

ENVIRONMENTAL PROTECTION (ENERGY END-USE EFFICIENCY) ACT 2009

PROCUREMENT POLICY NOTE

Implementing Article 6 of the Energy Efficiency Directive

May 2018

Issue

1. The requirements of Article 6 of the Energy Efficiency Directive 2012/27/EU relating to energy efficient procurement are transposed into Gibraltar law via Section 8 of the Environmental Protection (Energy End-Use Efficiency) Act 2009 (the "Act") and via the application of the Green Public Procurement Policy document issued by HM Government of Gibraltar ("HMGoG") in March 2012. In the interests of transparency, clarity and legal certainty, the Minister with responsibility for the environment has issued this Procurement Policy Note (the "PPN") under the powers vested in him under Section 8(6) of the Act.

Dissemination & Scope

2. The contents of this PPN apply to all HMGoG departments, agencies and authorities including entities that are "contracting authorities" for the purposes of Section 3 of the Procurement (Public Sector Contracts) Regulations 2016 (collectively referred to as "Contracting Authorities").

3. Contracting Authorities must comply with this PPN when interpreting and applying Section 8 of the Act.

4. Please circulate this PPN within your Contracting Authority, drawing it to the attention of those with a purchasing role.

Timing

5. Contracting Authorities must comply with the requirements of this PPN in respect of all procurement processes commenced after the date of publication of this PPN.

Action

6. Contracting Authorities must when purchasing products or services, or when purchasing or renting buildings comply with the energy efficiency standards applicable as set out in Section 8 and Schedule 6 of the Act. When applying Section 8 and Schedule 6 of the Act, Contracting Authorities must adhere to the detailed requirements set out in Annex I of this PPN.

7. As set out in Section 8(1) the requirements only apply where this is consistent with cost-effectiveness, economic feasibility, wider sustainability, technical suitability and ensuring sufficient competition as referred to in Schedule 6. These conditionalities are defined and explained in Annex II of this PPN.

8. Specific requirements with regard to the purchase or rental of buildings in accordance with Sections 7(1) to 7(6) of the Act are set out in Annex III of this PPN.

9. In case of any inconsistency or conflict between this PPN and the Act, the Act shall prevail.

Contact

10. Enquiries about this PPN should be directed to the Department of the Environment Energy and Climate Change at:

Duke of Kent House,
Cathedral Square,
Gibraltar
Tel No: (00350) 20066491
Fax No: (00350) 20066706
Email: mhe@gibraltar.gov.gi

Annex I

The Requirements

1. The requirements of Section 8 and Annex II of the Act only apply:

1.1 Where this is consistent with achieving cost-effectiveness, economic feasibility, wider sustainability, technical suitability and ensuring sufficient competition; and

1.2 To contracts that have a value equal to or greater than the thresholds set out in Regulation 7(1) of the Procurement (Public Sector Contracts) Regulations 2016 In respect of service contracts, it is where the value of the service contract as a whole, not the cost of the products, is higher than the threshold that the Article 6 requirements apply.

2. For the armed forces, the requirements do not apply where they conflict with the objectives of the armed forces, or to the purchase of military equipment.

3. Without prejudice to Sections 8(1) and 8(2) of the Act, when purchasing a product package covered as a whole by a delegated act adopted under the Environment (Energy Efficiency) Regulations 2013, HMGoG may require that the aggregate energy efficiency shall take priority over the energy efficiency of individual products within that package, by purchasing the product package that complies with the criterion of belonging to the highest energy efficiency class.

4. Contracting Authorities must carry out their procurement in accordance with the following energy efficiency standards:

For products with energy labels:

4.1 In cases where labels are provided, only those products that are labelled as having the highest energy efficiency class may be purchased. For example, for products that contain information provided in accordance with Directive 2010/30/EU on the labelling of energy-related products only those which have the highest energy efficiency may be purchased. If no labels are provided, Contracting Authorities must conduct reasonable enquiries to ascertain the energy efficiency of products it intends to purchase to ascertain that they are of a high energy efficiency class.

For products which have an impact on energy consumption during use:

4.2 Contracting Authorities must only purchase products that have a high energy efficiency benchmark. Contracting Authorities must conduct reasonable enquiries to ascertain the energy efficiency benchmark of the products it intends to purchase.

For tyres:

- 4.3 Only tyres that have the highest fuel efficiency class may be purchased (unless the purchase of tyres with the highest wet grip or external rolling noise class is justified in the interests of public safety or health).

