

Chapter 2

Public Procurement in Lithuania: (Dis)balance Between Profitability and Environmental Protection

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Introduction

While not necessarily arising from the function of the public authority and not necessarily directly connected with the purchased products' functional objectives, the horizontal objectives, such as the conservation of natural resources, prevention of climate change, may nevertheless be advanced through public procurement. Efforts are being undertaken by public authorities to promote sustainable consumption and production by means of public procurement since it is recognised that public purchasing because of its considerable size and diversity can have a great influence in the marketplace. By adopting the integrated approach, governmental authorities can demonstrate the advantages of, for instance, environmentally friendly goods and thereby lead the whole market towards the sustainable development.

As the environmental aspect of sustainability is highly aspired for in public procurement, this article analyses whether the preferred use of the lowest price criterion (hereinafter—LPC) for an award of the public contracts by the Lithuanian contracting authorities is balanced with the environmental protection. The article argues that criterion of the most economically advantageous tender (hereinafter—MEAT) should be used more frequently in order to ensure that environmental considerations are taken into account when procuring the products, works or services. In this article public procurement which takes into account environmental considerations is referred to as “green public procurement” (hereinafter—GPP), the term which is commonly used in Lithuanian national legislation.

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The chapter is divided into three parts. The first part aims at presenting a legal review of the Lithuanian national legislation regarding the GPP.

The second part analyses the extent to which the LPC and criterion of the MEAT are applied for awarding the contracts and how that affects the contracting authorities' possibilities to acquire products with the reduced environmental impact. It is argued that the application of the LPC not only disregards the environmental impact the procured product can make but also do not guarantee the quality of the product which, in turn, means that both the functional and horizontal objectives of procurement are not implemented. Therefore, the criterion of the MEAT should be used because it provides, among other things, the opportunity to take into account environmental considerations.

The third part provides an analysis of how environmental requirements can be included in the different stages of the public procurement under the EU and Lithuanian national law so as to ensure that the procured product is not only environmentally-friendly but also helps the contracting authority to save costs.

Methodology

In the study, the theoretical research methods of systematic analysis, analysis of documents, generalisation, as well as comparative methods, have been applied. The method of document analysis was used in order to obtain the information, to qualitatively investigate scientific publications, various laws, and legal practice documents relating to public procurement and GPP in particular. The qualitative analysis of the documents is based on an intuitive understanding and summarising of the content of the documents as well as the logical conclusion. The systematic analysis method was used for the examination of the problematic areas of the application of the LPC and its effect on the use of the GPP by the Lithuanian contracting authorities. The comparative method was applied to compare the practices of the other EU Member States with regard to the application of "green" requirements in procurement. The generalisation method was used for summarising data collected and analysed as well as for defining of conclusions.

The empirical data for the study are mainly obtained from the Public Procurement Office (hereinafter—PPO) as well as from Ministry of Environment of the Republic of Lithuania.

The Regulation of GPP in the Republic of Lithuania

The Law on Public Procurement of the Republic of Lithuania (hereinafter—"the LPP") is the main piece of legislation governing implementation of public procurement. As Lithuania is the EU Member State and therefore it's national

legislation has to be harmonised with the EU law, the LPP is a direct result of the respective EU legislation.¹

The Article 1 of the LPP defines that this Law establishes the procedure for public procurement, the rights, obligations and responsibility of participants in the procurement procedures, as well as the procedure for the control of public procurement and settling of disputes (Seimas of the Republic of Lithuania 1996). The LPP also contains provisions which open up the possibility to consider environmental issues in the procurement process. In this regard, the paragraph 3 of the Article 24 of the LPP is of the greatest importance. It states that in instances and in accordance with the procedure laid down by the Government or an authorised institution it is the *obligation* of the contracting authorities to specify the requirements and/or criteria of energy consumption efficiency and environmental protection into the tender documents (Seimas of the Republic of Lithuania 1996).

However, although the LPP obliges the public procurers to apply the environmentally-friendly requirements, this obligation is binding only upon certain categories of the contracting authorities, which are listed in the para. 2 of the Resolution of the Government of the Republic of Lithuania No. 1133 (2010) (hereinafter—Resolution No. 1133). According to the Resolution of the Government of the Republic of Lithuania No. 1257 (2011), these purchasing authorities, namely national authorities and other state institutions and organisations under the Government of the Republic of Lithuania, ministries and organisations under ministries, shall achieve that 25% by 2013, 30% by 2014 and 35% by 2015 of procurement by value and by number of tenders include core (mandatory) and comprehensive (advisable) environmental criteria, except in cases when there is no products, services or works which comply with the established environmental criteria, or when exceptions are approved by the legal acts of the Republic of Lithuania (Government of the Republic of Lithuania 2011). Other purchasing authorities that do not fall under the scope of the para. 2 of the Resolution No. 1133 are *recommended* to apply the environmental requirements to the same extent as indicated before (Government of the Republic of Lithuania 2011).

