Public Procurement Analysis

Risk that new Public Procurement Act undermines sustainability and social protection

Discussion Note: *Proposal for a Regulation on public contracts and concessions COM (2026) 590*

The proposed reform of Europe's public procurement rules comes at a critical time. Creating a coherent, flexible framework which responds to the challenges facing Europe is essential. This discussion note highlights six key provisions within the above proposal, and examines how they would work in practice from the perspective of Europe's public buyers, in particular local and regional authorities. In some cases, the proposed text falls short of what is needed to deliver the strategic objectives of the reform.

We identify opportunities to strengthen the impact of these provisions while also clarifying the legislative text. ICLEI and Public Procurement Analysis welcome the opportunity to discuss these ideas with the co-legislators and other stakeholders as part of the legislative process.

1. Exclusion grounds (Articles 25 and 26)

Analysis: Article 26(1)(a) allows for exclusion of an operator from a procedure where:

"the public buyer can demonstrate by any appropriate means that the economic operator has breached applicable obligations under relevant Union legislation, as referred to in Article 4(4)."

The equivalent provision in Directive 2014/24/EU, Article 57(4)(a), allows exclusion not only for breaches of Union legislation, but also national law, collective agreements and specified international environmental, social and labour law provisions. While this same set of obligations is referred to in Article 4(4) of the proposed Regulation, the reference to 'relevant Union legislation' in Article 26(1)(a) **narrows the scope of the optional exclusion.**

This would mean that **it would no longer be possible for public buyers to exclude operators based on breaches of national minimum wage legislation or binding collective agreements**, for example. The reason for this change is not clear, but it may be linked to the proposed use of the EU-wide electronic eligibility service to determine compliance with exclusion grounds. While this may enhance the efficiency of procedures, it should not come at the cost of ensuring operators comply with all applicable environmental, social and labour law obligations.

Similarly, the mandatory exclusion grounds set out in Article 25 refer only to convictions in Member States. This would appear to give an **unfair advantage to operators from outside of the EU, who would not be liable for exclusion based on convictions in their country of origin, for example for corruption, people trafficking or environmental crimes.**

Suggestion: Article 26(1)(a) should be amended to refer not only to Union legislation, but to all of the obligations set out in Article 4(4). Article 25(1) should be amended to include equivalent offences in the national law applicable to any operator. The electronic eligibility service must provide for exclusion based on all relevant obligations, regardless of where the operator is established. This is essential to ensure public buyers can rely upon the integrity of operators as established by the eligibility service. Adopting Articles 25 and 26 as drafted would place public buyers in the difficult situation of having to accept tenders from operators who may have gained an unfair competitive advantage by

failing to comply with their legal obligations. It would also breach the principle of equal treatment between EU and other covered operators as set out in Article 4(2) of the proposal.

2. **Energy efficiency (Article 52)**

Analysis: Article 52 replicates some, but not all, of the energy efficiency obligations currently set down in Article 7 and Annex IV of Directive 2023/1791 (the Energy Efficiency Directive or EED). Article 147(6) would delete Article 7 and Annex IV of the EED. **This would result in a significant weakening of the energy-efficiency requirements which currently apply to both the public and utility sectors for above-threshold contracts.** Notably this would mean:

i) Removal of the energy-efficiency first principle for public procurement (currently set out in Art. 7(1) of the EED, not included in Art. 52);
ii) Removal of the requirement to assess the feasibility of concluding energy performance contracts that provide long-term energy savings when procuring service contracts with significant energy content (currently set out in Art. 7(3) of the EED, not included in Art. 52);
iii) Removal of the requirements to take Union GPP criteria or equivalent national GPP criteria into account, and to publish information about energy efficiency impact of contracts (currently set out in Art. 7(5) EED, not included in Art. 52);
iv) Removal of the requirement for Member States to support contracting authorities and entities in the uptake of energy efficiency requirements, including at regional and local level, by providing clear rules and guidelines including methodologies on the assessment of life cycle costs and environment impacts and costs, setting up competence support centres, encouraging cooperation amongst contracting authorities, including across borders, and using aggregated procurement and digital procurement where possible (currently set out in Art. 7(5) EED, not included in Art. 52);
v) Removal of the requirement on Member States to establish the legal and regulatory provisions, and administrative practices, regarding public purchasing and annual budgeting and accounting, necessary to ensure that individual contracting authorities are not deterred from making investments in improving energy efficiency and from using energy performance contracting and third-party financing mechanisms on a long-term contractual basis, and to remove any regulatory or non-regulatory barriers to energy-efficiency (currently set out in Art. 7(7) and (8) EED, not included in Art. 52)
vi) Removal of the requirement on contracting authorities/entities, where a product or a service is covered by the Union green public procurement criteria or available equivalent national criteria with relevance to energy efficiency of the product or service, to make best efforts to purchase only products and services that respect at least the technical specifications set at 'core' level in the relevant Union green public procurement criteria or available equivalent national criteria, including among others for data centres, server rooms and cloud services, road lighting and traffic signals, computers, monitors tablets and smartphones (currently set out in Annex IV(c) EED, not included in Art. 52);
vii) Removal of the requirement to purchase only tyres that comply with the criterion of having the highest fuel energy efficiency class (replaced with the requirement in Art 54.1 for public buyers to refer to the energy classes set out in Regulation (EU) 2020/740 - not a minimum standard).

