services)

⁷¹ See Communication on Public Procurement for a Better Environment, n. 3 above, at 7.

⁷² See *Training Toolkit on GPP*, n. 46 above.

⁷³ Council Directive 93/12/EEC of 23 March 1993 relating to the sulphur content of certain liquid fuels, [1993] OJ L74/81.

cases where criteria of eco-labels or a similar measure were required in the call for tender, the procurement authorities also allowed for an alternative form of proof to verify compliance with the requirements besides national and Nordic environmental certificates.

DISCUSSION

The material studied gave us the impression that the use of environmental criteria in public procurement contracts increased to a certain extent between 2005 and 2007, being more common in the Swedish procurement contracts than in the Finnish.⁷⁴ In 2005, only around half of the green purchases also included environmental criteria in the contract clauses, whereas in 2007, the rate was around two-thirds. Especially in the procurement of transportation services, the Swedish authorities used environmental criteria almost without exception. Still, the use of environmental criteria only in calls for tenders remains a much more common practice than stipulating them in the contract clauses.

The contract clauses examined differed from each other especially in their accuracy. One distinctive feature distinguishing the contracts and the countries was that the environmental criteria stipulated in the Swedish calls for tenders and final contracts were set out in more detail. From a contract law point of view, the transport-related contracts in particular were comprehensive and skilfully drafted so that the procurement authorities would be able to ensure, in most circumstances, that the agreed environmental criteria would be met. On the other hand, many of the analysed procurement contracts stipulated that the contractor must comply in all activities with the prevailing environmental laws. At first glance, these kinds of contract terms would appear obvious and rather pointless since the contractor would cause a breach of contract if the provided services or goods were not in compliance with the applicable environmental laws. However, such contract terms might be valuable in such cases where the breach of environmental laws cannot be detected from the provided goods or services. Still, in this case we face the question of whether such a breach gives the procurement authority sufficient reason to terminate a procurement contract and claim for damages if the breach has not been or cannot be rectified in due time. We would also need to evaluate whether such a breach is so substantial that it entitles the party to demand corrective measures

or to terminate the contract. Finnish contract law, for example, excludes contract-related claims if the implications of the breach can be considered insignificant from the buyer's point of view.⁷⁵

From a contract law perspective, it is difficult to see any advantages in drafting very general terms where the practical meaning is vague and indefinite, and enforceability is unclear. In turn, breaches of public contracts relating to environmental aspects may be difficult to interpret if the terms pertaining to environmental aspects have been written in a very general way. For example, there were several contracts studied which included referrals to the procuring municipalities' own environmental programmes without clear stipulation as to the extent to which the environmental programme should be followed. In general, the municipalities' environmental programmes looked like political agendas stating that the municipalities should strive for a better future by taking environmental considerations into account in all of their activities. These kinds of contract terms might serve a green political purpose, but from a contract law point of view hardly any purpose is served.

We also examined the enforceability of environmental terms and conditions in procurement contracts to discover whether the agreed environmental criteria could be supervised by the procuring authority and could, in such terms, be effectively enforced in case of a breach of contract. In this respect, many terms and conditions regarding environmental criteria in the procurement contracts were vague. In many cases, the procurement authority had not reserved the right to inspect for compliance with the agreed environmental criteria. Few contracts included the monitoring and inspection of the activities of the contractors. However, they had clearly drafted contract terms according to which the contractor was obliged to pay liquidated damages if there was a breach of the environmental criteria it had agreed upon. The amount of the liquidated damages varied from 500 to 1000 euros, which seemed, according to the principle of proportionality, a reasonable amount to ensure compliance. We consider that this kind of formulation of procurement contracts is useful and cost-effective since it enables the procurement authority to react to possible breaches of contract with efficient means. Complying with environmental criteria may bring additional costs to the supplier, which might lead to a temptation to disregard the criteria. Thus, the possibility of monitoring the contractor and imposing immediate and predetermined sanctions for breach of contract might be a useful method to guarantee that the agreed environmental criteria are honoured.

⁷⁴ These results support the results from previous studies, e.g., A. Nissinen *et al.*, n. 69 above, at 1843; and M. Bouwer *et al.*, n. 38 above, at 43. See also P. Kippo-Edlund *et al.*, *Measuring the Environmental Soundness of Public Procurement in Nordic Countries* (TemaNord 505/2005), at 25.