Depending on the subject matter of the contract, the requirements and/or criteria of the energy consumption efficiency and the cases in which they have to be applied are set forth in two main legal acts:

1. The Order of the Minister of Energy No. 1-154 of 18th June 2015 (Ministry of Energy of the Republic of Lithuania 2015), which identifies the list of product groups, except the road vehicles, that are subject to energy efficiency requirements during public procurement and the energy efficiency requirements for such products;
2. The Order of the Minister of Transport and Communications No. 3-100 of 21st February 2011 (Ministry of Transport and Communications of the Republic of

¹The full list of the legal acts of the European Union implemented by the LPP is provided in the Annex of this Law (available at <https://www.e-tar.lt/portal/en/legalAct/TAR.C54AFFAA7622/eJMdGqxbgP>).

Lithuania 2011), which identifies the list of requirements for energy efficiency and environmental protection when purchasing road vehicles and cases in which these requirements are to be applied.

With regard to the requirements and/or criteria of environmental protection, the essential legal document is the Order of the Minister of Environment No. D1-508 of 28th June 2011 as amended by the Order of the Minister of Environment No. D1-556 of 25 June 2014 which lists the product groups for which the environmental criteria are to be applied (it currently covers 4 product groups), approves the comprehensive environmental criteria for every product included in those lists, and lays down the rules (hereinafter—the Rules) guiding the application of environmental criteria applicable to all contracting authorities when implementing the GPP (Ministry of Environment of the Republic of Lithuania 2014).

Notably, these Rules define the GPP as a public procurement whereby the contracting authority includes into the tender documents at least the minimum environmental criteria endorsed by the Ministry of Environment in order to procure goods, services and works while considering not only their price and quality but also the reduced environmental impact throughout their life-cycle, thereby stimulating the production of environment-friendly products (Ministry of Environment of the Republic of Lithuania 2014). It further continues that GPP enables the contracting authority to acquire the product which (if compared to the product of the same function) consumes less natural resources for its production and consumption, contains fewer or none hazardous, toxic materials, is durable and can be used repeatedly (Ministry of Environment of the Republic of Lithuania 2014).

However, according to these Rules endorsed by the Order of the Minister of Environment No. D1-508, the procurement qualifies as “green” only if a product is in compliance with *all* product-related minimum environmental criteria (Ministry of Environment of the Republic of Lithuania 2014). In addition, the contracting authority, as stated in paragraph 13 of the Rules, can include additional environmental criteria established by the Ministry of Environment or the contracting authority itself (Ministry of Environment of the Republic of Lithuania 2014).

Furthermore, the Implementation Measures of GPP for the years 2013–2015 have been approved by the Order of the Minister of Environment of the Republic of Lithuania No. D1-266 of 16th April 2013. The aim of the measures is to promote GPP and make sure that the goods, services or works purchased are as environment-friendly as possible. In order to achieve this goal, the responsible institutions (the Ministry of Environment, the Environmental Protection Agency and the PPO) have to develop and apply a number of different types of instruments, such as training and communication tools, which are designed to provide environment-related information to the range of government levels and private entities and thus not only to increase environmental awareness among them but also assist purchasers in making effective procurement decisions (Ministry of Environment of the Republic of Lithuania 2013).

Finally, Lithuanian National Strategy for Sustainable Development sets an ambitious target of reaching the level of the leading EU countries in GPP

application until 2020 and outlines, among other things, a variety of actions and support measures which have to be taken in order to green public procurement (Government of the Republic of Lithuania 2011). Such measures, for instance, include a regular supplement of the list of products for which the environmental criteria are to be applied or the organisation of the training for the procurement officials (Government of the Republic of Lithuania 2011).

In conclusion, there is mainly a centralised regulation of the GPP in Lithuania which impacts all government levels. The mandatory requirements are placed on the central government level while recommending the inclusion of environmental considerations into the procurement process at the local level. Monitoring of GPP is centralised by the PPO and is based on direct reporting from contracting authorities.

Lowest Price Versus Environmental Protection: (Dis)balance? (Case of Lithuania)

Under the former Procurement Directive 2004/18/EC the contracting authorities had a choice to award the contract on the basis of price alone or on the basis of the MEAT. Following the passing of the new public contracts Directive 2014/24/EU of the European Parliament and the Council on Public Procurement and Repealing Directive 2004/18/EC, authorities *must* award on the basis of MEAT thereby encouraging evaluation of the bids offering *the best price-quality ratio* and stimulating smart, sustainable and inclusive growth (European Parliament, and the Council 2014). As provided in the Article 67(2) of the Directive, “the most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing <...>, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject—matter of the public contract in question” (European Parliament, and the Council 2014, Article). Thus, the new MEAT still provides the scope for the price and cost to be considered, alongside other qualitative criteria, and enables the contracting authorities to balance desirable (although not absolutely necessary) features against price (Client Earth 2011).

The Article 39 paragraph 4 of the LPP provides that the contracting authority has an alternative to evaluate the tender either on the basis of the LPC or the MEAT (Seimas of the Republic of Lithuania 1996). Thus, as in the former directives the contracting authority’s discretion to choose the criteria regarded as relevant for assessing tenders is still affirmed. PPO has developed a procurement tender evaluation guidelines (hereinafter—the Guidelines) which stipulate that the LPC should be chosen in cases where “other characteristics” or “other terms” of the offer do not have a high importance for the future use of the purchased product or the performance of the public contract (Public Procurement Office 2006). The Guidelines further indicates that the criterion of the MEAT is particularly suitable when it is

important to acquire the product with the best possible quality. This criterion should be chosen in order to evaluate not only the price of the product but also the functional, aesthetic, environmental and other characteristics directly related to the object of procurement (Public Procurement Office 2006).

