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Awarding Public Contracts Skillfully and Lawfully within the Procurement Rules

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Climate Metrics

How do you incorporate carbon and climate metrics into tender documents, that ensure fairness and equity across bidders?

Is GPP mandatory?

TOPIC	INSTRUMENT	REQUIREMENT	WHO DOES IT APPLY TO?
APPLICATION OF GPP CRITERIA	<i>Climate Action Plan/ Programme for Government</i>	All procurement using public funds must include green criteria by 2023.	All public bodies and any other organisation spending public funds
APPLICATION OF GPP CRITERIA	Energy Efficient Public Procurement Regulations S.I.s <i>151/2011, 426/2014 and 646/2016</i>)	Public bodies may only procure equipment or vehicles which are included on the <i>Triple E Register</i> or which meet the relevant energy-efficiency criteria.	All public bodies
PLANNING	<i>Circular 20/2019</i> (DPER/ OGP)	Corporate Procurement Plan must state where GPP criteria will be used in upcoming procurements	Departments
REPORTING	<i>Circular 20/2019</i> (DPER/ OGP)	From 2020 onwards, annual reports must detail the number and value of contracts including GPP criteria ²	Departments – to be extended to other public bodies

Table 1: Legal and other requirements for GPP in Ireland

When can I use GPP?

Environmental criteria can be included in the procurement process:

- When defining the subject matter of the contract;
- In exclusion grounds and selection criteria;
- As technical specifications;
- As qualitative award criteria;
- In the application of life-cycle costing;
- In contract performance clauses.

Exclusion Criteria

Article 57 of Directive 2014/24/EU

- Non-compliance with applicable national law, collective agreements, EU or international environmental, social and labour law (Art. 57.4(a)2 and Art 18)
- Grave professional misconduct which renders integrity questionable (Art. 57.4(c))
- Significant/persistent deficiencies in performance of substantive requirement under prior contract which led to termination or comparable sanctions(Art. 57.4(g))
- Misrepresentation of any of the above or inability to submit supporting documents (Art. 57.4(h)).

Selection Criteria

Selection criteria allow you to check that bidders have appropriate experience and technical and professional ability and human capacity to deliver GPP aspects of a contract but must be proportionate and related to the subject matter of the contract.

Selection Criteria related to GPP may include:

- Human and technical resources
- Experience and references
- Educational and professional qualifications of staff
- Environmental management systems and schemes (e.g. EMAS, ISO 14001)
- Supply chain management/tracking systems
- Samples of products
- Conformity assessment certificates

Specifications and Award Criteria

- Where most economically advantageous tender (MEAT) is chosen as the award basis, contracting authorities can include environmental criteria, provided those criteria:
 - Are linked to the subject-matter of the contract
 - Do not confer an unrestricted freedom of choice on the contracting authority
 - Are expressly mentioned in the contract notice and tender documents; together with their weightings and any applicable subcriteria
 - Are not selection/eligibility criteria (e.g general capacity); and
 - Comply with the fundamental principles of EU law

Specifications and Award Criteria

Sample Award criteria for a vehicle procurement

- Total cost of ownership (including purchase/lease costs, fuel/energy consumption over a specified mileage and driving conditions, and maintenance costs where relevant) **45%**
- Vehicle handling/road test **20%**
- Co2 emissions – lower than specified maximum **10%**
- Air pollutant emissions – lower than specified maximum **10%**
- Extended warranty **10%**
- Zero tailpipe emission capability **5%**

EPA Green Public Procurement Guidance 2021

This edition of the guidance includes fully updated Irish GPP criteria for **ten priority sectors**:

 Road transport vehicles and services	 Indoor and outdoor lighting
 ICT products and services (including data centres)	 Heating equipment (including boilers, cogeneration, trigeneration and heat pumps)
 Food and catering services	 Energy-related products (white goods/appliances, electronic displays, vacuum cleaners)
 Cleaning products and services	 Paper products and printing services
 Design, construction and management of office buildings	 Textile products and services (including uniforms and laundry services)

What Evidence can be requested for evaluation of GPP Criteria?