For services:

- 4.4 When contracting for new services, Contracting Authorities must require in the tender and the services contract that any new products purchased by the service provider partially or wholly for the purpose of providing the services comply with the standards for the products set out above.

Purchase or rental of buildings:

- 4.5 Only buildings that comply at least with the minimum energy performance requirements referred to in section 7(1) to (6) of the Act may be purchased or rented, except where buildings are purchased for deep renovation, demolition or resale without being used for a Contracting Authority own purposes or to preserve it as a building officially protected as part of a designated environment or because of its special architectural or historic merit. Specifically with respect to the purchase or rental of buildings see further Annex III to this PPN.

Annex II

The Conditionalities

1. Cost effectiveness and economic feasibility

In the context of energy efficiency, cost effectiveness relates to the cost-effectiveness over the life-cycle of the product, service or building in question and relates the costs of a measure to the impact that has been achieved in terms of energy efficiency (e.g. pound purchase cost per amount of energy saved) and performance of the product/service/building. In the context of public procurement, however, cost effectiveness can also be understood to include considerations which are not linked with direct benefits to the procuring entity e.g. lowering of greenhouse gas emissions or other air pollutants to be included in the life cycle costs.

Economic feasibility relates to the upfront price and the running costs of the product/service/building compared to the ability of the procuring body to bear this cost.

It is possible for a situation to arise whereby it is not cost effective or economically feasible to buy the most energy efficient product. In this case, the number of products on the market that meet

the best criteria might be very limited, thus making their costs prohibitive and not economically feasible.

It should also be clear that cost-effectiveness does not necessarily mean the cheapest product on the market from a life-cycle cost standpoint. Contracting Authorities have an obligation to draw the market towards greater efficiency, through their purchasing power, even if this does not result in purchasing the products with the lowest life cycle cost.

If a Contracting Authority discovers that the life cycle cost of all products in a particular efficiency category are significantly higher than the life-cycle costs of less efficient products, they should have the possibility to purchase these less efficient products, provided this is done on the basis of a structured, transparent and evidence based approach.

2. Wider sustainability

Achieving wider sustainability and greater energy efficiency can often be complementary aims. In most of the items covered by Schedule 6 of the Act, it is the energy consumption in the use phase that has the greatest environmental impact.

On the rare occasion that a conflict arises between greater energy efficiency and reduced environmental impact, those impacts will need to be weighed on the basis of a transparent and evidence based approach. The results of such an exercise could allow the purchase of products/buildings/services that are less efficient than the levels indicated in Schedule 6 of the Act.

There are difficulties in equating energy, materials, emissions and other environmental impacts and placing them on an equal scale. One possible solution to this is to normalise the impacts by dividing each impact category by the whole amount of this category in a given year (e.g. yearly carbon emissions of the product/building/service divided by Gibraltar's total carbon emissions) and then determine in which environmental category the product/building/service has the greatest impact. Although such assessments have their flaws they can help to identify those cases where higher energy efficiency could lead to an overall negative environmental impact.

In such cases, Contracting Authorities should have the option of purchasing the less energy efficiency products.

3. Sufficient Competition

It is possible for a situation to arise where for a given product there is a limited offer on the market. The EU Commission Guidance Note on Article 6 draws attention to case law whereby in the 'Concordia Bus Finland' case (C- 513/99) the European Court of Justice found that:

'[...] the fact that one of the criteria adopted by the contracting authority to identify the economically most advantageous tender could be satisfied only by a small number of undertakings, one of which was an undertaking belonging to the contracting authority, is not in itself such as to constitute a breach of the principle of equal treatment' (paragraph 85).

4. Conclusion

If a procuring entity has reason to believe that the most efficient products/buildings/services on the market do not meet one or more of the conditionalities included in Article 6, the obligation to purchase those items does not apply. The entity will have to demonstrate in a transparent and evidence based way that the conditionality is not met.

Annex III

Purchase or rental of buildings

1. Contracting Authorities will only purchase buildings or make new rental agreements for buildings that comply at least with the minimum energy performance requirements. This will be determined by requiring any building to be purchased or rented to be provided with an Energy Performance Certificate, setting out its energy performance, which must meet a minimum of a B on the primary energy scale.
2. Buildings that have been purchased or rented for the purposes of demolition or deep renovation are exempted from these requirements.
3. Any such deep renovations should result in a refurbishment that reduces both the delivered and the final energy consumption of a building by a significant percentage compared with the pre-renovation levels, leading to a very high energy performance that achieves or goes beyond the minimum standards.