According to the data provided by the Public Procurement Office (2015), in 2014 the value of the contracts where the tenders were evaluated on the basis of the LPC amounted to approximately 90% of the total value of all public procurements. In sharp contrast, just 10% of the total value belongs to the procurements where the criterion of the MEAT was applied.

These figures underline that the vast majority of the contracting authorities in Lithuania with extensive experience and expertise in the area of public procurement significantly prefer to use the LPC within the evaluation of public procurement and believes that its use results in a more efficient tender for a public contract. Although the legal possibilities to increase the use of the MEAT criterion exist, it is applied fairly rare. It is especially the case for the low-value purchases.

Whether the use of a single evaluation criterion (the lowest bid price) is the most appropriate measure for the selection of the tender for a public contract, is questionable. *Firstly*, the lowest bid price evaluation criterion does not always really leads towards the lowest final price of a public contract. This is due to the fact that the information about the initially estimated price of a public contract is publicised² and the tender participants usually use it as the main factor for the formulation of their bidding strategy. Applicants seek to cut the bid price down as much as possible so that “the offered price is at the margin of profitability with the expectation to win the public tender” (Ochrana and Hrnčířová 2015). *Secondly*, the selection of this criterion does not guarantee that “an offer with the lowest bid price corresponds to the principle of economy, meaning that for the lowest incurred cost the given target of public procurement was indeed met” (Ochrana and Hrnčířová 2015). An inappropriate use of the lowest bid price criterion can lead to a waste of resources, if the offer with the lowest price, but with a very low quality of the performed work, was selected. Thus, the “price only” option allows the purchasers to ignore the best value offer, as the price of a product or service often does not reflect the best value, especially in the long term.

The National Audit Office of Lithuania (2011) indicated that 35% of municipalities, 38% of ministries and 50% of other contracting authorities not always achieve the expected result if the LPC is chosen. The public authorities state that suppliers who offer the lowest price often fail to fulfill their obligations and the service or product procured is faulty. This, in turn, leads to the loss of financial resources and additional time-consumption. However, in the view of the purchasing authorities, the application of this criterion is simpler, safer and prevents from violation of procurement procedures (National Audit Office of Lithuania 2011). The Lithuanian contracting authorities prefer to choose the LPC even in cases when the

²With regard to Lithuania, this information can be found at http://www.cvpp.lt/index.php?option=com_vptpublic&Itemid=88.

qualitative and other characteristics of the product are of great importance for the use of the product and performance of the contract. As a result, allowing purchases to be based solely on the lowest price often encourages purchases that result in significant negative externalities, including environmental degradation.

On the contrary, if the criterion of the MEAT is selected for the award of the contract and the life-cycle costing approach is used, the variety of factors (e.g. running and disposal costs, cost-effectiveness, quality, environmental impact) are considered and ranked. Theron and Dowden (2014) indicated that evaluation based on multiple criteria allows the public authorities to achieve the “five rights”—the right quantity of the right quality at the right time, from the right source at the right cost. In addition, according to Siemens (2003), environmentally-preferable products should be defined based on a comprehensive life-cycle assessment that objectively assesses the environmental effects of products and processes over their entire lifetime. However, Lithuanian public authorities rarely apply the multiple criteria (criterion of the MEAT) because the application of the LPC is simpler and faster while definition of objective criteria for the evaluation of offers on the basis of the MEAT is difficult and procurement officers usually lack the competence to apply this criterion. In addition, the Guidelines (2006) developed by the PPO with regard to the application of the MEAT are too difficult and time-consuming, as well as there is a lack of practical examples of how to identify and evaluate the cost-effectiveness of proposals (National Audit Office 2011).

Nevertheless, it is necessary to apply the MEAT criterion more widely and at the same time to limit the use of the criterion of the lowest bid price because when the assessment of tender bids is undertaken on the basis of multiple criteria, the bidders take more factors into account when preparing their offers, not the price only. As a result, the applicants can offer the slightly higher price which is compensated by a higher quality of the offered product or other desired parameter such as reduced environmental impact.

That Lithuanian contracting authorities prefer to choose the easier way and buy the products, services and works with the lowest price rather than those with a little bit higher price but reduced environmental impact can be seen from the following tables and figures where the data provided by the PPO (Public Procurement Office 2013, 2014) is summarised (Tables 2.1 and 2.2).