PROCUREMENT STAGE	TYPE OF GPP CRITERIA	WHAT EVIDENCE CAN BE REQUESTED?
EXCLUSION	Exclusion for non-compliance with environmental law, grave professional misconduct, or significant/ persistent defects in prior contracts.	A self-declaration should be accepted in the first instance (this may include the European Single Procurement Document), however further evidence may be required at any time to ensure the proper conduct of the procedure.
SELECTION	Ability to apply environmental management measures.	EMAS, ISO 14 001 or other independent third-party schemes. In-house environmental management systems may also be accepted if they include the specific measures required for the contract.
	Technical and human capacity.	Supply chain management and tracking systems; measures for quality control; experience and qualifications of staff; tools, plant and equipment.
	Previous experience related to GPP.	A list of previous similar contracts carried out over the past three years (for supply/service contracts) or the past five years (for works contracts).
TECHNICAL SPECIFICATIONS	Environmental standards, production processes, minimum performance requirements (e.g. energy efficiency levels).	Ecolabels, certificates, test reports or technical documentation. Equivalent evidence must be accepted if it establishes compliance or performance under the specific criteria. If a bidder does not have a third-party label or certificate, they must prove that this is for reasons not attributable to them.
AWARD CRITERIA	Performance above minimum specified levels, life-cycle costs, added value.	As above. Method statements/descriptions may also be relevant for certain criteria. For life-cycle costing, bidders should complete a spreadsheet and may also be required to provide test reports, certificates etc.
CONTRACT PERFORMANCE CLAUSES	Key performance indicators, incentives, penalties or remedies linked to GPP.	Ecolabels, certificates etc may be required under the same conditions as above. On-site inspections, tests, or audits may be carried out and the contractor may be required to report on environmental performance.

Relevant case law

Finnish buses [2003] 3 CMLR 20

The judgment concludes that a contracting authority may take into account ecological criteria provided that:

- they are linked to the subject-matter of the contract,
- do not confer an unrestricted freedom of choice on the authority,
- are expressly mentioned in the contract documents or tender notice, and
- comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.

Relevant case law

Dutch Coffee Case[2013] All ER (ECCC) 804. ECJ case

clarifying extent to which a supplier can be required to provide products bearing specific labels relating to their fair trade/environmental credentials.

Found:

- (a) If using environmental specifications, must be set out in full in the spec
- (b) Fair trade is not a technical specification and so cannot be included but can be in a contract condition
- Evaluation criteria can reflect fair trade or eco-requirements, but they must be linked to the subject matter of the contract and observe the principles of equality, non discrimination and transparency

Relevant case law

- *Dutch Coffee Case (2)*
 - General requirements on bidders to demonstrate socially responsible business cannot be used as pre –qualification factors.
 - Equal treatment means that factors have to be identified with clarity and precision.
- *Republic v Germany C-20/01*-It was not impossible that a technical reason relating to the environment may be taken into account, but there was not enough evidence to substantiate this claim .

The Future

Taxonomy Regulation (EU) 2020/852 and Delegated Act

Article 3

"For the purposes of establishing the degree to which an investment is environmentally sustainable, an economic activity shall qualify as environmentally sustainable where that economic activity:

- (a) contributes substantially to one or more of the environmental objectives set out in Article 9 in accordance with Articles 10 to 16;
- (b) does not significantly harm any of the environmental objectives set out in Article 9 in accordance with Article 17;
- (c) is carried out in compliance with the minimum safeguards laid down in Article 18; and
- (d) complies with technical screening criteria that have been established by the Commission in accordance with Article 10 (3), 11(3), 12(2), 13(2), 14(2) or 15(2)."



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Maples Group - Do No Significant Harm Handbook:
https://issuu.com/maplesgroup/docs/mg_dnsh_a4-test