

Sustainable Public Procurement in the Green Climate Fund: A “Walk-the-Talk” Strategy on Climate Change¹

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☞ Climate change; International environmental law; Public procurement; Sustainability

Abstract

Sustainable procurement (SP) (generally known in the US as “sustainable acquisition”²) is a process whereby organisations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole-life basis in terms of generating benefits not only to the organisation but also to society and the economy, whilst maintaining an appropriate balance between the three pillars of sustainable development, i.e. economic, social and environmental.³

While the terms “green procurement” and “sustainable procurement” are often used interchangeably,⁴ sustainable procurement is not limited to the “impact for ... human health and the environment”,⁵ of the procurement process which is the emphasis of green procurement. It also includes the determination of the social benefits of the project, i.e. poverty reduction, improved equity and respect for core labour standards, and its economic impact on generation of income, reduction of costs and support for the transfer of skills and technology.⁶ It becomes “sustainable public procurement” (SPP) when the organisation or the procuring entity is “any governmental department, agency, organ or other unit, or any subdivision or multiplicity thereof”.⁷

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² M.A. Mullin and D.J. Deeb, “Policing Green Claims” (2012) 26 Nat. Resources & Env’t 28. *Sustainable Acquisition Policy*, 76 Fed. Reg. 31, 399 (31 May 2011) (to be codified at 48 CFR Part 23.101) required federal agencies to advance the cause of sustainable acquisition by ensuring that 95 per cent of new contract actions, i.e. contracts that result in the purchase, rent, or lease of supplies or equipment, services or construction, would qualify as sustainable. Sustainable purchases were those that meet one or more of the following requirements: energy efficient, water efficient, bio-based, environmentally-preferable, e.g. non-toxic or consisting of less toxic alternatives, non-zone depleting or made with recovered materials. See pp.30–31. See also, K.M. Urban, “Sustainable Acquisition and the Post-Conflict Environment: Why adopting a federal sustainable procurement policy for post-conflict environments that mirrors those adopted by local governments would help lead to mission success” (2015) 44 Pub. Cont. L.J. 261. The author noted that the *Sustainable Acquisition Policy* is now incorporated in the Federal Acquisition Regulation as FAR Part 23.103(a).

³ UNEPS, “Sustainable Public Procurement Implementation Guidelines” (2012), p.7, available at http://www.oneplanetnetwork.org/sites/default/files/sustainable_public_procurement_implementation_guidelines.pdf [Accessed 23 May 2019].

⁴ UKEssays.com, “Sustainable Public Procurement Vs Green Public Procurement Construction Essay”, (November 2013), available at <https://www.ukessays.com/essays/construction/sustainable-public-procurement-vs-green-public-procurement-construction-essay.php?cref=1> [Accessed 23 May 2019]. See also, L.W. Hansson and S. Johansson, “Institutional Incentives for Sustainable Public Procurement: A Case Study of Sustainability Considerations in the Swedish Construction Sector” (2017) 27 P.P.L.R. 221 stating: “[t]he concept of sustainable public procurement has developed from Green Public Procurement ... it entails a sustainable development perspective on public procurement, whereby economic, environmental and social aspects of development are considered holistically”.

⁵ UNDP (2008), cited by M. Frey, “Introduction” in F. Decarolis, M. Frey and G. Piga, (eds), *Public Procurement's Place in the World* (Palgrave Macmillan UK, 2014), p.1.

⁶ UNEPS “Sustainable Public Procurement Implementation Guidelines” (2012), p.6.

⁷ Article II (n), UNCITRAL Model Law on Public Procurement (United Nations, 2014).

Sustainable public procurement has several benefits: it expands or creates broader markets for goods and services that support sustainable development; it serves as a model for other consumers; and it offers standards and information for use by other consumers.⁸ It is often politically attractive as it responds to the public demand for governments to be environmentally and socially responsible in their own operations.⁹

The European Commission has indicated that procurement by all European public authorities of green electricity would result in meeting 18 per cent of the EU's Kyoto commitment, and of organic food, would offset the eutrophication impacts of intensive agriculture.¹⁰

Pacala and Socolow (2004) demonstrated that construction of efficient buildings, i.e. buildings with energy-efficient space heating and cooling, water heating and lighting and refrigeration in residential and commercial buildings, more particularly in developing countries, can cut carbon emissions by a quarter in buildings and appliances by 2054.¹¹ In the US, energy efficiency in using best available green building technology would reduce US energy consumption by 17.9 per cent.¹²

By 2050, the world's income will grow from \$35 to \$135 trillion, 40 per cent of which will be in low and middle-income economies,¹³ and with a population growth up to 9 billion (from 6 billion in 2004),¹⁴ more than 65 per cent of which will be living in urban areas.¹⁵ If so, an additional 15 million megawatts of new electricity capacity will be required by 2050,¹⁶ necessitating investment equivalent to building 1,000 large electric power plants per year;¹⁷ hence, there is an urgent need to be "climate friendly",¹⁸ including in public procurement.