Table 2.1 Number and value of overall and GPP in Lithuania (2013–2014)

	2013	2014
Number of all public procurement (excl. low-value contracts)	12,505	9923
Number of all GPP (excl. low-value contracts)	871	562
Total value of all public procurement (excl. low-value contracts) (million of litas, including VAT)	13,020.9	15,644.6
Total value of all GPP (excl. low-value contracts) (million of litas, including VAT)	2591.8	1344.5

Table 2.2 Number of overall and GPP in Lithuania evaluated on the basis of the LPC and criterion of MEAT(2013–2014)

	2013	2014
Number of procurements evaluated on the basis of LPC (excl. low-value contracts)	11,793	9277
Number of procurements evaluated on the basis of MEAT (excl. low-value contracts)	712	646
Number of GPP evaluated on the basis of LPC (excl. low-value contracts)	815	513
Number of GPP evaluated on the basis of MEAT (excl. low-value contracts)	56	49

The statistics show that 11,793 procurements out of 12,505 were evaluated on the basis of the LPC in 2013. In 2014, this number was equal to 9277 out of 9923. The number of procurements when the tenders were evaluated on the basis of the MEAT amounted accordingly to 712 in 2013 (5.7% of an overall number of procurements, excluding low-value contracts) and 646 in 2014 (6.5% of an overall number of procurements, excluding low-value contracts).

Furthermore, the statistics indicates that in 2014 the total value and number of GPP (excluding low-value contracts) conducted by all contracting authorities, including those which must apply the environmental criteria during the tendering process, have decreased almost twice comparing to 2013 and is well below the levels set forth by the Government of the Republic of Lithuania, i.e. 25% by 2013, 30% by 2014 and 35% by 2015 (the target for 2016 is 40%). Furthermore, it is far from achieving the objective of reaching the level of the leading EU countries in GPP application. With regard to this it should be noted that in 2008 Communication “Public Procurement for a Better Environment”, the European Commission has set the objective that, by the year 2010, at least 50% of all public tendering procedures should be green in the European Union, i.e. compliant with endorsed common core GPP criteria (Fig. 2.1).

The number of GPP as compared to the overall number of public procurement (excluding the low-value contracts) consisted only 7% in 2013 and 5.7% in 2014 (Fig. 2.2).

The value of GPP as compared to the overall value of public procurement (excluding the low-value contracts) was 19.9% in 2013 and 8.6% in 2014 (Fig. 2.3).

The extent to which the LPC is used for award of the public contracts supposes that the decrease of GPP in value and number is firstly influenced by the existence of the general perception that GPP costs more because the initial capital cost of the greener products is usually higher than an initial price of more environmentally-damaging substitutes. However, this is not always the case, particularly if the full-life cycle costs (purchase price, usage, disposal costs) of a contract are considered and not only the purchase price.

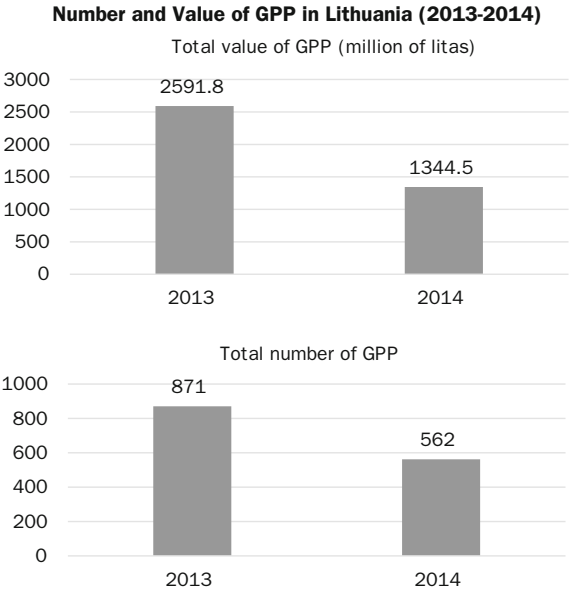


Fig. 2.1 Number and value of GPP in Lithuania (2013–2014)

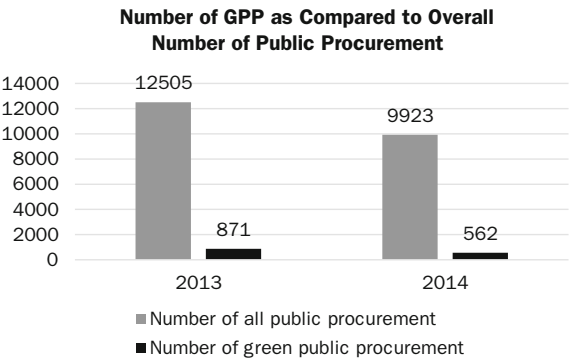


Fig. 2.2 Number of GPP as compared to overall number of public procurement

In the earlier mentioned Communication (2008), the European Commission states that there are a number of studies confirming the cost-effectiveness of GPP (unfortunately, any of those studies is not explicitly indicated there).³ What is more, the PricewaterhouseCoopers, Significant and Ecofys (2009) also concluded that GPP can lead to decreases in costs for the contracting authority instead of increases. It was

³There are also studies which conclude that GPP is cost-ineffective. See, for example, http://businessperspectives.org/journals_free/ee/2013/ee_2013_04_Lundberg.pdf.