⁷⁵ See M. Hemmo, n. 64 above, at 116–117.

With a preset sanction, the procurement authority does not have to deal with the usually difficult question of the assessment of damages caused by a breach of contract. Breach of environmental criteria might not cause any direct damages to the procuring authority, so claiming for damages or even verifying a breach of contract might prove to be a difficult exercise since such a breach could be considered insignificant from the procurement authority's point of view. In this case, the question relates to defining disruption in execution: can the contract be considered correctly fulfilled even though the execution differs somewhat from the description of obligations?⁷⁶ Finnish contract law and jurisprudence, for example, does not expect perfect performance in fulfilling the contract.⁷⁷ If the performance of the contractor is flawless in its detectable qualities, but the environmental criteria of the manufacturing process have not been met, it can be argued with merit that the contractor has delivered the agreed goods or services and the failure to comply with the agreed environmental criteria is a secondary concern and thus can, in some cases, be considered insignificant or irrelevant from the buyer's point of view. This might well be the case when the procurement authority cannot provide any evidence that the possible breach has had any direct effects.

In general, a breach of contract does not exist if it does not have a significant or substantial meaning to the buyer. If the consequence of infringement or omission is considered insignificant or irrelevant to the buyer, it does not give the buyer the right to claim any damages or rectification. Breach of environmental criteria would probably not cause additional costs directly or, in most cases, even indirectly to the procurement authority, and thus, such damages would not be compensated. If the environmental criteria have been awarded a 3–5% weighting in the evaluation of the tenders,⁷⁸ such criteria could be regarded as secondary obligations in the procurement contract, which can be considered insignificant or irrelevant with respect to the contract.⁷⁹ An example is the environmental friendliness of detergents: even if the use of a defective detergent is seen as a disruption in execution that exceeds tolerable limits, the procurement authority could only resort to demanding fully compliant execution later, because in practice there is no possibility of claiming damages for a breach of contract like this unless there is an explicit clause in the contract.⁸⁰ Thus, a more detailed definition of the terms of contract seems the most expedient

way to ensure the implementation of environmental aspects related to purchasing.

Many procured items in the studied documents were such that including environmental criteria in the purchasing documents would not necessarily lead to true environmental benefits or make the purchase more environmentally friendly; for example, procurement of consulting and accounting do not have apparent green criteria.⁸¹ However, there were also several procurement contracts in the sample concerning products or services with apparent environmental criteria in which the contract price was the decisive factor and environmental criteria were not included at all, although they could have been fairly easily included at least in the award criteria. This indicates the difficulty of formulating detailed contract clauses that would lead to actual environmental benefits while, at the same time, being legally binding and justifiable. Lack of clearly expressed environmental obligations to the contractor can lead to typing green thoughts on contracts without meaningful substance.

Nowadays, it seems that public procurement politics allow somewhat more widespread interpretations to implement life-cycle thinking into total economical advantageousness, especially the production-related issues as far as they are relevant when defining the contract item from a life-cycle perspective.⁸² However, the public procurement directives that underline the linking of each criterion to the subject matter of the contract, and the principles of non-discrimination and free movement of goods, may still question the suitability of some life-cycle analysis based environmental aspects to be used as purchasing criteria, namely criteria related to production process and transportation. Indeed, the results of this study show that, in practice, the environmental criteria used in public purchases focus on those purchasing criteria that are undoubtedly covered by the directives, and thus the environmental award criteria are often based on the environmental performance of the use phase and exclude the production phase.

The results of this study are in accordance with the GPP target of the EU Commission that, by the year 2010, 50% of all tendering procedures should be green.⁸³ So far, however, the environmental criteria in the calls for tenders, and especially in the contracts, are not

⁷⁶ See M. Hemmo, n. 64 above, at 114.

⁷⁷ E. Routamo and J. Ramberg, *Kauppalain kommentaari* (Lakimiesliiton kustannus, 1997), at 317.

⁷⁸ See K. Parikka-Alhola *et al.*, n. 65 above, at 273–274.

⁷⁹ See M. Hemmo, n. 64 above, at 116–117.

⁸⁰ *Ibid.*

⁸¹ See A. Nissinen *et al.*, n. 69 above, at 1843.

⁸² See Communication on Public Procurement for a Better Environment, n. 3 above, at 4, stating that GPP is 'a process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life cycle when compared to goods, services and works with the same primary function that would otherwise be procured'.