While acknowledging the impediments which many Member States have faced in fully implementing Article 7 of the EED, and that some of the above requirements may be reflected in new delegated acts adopted by the Commission, **the rationale for such a radical reduction in the legal framework for energy-efficiency in public procurement has not been clearly set out.** While the Proposal includes delegated powers for the Commission to develop product-specific environmental requirements, alongside existing powers under the ESPR, these are strictly circumscribed and **do not provide an equivalent level of protection for energy-efficiency considerations in procurement as currently exists under the EED.**

In particular, the removal of the provisions in Article 7(7) and 7(8) EED, which aim to ensure that **national budgetary and accounting frameworks do not impede adoption of energy-efficient procurement** (for example, by failing to take life-cycle savings into account) would undermine the efforts undertaken by many local and regional authorities to progress energy-efficiency through their procurement. Replacing these measures with strictly voluntary provisions on life-cycle costing represents a reduction in the value of EU law in supporting sustainable procurement and public investment.

The removal of the requirement to make best efforts to procure products which at least meet the core level under the relevant EU or national GPP criteria suggests that the development and application of these criteria, which have been widely adopted by many local and regional authorities, will no longer be supported. While Recital 23 refers to the possibility of using the voluntary GPP criteria developed at EU level, it appears that the development and updating of these criteria has ceased (the most recent update was published in 2021), leaving gaps in particular in relation to common GPP criteria for the built environment.[1] The Energy Performance of Buildings Directive is also not included in the instruments referred to in Annex VII of the proposal.

Suggestion: Article 52 should replicate the text of Article 7 and Annex IV of the EED, unless specific justification is provided for the removal of the current provisions, accompanied by a clear explanation of how equivalent levels of environmental protection will be achieved using the delegated powers under Article 54.

Replacing existing general obligations with potential product-specific measures represents a diminution in the standards for energy-efficiency in procurement. Many products, services and works procured by public buyers are not (yet) covered by product-specific measures. **This does not reflect the urgency for Europe to reduce its reliance on imported fossil fuels, including for the production of electricity used by the public and utility sectors. It also increases the complexity of EU law, as one instrument (the EED) will be replaced by multiple product-specific acts, with an uncertain timetable for their adoption.**

3. **Requirements for green public procurement for certain products (Article 54) and Amendments to horizontal public procurement provisions (Article 147)**

[1] An updated set of GPP criteria for buildings was developed by the Joint Research Centres and published in 2023, however these have not been formally adopted by the European Commission. The current GPP criteria for buildings cover offices only and date to 2016.

Analysis: Article 54(1) sets a general requirement on public buyers to 'set such environmental characteristics as they consider appropriate for the procurement in question', taking account of environmental objectives as well as the Treaty principles. For the product categories covered by instruments in Annex VII, there is a requirement to express environmental characteristics in terms of the classes or levels of performance, thresholds, environmental aspects or environmental sustainability requirements laid down in those instruments**. Notably, for many products and services this is not a requirement to apply minimum levels of environmental performance, and may interfere with more impact- or outcome-based approaches to defining environmental performance (for example, a requirement that a contract generates zero or a defined level of emissions).**

Article 54 appears to set both a 'floor' and a 'ceiling' for green public procurement, by requiring alignment with sectoral measures. For example, **for heavy-duty and passenger vehicles, Annex VII refers only to the legal limits for emissions currently in place, potentially undermining the ability of public buyers to set higher requirements.** At the same time, there is no reference to the Clean Vehicles Directive, so public buyers may be in doubt regarding its continued application.

Suggestions: A provision should be inserted in Article 54 to **make it clear that nothing in that Article prevents public buyers from pursuing higher levels of environmental protection in accordance with any of the approaches set out in Article 50, or which are otherwise linked to the subject-matter of the contract being awarded**. The ongoing application of the Clean Vehicles Directive, and/or other measures to specifically address emissions from road transport beyond minimum standards for placing vehicles on the market, should be directly cited in the proposal.

The list of amendments in Article 147 must be subject to line-by-line scrutiny, to ensure that none of these will result in a lower level of environmental protection or increase complexity and uncertainty for public buyers and economic operators in understanding the applicable environmental standards.

4. **Socially responsible public procurement (Article 55) and Link to the subject-matter (Art 90)**

Analysis: Article 55 solidifies the legal basis for socially responsible procurement, by providing a non-exhaustive list of social considerations which may be taken into account as part of specifications, selection or award criteria, and contract performance conditions. This includes specific reference to improvement of working conditions within Article 55(2)(b). In addition, Article 90 confirms that the link to the subject-matter may be either direct or indirect, and includes "the working conditions of the workers involved in any…stages of the life-cycle and responsible sourcing and supply chain transparency for the product subject to the procurement in question."