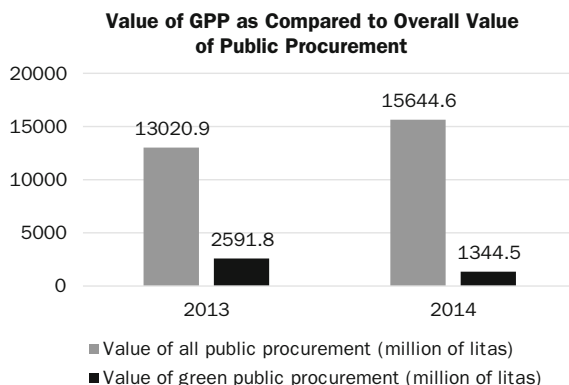


Fig. 2.3 Value of GPP as compared to overall value of public procurement

ascertained that “[w]hen using a Life Cycle Costing (LCC) approach in calculating the financial impact of GPP, the outcome is that with an average level of GPP of 45%, the average financial impact of GPP is -1% ” (PricewaterhouseCoopers, Significant and Ecofys 2009).⁴ This implies that “although the use of environmental criteria in procurement procedures can lead to higher direct purchasing costs, it can result in an average decrease of overall costs for public organisations of around 1%. The reason behind this is that higher purchasing prices of green goods are compensated by lower operating costs” (PricewaterhouseCoopers, Significant and Ecofys 2009). The other study also supported this conclusion by stating that “[l]ower life-cycle costs of GPP-compliant goods and services and increasing competition over time as GPP compliance initially gives a competitive advantage are assumed to restore the balance of the costs of goods and services purchased with GPP requirements” (Kahlenbom et al. 2010).

Undoubtedly, there also exist a number of other barriers and concerns which are directly associated with the decrease in number and value of GPP in Lithuania. *Firstly*, because of existing perception that GPP costs more and the annual budget constraints on the public authority, there is a lack of support for GPP from senior management. Visible support from high-level officials would provide “the stamp of legitimacy to green procurement, thus increasing its likelihood to success” (Thai et al. 2007). *Secondly*, there is a lack of consultation between the contracting authorities, suppliers, environmental experts and the end users. However, European public authorities, including Lithuanian, are unwilling to engage with the suppliers during the pre-procurement consultation stage because of the strict legislation regulating the preferential treatment of the suppliers. *Finally*, many purchasers within public authorities often lack the information with respect to the more

⁴The report presents the levels and impact of GPP measured in the best performing Member States (Green-7: Austria, Denmark, Finland, Germany, The Netherlands, Sweden and the United Kingdom) on average for 10 priority products groups/services in 2006/2007.

economic alternatives, also knowledge of environmental criteria and practical experience on the application of GPP. Consequently, the inefficient purchasing decisions that not only hurt the environment but also waste government resources are often made. In addition, GPP is seen as a more complex, detailed and resource intensive process which places a large burden on purchasers. This in turn leads to attention being paid to the procurement process rather than the outcome. Therefore, intensive training on legal and technical aspects of GPP implementation is necessary as only the procurement officials who are well-equipped can properly and objectively assess the extent to which the tender is environmentally-friendly.

In summary, since the contracting authority's discretion to choose the criteria regarded as relevant for assessing the tenders is still affirmed in the Lithuanian national law regulating the public procurement, purchasing authorities almost unanimously choose to apply the LPC the use of which usually leads to the procurement of goods, services or works with the negative environmental impact. What is more, the application of this criterion instead of the MEAT not only results in the acquisition of environmentally-unfriendly products but also, as ascertained by a number of studies mentioned earlier, loss of financial resources.

Inclusion of Environmental Requirements into Public Procurement Process

Public purchasers have an obligation to obtain the best value for money, which should be achieved through competition, and act fairly in the course of public procurement. Although public authorities are careful to balance primary procurement objectives (i.e. delivering goods and services necessary to accomplish government mission in a timely, economical and efficient manner (Organisation for Economic Co-operation and Development 2015) with secondary policy objectives (such as promoting sustainable green growth), this undoubtedly can be compatible and the inclusion of the green product criteria into the tendering process is one of a simplest, clearest and straightest way in finding this balance between the financial and environmental benefits. It is noted in the General Union Environment Action Programme to 2020 that administrations at all levels can reduce their environmental impact through their purchasing decisions, particularly by including environmental considerations into the procurement process (European Parliament and the Council 2013). Furthermore, the Europe 2020 strategy of March 2010 indicates that there is a need to encourage a wider deployment of GPP in order to support "the shift towards a resource efficient and low-carbon economy that is efficient in the way it uses all resources" (European Commission 2010). So it has been recognised that by applying an integrated approach and including environmental criteria at every stage of the procurement procedure, the contracting authorities can promote the modes of production and consumption that are more environmentally friendly and stimulate the supply and demand of "green" products (PricewaterhouseCoopers, Significant and Ecofys 2009).

Since the total amount spent through the public procurement procedures averages almost 10% of the country's Gross Domestic Product (GDP), or one third of Lithuania's national budget (Ministry of Economy of the Republic of Lithuania, Undated), the greater inclusion of environmental requirements into the procurement documents can deliver significant benefits not only for the price of procured works, services or products but also for the production and consumption of greener products, especially if the application of those requirements are focused on the sectors where there is a high public-demand intensity, also that raise the largest environmental concerns and that have been overlooked by the existing regulatory structures.

Furthermore, as Lithuania systematically invests into all purposeful activities directly aimed at the prevention, reduction and elimination of pollution or any other degradation of the environment (Eurostat, Undated),⁵ the increasing usage of GPP could significantly contribute to Lithuania's efforts with regard to environmental protection.