⁸³ *Ibid.*, at 8.

compliant with the common 'core' criteria defined by the Commission.⁸⁴ Thus, it seems that public authorities need guidance and practical help to facilitate the use of environmental criteria.

CONCLUSIONS

Green public procurement is about setting environmental criteria while complying with the legal principles of the free movement of goods, transparency and equal treatment of bidders. Important in legal matters is the objectivity of the award criteria, so that they are linked to the subject matter of the public contract in question. In some cases this linking needs, however, at least some kind of justification related to requirements and their importance from an environmental point of view. Generally, if a purchaser wishes to address detailed environmental issues in contract award criteria, these requirements may also need more precise justification.

When we analysed the procurement contracts we needed to emphasize the importance of definite and clear environmental-related obligations in order to avoid problems of interpretation. When drafting terms of contracts with environmental obligations, the procuring authority should write them in a simple and efficient form, for example, use contractual penalty clauses in order to ensure that the agreed environmental criteria of the contractors are addressed. The use of contractual liquidated damage clauses positions environmental obligations as a part of public contracts and gives the procurement authority the chance to react efficiently to disruptions in performance, when the disruption and its consequences are clearly and unequivocally defined. Thus, we consider the use of relatively low liquidated damages for those cases as good practice where the contractor is in breach of the agreed environmental criteria. Reserving the right to inspect the activities of the contractor at will should be included in the procurement contract in order to improve the detection of possible breaches. This would enable the procurement authority to respond in a clear and predetermined manner if necessary.

When examining the public contracts, it became evident that environmental aspects have often not been considered of particular importance, and hence their formulation has often received no special attention. On this account, it may be presumed that the consequences of possible breaches of terms of contract relating to environmental protection will, in reality, remain insubstantial when drafting the contracts.

Certainly there are products and services where environmental matters do not play a role at all but in some of the products and services, environmental performance can be highly important, even the most important criterion, and should be taken into account. Naturally, in most cases, environmental criteria, at least for the moment, are not the only or the most important criteria. Nevertheless, systematically presented green criteria in the calls for tenders could give a signal to manufacturers to move towards more environmentally sound products and could evidently lead to actual changes in the products. However, much is dependent on how the purchasers manage to stipulate the criteria in the calls for tenders and contract clauses in an effective way. There is, of course, potential for further progress in generating legislation related to sustainable or green public procurement. Enforcing compulsory GPP criteria, at least in some key areas, would be the most radical step. Could the energy sector and energy-consuming commodities be one of these key areas? Of course, it is relatively easy to recommend compulsory public purchasing, but in practice it is not overtly clear in every case which product would be the most environmentally friendly. Compulsory green public procurement would also certainly have its own set of legal problems, although they could be solved and some of them even avoided if the legislation was prepared carefully.

Currently, contract award criteria are relatively open for many kinds of environmental requirements and many kinds of valuation criteria, and as such to positive developments. A recent study⁸⁵ on the status of GPP in the EU supports the findings of this study by showing that public purchasers seek to consider environmental aspects quite often. However, despite some innovative practices in the field of public procurement, for example in Finland and Sweden, public purchasers still tend to favour practices so that potential legal conflicts are avoided. Although Community communications and case law have provided more precise interpretations of the purchasing directives, which have helped to identify and address the most debatable issues in green public procurement, the legal boundaries are still not straightforward, due to the fact that legal disputes and court decisions in the area of GPP are scarce. Thus, so far, legislation has not posed a problem in taking environmental aspects into account in public procurement, although general legal requirements also concern green purchasing. It is obvious, however, that there is a call for clearer, more detailed and proactive environmental purchasing criteria in calls for tenders and contract clauses. This

⁸⁴ See *Training Toolkit on GPP*, n. 46 above.

⁸⁵ *Collection of Statistical Information on Green Public Procurement in the EU: Report on Data Collection Results* (PricewaterhouseCoopers Sustainability, 2009).

seems to be a challenge for the future, although the intense political pressure and the development of practical tools, especially the formulation of common environmental purchasing criteria, have helped purchasers in implementing green criteria. This study has shown that there could be potential for further progress in GPP by adding more detailed environmental criteria that would lead to actual environmental benefits, or to develop general contract clauses and various kinds of framework contracts that include environmental clauses. And if sustainable development issues were to be more widely included in public procurement, contract clauses would obviously need to change with greater urgency.

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