This article evaluates the possible role of public procurement in addressing the problem of climate change. It is divided into three parts. Part I covers the climate negotiations from Stockholm to Paris where the author evaluates the published records in every negotiation and identifies any input that may lead to

⁸ *Integrating SCP in Government Operations—including sustainable public procurement, The Marrakech Process*, UNEP, pp.1–2, available at https://esa.un.org/marrakechprocess/pdf/Issues_Sustainable_Public_Procurement.pdf [INVALID URL]. See also, "Public Procurement as a tool for promoting more sustainable consumption and production patterns", 5 Sustainable Development Innovation Brief (UNDESA, August 2008), p.2, available at <https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=70&menu=1841> [Accessed 23 May 2019]. There are four reasons why the government should engage in green public procurement or sustainable public procurement, namely: (1) GPP is based on cost effectiveness, (2) it is important to customers in some markets because of its environmental impacts; (3) the government can use their market power to influence producers to shift more rapidly to clearer energy; and (4) public demand for more sustainably produced goods and services can also have desirable indirect effects, such as raising consumer awareness about the environmental and social implications associated with different types of purchases. See also M. Kullman, "Promoting Social and Environmental Sustainability: what role for public procurement" (2018) 40 Comp. Lab. L. & Pol'y J. 109 at 128–129, stating that public procurement provides "room for public authorities to promote social and environmental sustainability through the pursuance of horizontal procurement policies, i.e., social, labor and environmental obligations ... contracting authorities can act as promoters of creating a more social and environmentally friendly society, which in turn will be beneficial to the economy".

⁹ See fn.9 above. See also, UNEP (2012), p.9, available at <http://www.oneplanetnetwork.org/resource/sustainable-public-procurement-implementation-guidelines> [Accessed 23 May 2019] stating: "[c]ountries committing to invest their time, human resources and funding to implement SPP will have the opportunity to: 1) contribute to the delivery of a wide range of national objectives; 2) improve environmental performance; 3) deliver financial benefits; and 4) develop markets for more sustainable products and services". See also, A. O'Rourke, *Measuring and Communicating the Benefits of Sustainable Public Procurement (SPP): Baseline Review and Development of a Guidance Framework* (UNEP, 2016), pp.16–17, available at <http://www.upphandlingsmyndigheten.se/globalassets/publikationer/rapporter/measuring-and-communicating-the-benefits-of-sustainable-public-procurement-spp-baseline-review-and-development-of-a-guidance-framework.pdf> [Accessed 23 May 2019] stating: "UNEP's highlighted GHG emission reductions as the most cited and the most often quantified benefits among the perceived benefits of sustainable public procurement, e.g. promotes innovation, regional economic development, generates employment opportunities, improved occupational health and safety, and reduced waste generation".

¹⁰ ICLEI, *Local Government for Sustainability* (2005), cited in *Integrating SCP in Government Operations* (see fn.9 above). See also, C. Erdmenger (ed.), "Eco-procurement: The Path to a Greener Market place" (ICLEI EPP, 2002) stating: "The International Council for Local Environment Initiatives (ICLEI) also showed that purchasing green computers has the potential for CO₂ reduction. Over 2.8 million desktop computers are purchased each year by public authorities in the European Union. The purchasing of more energy efficient models would reduce electricity bills and the European emissions of green-house gases by over 830,000 tonne CO₂ equivalents."

¹¹ S. Pacala and R. Socolow, "Stabilization Wedges: Solving the Climate Problem for the Next 50 Years with Current Technologies" (2004) 305 Sci. 968, 968–969.

¹² P. E. Tolan Jr., "Going-Going Green: Strategies for Fostering Sustainable New Federal Buildings" (2012) 41 Pub. Cont. L.J. 233, pp. at 241–242 stating that: "Implementing technological advances to promote energy efficiency in the building stock can dramatically reduce future energy use per capita and corresponding GHG emissions."

¹³ The World Bank, "Responsible Growth for the New Millennium: Integrating Society, Ecology, and the Economy" (2004) p.1, available at <http://documents.worldbank.org/curated/en/355991468347053896/pdf/334050PAPER0Responsible0growth.pdf> [Accessed 23 May 2019].

¹⁴ The World Bank, "Responsible Growth for the New Millennium: Integrating Society, Ecology, and the Economy" (2004) p.1.

¹⁵ The World Bank, "Responsible Growth for the New Millennium: Integrating Society, Ecology, and the Economy" (2004) p.2.

¹⁶ The World Bank, "Responsible Growth for the New Millennium: Integrating Society, Ecology, and the Economy" (2004) p.11.

¹⁷ The World Bank, "Responsible Growth for the New Millennium: Integrating Society, Ecology, and the Economy" (2004) p.11.

¹⁸ The World Bank, "Responsible Growth for the New Millennium: Integrating Society, Ecology, and the Economy" (2004) pp.77–78.

the recognition of the role of sustainable public procurement in carbon emission reduction. Part II highlights the best examples of how sustainable public procurement has contributed to the reduction of carbon emission through what is now referred to as “low-carbon procurement”. Part III evaluates the propriety of adopting low-carbon procurement as a “walk-the-talk” strategy by the Green Climate Fund in its administrative guidelines for corporate procurement. This article concludes that sustainable public procurement, like other types of procurement (i.e. trade procurement), has barriers, and one of the possible ways to slowly erode these barriers is to re-evaluate the principles behind its conceptualisation, e.g. nondiscrimination and national treatment applied in the context of trade. In the case of sustainable public procurement in the context of climate negotiations, the objective has been the reduction of carbon emission. It is not difficult to get institutions that were and will be established because of the continuing climate negotiations to be consistent in promoting this objective, even in the most trivial activity such as their own corporate procurement. For if an institution like the Green Climate Fund (GCF) will not implement low-carbon procurement, sustainable public procurement that has been proven to contribute to the reduction of carbon emission, in its corporate procurement, how can it ensure that the countries that it hopes to assist will do the same? Sometimes, it takes an institution like the GCF to have the political will or moral integrity to encourage change one step at a time.