Inclusion of Environmental Criteria Under Lithuania's and EU Law

There are a number of ways under the Lithuanian law which provide the opportunity for the contracting authorities to incorporate environmental requirements into the procurement process. What is more, being a member of the European Union Lithuania has agreed to subject its procurement procedures to a certain degree of international regulation which establishes a number of rules and principles which must be observed in the award of the public contracts. In fact, the EU plays a major role in developing and adopting the policy framework which guides and assists the Member States in implementing procurement policies that seek to address not only economic but also environmental objectives.

In the EU, the legal framework for public procurement is defined by the provisions of the Treaty on the Functioning of the European Union (hereinafter—the Treaty), the EU Procurement Directives⁶ and by the jurisprudence of the European Court of Justice (ECJ). Although originally designed to foster competition and efficiency, now EU rules, among other things, seek to address environmental goals.

⁵Investments gave the positive results. See <http://gamta.lt/files/AB20141451478063964.pdf>.

⁶The legislative package consists of:

(a) Directive 2014/24 on Public Procurement ("Public Sector Directive"), replacing Directive 2004/18;

(b) Directive 2014/25 on procurement by entities operating in the water, energy, transport and postal services sectors ("Utilities Directive"), replacing Directive 2004/16; and

(c) New Directive 2014/23 on the award of concession contracts ("Concessions Directive").

The Treaty

The “integration principle”, stipulated in the Article 11 of the Treaty, requires environmental protection requirements to be “integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development” (European Union, *TFEU* 2012). The main aim of this integration is to contribute to the preservation, protection and improvement of the quality of the environment, protection of human health, prudent and rational utilisation of natural resources and promotion of measures at international level to deal with regional or worldwide environmental problems (European Union, *TFEU* 2012, Article 191). In addition, Article 3(3) of the Treaty on the European Union states that the Union “shall work for the sustainable development of the Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment” (European Union, *TEU* 2012).

Procurement Directive 2014/24/EU

It clarifies *how* the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts (European Parliament, and the Council 2014, Recital (91) of Directive). The Directive contains a number of provisions that refer specifically to the incorporation of the environmental considerations into the tendering procedures. If a contracting authority wishes to include environmental requirements, it has a choice of approaches listed below.

Technical Specifications

The contracting authorities may include a minimum level of environmental performance in the technical specifications of goods, services or works being purchased (Article 42(3)a) if it contributes to the fulfilment of their use. Technical specifications may be formulated in terms of performance or functional requirements and/or by reference to European, international, national standards or equivalent, as well as to specific production process or method provided they are linked to the subject-matter of the contract, proportionate to its value and objectives, and non-discriminatory. Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of unjustified obstacles to the opening up of public procurement to competition (Article 42 (2)). In addition, characteristics required of a material, product, supply or service may also include levels of environmental and climate performance (Annex VI of Directive 2014/24/EU). Article 25(3)2 of the LPP reiterates the respective Directive’s provisions and provides that without prejudice to mandatory national

technical rules and to the extent that they are compatible with EU law, the technical specifications may be formulated in terms of performance or functional requirements of the subject-matter of the contract which may include environmental characteristics (Seimas of the Republic of Lithuania 1996). Importantly, as an ability to meet the technical specifications is a prerequisite for being considered a candidate for the contract, the environmental demands included therein is compulsory.

Eco-labels

Public authorities can use eco-labels [Article 43(1)], such as the European Eco-label, (multi)national eco-labels or any other label which provide with information relating to the environmental characteristics of the products and thus allow to compare the environmental performance of products of the same type. The eco-labels can be used if the requirements for them are linked to the subject-matter of the contract (Recital (75) of Directive 2014/24/EU) and meet certain standards of openness and transparency. A certain eco-label cannot be required because it would be considered discriminatory. However, the criteria used by that eco-label can be included in the tender documents. The LPP in this regard states that where a contracting authority lays down environmental characteristics in terms of performance or functional requirements it may “use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi-) national eco-labels, or by any other eco-label, provided that: those specifications are appropriate to define the characteristics of the supplies or services that are the object of the contract; the requirements for the eco-label are drawn up on the basis of scientific information; the eco-labels are adopted using a procedure in which state institutions, consumers, manufacturers, distributors, environmental organisations and other interested persons can participate” (Seimas of the Republic of Lithuania 1996). The contracting authority may also indicate that “the products and services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents. In such a case, it must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a notified body” (Seimas of the Republic of Lithuania 1996, Article 25(6)6).

Exclusion on the Ground of Non-compliance with Environmental Legislation

According to the Article 57(4)a of the Directive, the purchasing authority may exclude from participation in procurement procedure any economic operator which has violated the applicable environmental obligations (European Parliament, and the Council 2014). A case of non-compliance with environmental legislation amounts to grave professional misconduct under the national law of Lithuania (Seimas of the Republic of Lithuania 1996, Article 33 (2)4 of the LPP) and the

economic operators may be excluded from the procurement procedures if this misconduct took place less than one year ago. However, care should be taken to ensure that decision to reject economic operator is proportionate to the offence and that the candidate is given the opportunity to “demonstrate its reliability despite the existence of a relevant ground for exclusion” (self-clean) [European Parliament, and the Council 2014, Article 57(6)].

Environmental Technical Competence

Contracting authorities can impose requirements ensuring that economic operators possess environmental technical competence necessary to fulfil the contract (Article 58(4)), e.g. have access to the technical equipment for environmental protection.

Environmental Management Systems or Standards

Public purchasers can require economic operators to demonstrate that they comply with environmental management systems or standards (Article 62(2)) which are relevant to the performance of contract in question (for service and works contracts only) and which certify that companies operate to certain levels of environmental standards and awareness. An organisation running an environmental management system may request certification under one of the two main environmental management systems in use in the EU: the “Eco-management and audit scheme” (EMAS) or the European/international standard on environmental management systems (EN/ ISO 14001) (European Commission 2011). Companies may also be able to demonstrate that they apply equivalent environmental management measures, even without certification (European Commission 2011).

With regard to environmental management systems, the Article 37(2) of the LPP states: “Should contracting authorities, in public works contracts and public service contracts require the production of certificates issued by independent bodies attesting compliance of the supplier with certain environmental management standards, they must refer in the contract documents to the EU Community Eco-Management and Audit Scheme (EMAS) or to environmental management standards based on the relevant European or international standards certified by bodies conforming to EU law or the relevant European or international standards concerning certification. The contracting authorities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent environmental management measures from the suppliers” (Seimas of the republic of Lithuania 1996).

Contract Award Criteria

The application of the contract award criteria based on environmental characteristics is another possible choice (Article 67(2)a). Award criteria enable the purchasing authority to score each tender on the basis of its satisfaction of different combinations of criteria, including those related with the environmental protection. The additional points can be awarded to the candidates that go beyond minimum requirements thereby stimulating greater sustainability. It is important to ensure, however, that the assessment which has taken place at selection stage is not duplicated at the award stage. In addition, the choice of environmental qualification and award criteria must respect the single market principles which serve to uphold competition: equal treatment, transparency, non-discrimination, proportionality, and mutual recognition (Lundberg and Marklund 2013).

It is also important to note that the pre-procurement consultation can be very useful when formulating more appropriate and ambitious award criteria related to environmental objectives. However, as it was mentioned earlier, contracting authorities are discouraged from pre-procurement consultation because of the strict legislation regulating the preferential treatment of the suppliers. Economic operators, in turn, is uncertain whether they could take part in the further procurement process if involved in the pre-procurement consultation.

Life-Cycle Costing

Contracting authorities can apply the life-cycle costing to measure and compare costs including those imputed to environmental externalities [Article 68(1)b, (3)].

Contract Performance Clauses

Environmental conditions for the performance of a public contracts can be set up provided that they are linked to the subject-matter of the contract and are indicated in the call for competition or in the procurement documents (Article 70) so as to ensure the equal treatment of tenderers and transparency (European Court of justice 2004, paras. 108–121). Unlike contract award criteria which are the basis for a comparative assessment of the quality of tenders, contract performance conditions constitute fixed objective requirements that have no impact on the assessment of tenders (Recital (104) of Directive 2014/24/EU). However, having environmental contract performance clauses is only effective if compliance with them is regularly and impartially monitored. Because of the lack of human resources, also the difficulties of verifying compliance with all requirements it is a rare practice in Lithuania.

Contracting authorities in the EEA Member States use technical specifications most often (66%) as the tender section for GPP, followed by the award criteria (45%) and the requirements for technical and/or professional ability (44%)

(Kahlenbom et al. 2010). Excluding the GPP leaders (Denmark, the Netherlands, Norway, Sweden and the UK) which use most of the sections for including “green” requirements, the majority of the Member States (including Lithuania) mainly introduce the GPP requirements in the technical specifications (67%). Those contracting authorities that “use only technical specifications do so because the minimum GPP criteria have been predefined, and they are sure they are legally valid.” (Kahlenbom et al. 2010).

As concerns the predefined GPP criteria, the European Commission has developed core and comprehensive criteria for a series of product and service groups⁷ which are regularly reviewed and updated. They are designed to be inserted directly into the public tender documents and thereby help procuring authorities to “reach a good balance between environmental performance, cost considerations, market availability and ease of verification” (European Commission, Undated). As it was indicated in the study on strategic use of the public procurement, Eastern European Member States, such as Lithuania, Latvia, Estonia, explicitly name the EC GPP criteria as a basis for their own GPP criteria (Kahlenbom et al. 2010).

However, although the provisions on environmental matters were included in the new directives, these are almost all voluntary (Client Earth 2011) and their application both in law and practice is all left up to national legislators of the Member States or individual contracting authorities. It is important to note that the provisions of the Directive are applicable to procurement procedures, whose value is estimated to be not less than the thresholds laid down in the Article 4 of the Directive. In cases when the value of the contracts is below the thresholds indicated in the Directive, national procurement rules have to fill the gap. In Lithuania, the LPP and the rules of simplified procurement procedures which must be prepared by each contracting authority play the main role in this regard. All in all, all the national rules have to observe the fundamental principles embedded in the Treaties (TFEU and TEU).

European Court of Justice

The European Court of Justice in its jurisprudence clarified that a contracting authority can include horizontal procurement criteria promoting environmental policy objectives, even if these criteria do not contribute to the direct economic advantage of the contracting authority (Client Earth 2011), provided that the criteria are linked to the subject-matter of the contract, comply with the general requirements of equal treatment, transparency and proportionality, are expressly mentioned in the contract documents or the tender notice and do not confer an unrestricted freedom of choice on the authority (European Court of Justice 2002, *Case C-513/99*, para. 64). The fact that such a criterion does not necessarily serve to

⁷The complete list of criteria is available at http://ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm.

achieve the functional objective pursued is irrelevant (European Court of Justice 2003, *Case C-448/01*, para. 53). In addition, the Court has underscored the contracting authorities' discretion to define the criteria for determining the most economically advantageous tender and to determine the weighting of such criteria (European Court of Justice 2003, *Case C-448/01*, para. 39).

Unfortunately, there is no Lithuanian case law governing the introduction of the environmental requirements into the public procurement procedures.

In conclusion, both Lithuanian national and EU law regulating the public procurement provide a number of opportunities for the contracting authorities to include environmental considerations into the procurement procedures. Namely, if a contracting authority wishes to include environmental requirements into the procurement process, it can do so by, for example, incorporating such requirements into the technical specifications, by using the eco-labels, excluding on the ground of non-compliance with environmental obligations or by setting up environmental conditions for the performance of a public contract. In such a way, primary procurement objectives can be balanced with the protection of the environment. However, the environmental provisions are almost all voluntary. Therefore, the extent and frequency to which these provisions will be implemented depend on the governments of the Member States or individual contracting authorities.

Conclusions

The world is paying a lot of attention to sustainability issues, especially on the environment. Public authorities spend significant amount of public funds every year for acquiring products, services or works which they need for the implementation of their functions. It is already widely recognised that public authorities have to implement not only functional but also horizontal objectives, such as the protection of environment. Therefore, the contracting authorities should not contribute to the degradation of the environment and thus be a part of the problem, but, on the contrary, be a part of the solution by making the environmentally-friendly procurement decisions.

The LPP provides that the purchasing authorities can award a public contract on the basis of either the criterion of the lowest price or the criterion of the MEAT. According to the statistics provided by the Public Procurement Office of the Republic of Lithuania, the value of the contracts where the tenders were evaluated on the LPC amounted to approximately 90% of the total value of all public procurements. These figures emphasises that Lithuanian contracting authorities believes that the use of this criterion results in a more efficient tender for a public contract. On the other hand, many institutions (35% of municipalities, 38% of ministries and 50% of other contracting authorities) admit that they do not always achieve the expected result if the LPC is applied. What is more, purchases based solely on the LPC often result in significant negative externalities, including environmental degradation. The criterion of the MEAT, on the contrary, induces

the inclusion of the environmental considerations into the procurement process and therefore fosters the sustainable consumption and production. However, Lithuanian public authorities rarely apply this criterion (MEAT) because it is considered to be more complex and time-consuming. Furthermore, the contracting authorities indicate that it is difficult to define the objective criteria for the evaluation of tenders. Consequently, the use of the LPC as a major criterion for awarding the public contracts results in decreasing number and value of purchases which include environmental requirements into the tendering process. This, in turn, stimulates the acquisition of products with the negative environmental impact.

Although the Government of the Republic of Lithuania indicated that 25% by 2013 and 30% by 2014 of procurement by value and number should be “green”, the number of GPP as compared to the overall number of the public procurement (excluding the low-value contracts) was equal to 7% in 2013 and 5.7% in 2014. The value of GPP as compared to the overall value of the public procurement (excluding the low-value contracts) was 19.9% in 2013 and 8.6% in 2014. The volume to which the GPP is practised demonstrates the commitment of the contracting authority to consider and minimise the environmental consequences of its activities. Furthermore, it was determined that the “greener” the public procurement is, the more financial cost can be saved by the contracting authorities.

The decrease of green procurement in value and number in Lithuania can be influenced by some existing barriers and concerns, such as the perception that GPP costs more, lack of consultation with suppliers, lack of support from senior management, also the lack of knowledge and practical experience.

On the other hand, the existing situation can be improved and the primary procurement objective can be balanced with the societal goal of protecting the environment by including environmental considerations into the different stages of procurement. The EU and Lithuanian national law provide that if a contracting authority wishes to include environmental requirements, it has a choice of approaches: technical specifications; eco-labels; exclusion on the ground of non-compliance with environmental legislation; environmental technical competence; environmental management systems or standards; contract award criteria and contract performance clauses.

According to the study conducted in 2010, the contracting authorities in the EEA Member States, including Lithuania, use technical specifications more often for the purpose of including environmental requirements in procurement (Kahlenbom, Moser, Frijdal, and Essig). This is so because the minimum GPP criteria are pre-defined by the European Commission and therefore purchasing authorities are sure they are legally valid.

However, although provisions on environmental matters are included in the EU as well as Lithuanian legislation concerning public procurement, these are almost all voluntary and their application is left up to national legislators of the Member States or individual contracting authorities.

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