These provisions are welcome and largely reflect CJEU case-law, however there is still potential ambiguity in the term 'working conditions', as it may not be clear to public buyers whether this includes the remuneration of workers. In Case C-210/24 *AESTE*, the CJEU held that award criteria could relate to rates of pay in excess of those set in a sectoral collective agreement - resolving a long-standing ambiguity which many local and regional authorities have struggled with in light of their commitments

to fair pay. **To secure this gain, Article 55 and Article 90 should refer explicitly to remuneration alongside 'working conditions.'**

The proposal also makes no reference to **Directive (EU) 2023/970 on equal pay and pay transparency**. Article 24 of that Directive requires Member States to take appropriate measures to ensure that, in the performance of public contracts or concessions, economic operators comply with their obligations relating to the principle of equal pay, and to consider requiring contracting authorities to introduce, as appropriate, penalties and termination conditions ensuring compliance with the principle of equal pay in the performance of public contracts and concessions. It also makes clear that infringement of pay transparency obligations, or an unjustified pay gap of more than 5% in any category of workers, constitute an optional grounds of exclusion. **Directive (EU) 2022/2041 on adequate minimum wages** should also be referenced, as this is not clearly incorporated in the proposal.

Suggestion: Article 55(2)(b) and Article 90(3) should be amended to insert the words '**and remuneration**' after 'working conditions'. Article 90(3) should also be amended to replace the reference 'product subject to the procurement in question' with a reference to '**products, services or works** subject to the procurement in question.' Equal pay and pay transparency, and adequate minimum wages, including the provisions set out in Article 24 of Directive 2023/970 and Article 9 of Directive 2022/2041, should be clearly incorporated in the proposal as part of the coherence objective. This could be by adding **explicit references to equal pay and pay transparency and adequate minimum wages** to Articles 26, 55, and 107, for example.

5. **Technical specifications (Article 88)**

Analysis: Article 88 would make the use of functional specifications (sometimes also referred to as outcome-based specifications) the default. This approach is often conducive to environmental, social and in particular innovative procurement. However, **in some cases it is necessary to specify a particular technical characteristic, production method or material in order to ensure sustainability**. For example, food produced from organic agriculture, electricity produced from renewable sources, or products with a certain minimum percentage of recycled materials. The intention to protect these approaches is apparent in Article 88(2). However, in light of recent CJEU case law there may be a need to go further in protecting the ability of public buyers to specify production methods, processes or materials where these are essential to achieve sustainable outcomes.

In Case C-424/23 *DYKA Plastics v Fluvius System Operator* the Court held that a contracting authority may not specify a material without allowing for equivalents, "unless the use of a particular material follows inevitably from the subject matter of the contract, it not being possible to contemplate an alternative based on a different technical solution." It appeared to affirm this position in *Case C-568/24 Sof Medica*. This case law has created some uncertainty for public buyers where they wish to specify particular materials or types of products for environmental reasons. For example, **national and EU circular economy policy and legislation often sets a minimum percentage of recycled materials for particular products.**

Suggestion: Article 88(6) should be amended to make clear that references to particular processes, production methods, types or materials are possible where these are essential to the strategic characteristics of the goods, services or works being procured. It should read: "The reference**s** referred to in paragraph 5 shall only be allowed on an exceptional basis, where a minimum level of precision pursuant to paragraphs 1, 2 and 3 is otherwise not possible, **or where such references are essential to strategic aspects as set out in Title II of this Part**. Such reference**s** shall be accompanied by the words 'or equivalent.' (text in bold added)

6. Award criteria (Article 98)

Analysis: The proposal aims to increase the use of qualitative award criteria by making best price-quality ratio the default award basis, with a minimum quality weighting of 30%, or 50% for labour-intensive contracts. This is welcome as a recognition that award based on lowest price or cost seldom contributes to the sustainability and long-term quality of public contracts. It must be acknowledged that many public buyers currently award contracts based on lowest price or cost, even in the case of complex services or works. Significant regional disparities exist, and in some cases public buyers lack training and institutional support to apply meaningful qualitative award criteria, including those linked to environmental, social and innovative considerations. The professionalisation and capacity building measures described in Article 139 will be essential to support the desired transition.

However, Article 98(5) allows derogation from the minimum quality weightings where quality can be ensured in the specifications, contract performance conditions or by a combination of these and the award criteria. **Effectively, this would mean that award based on lowest price or cost alone can continue, provided this is justified in the competition summary.** While there is a need to allow for derogations from minimum quality weightings in appropriate cases (e.g. purchase of standardised commodities), the derogation as drafted is very wide, and means the adoption of qualitative criteria is likely to falter.

Article 98(4) also provides that where 'public buyers apply life-cycle costing, the weight given to life-cycle costs shall be counted within the respective percentage share allocated to quality criteria.' **Most life-cycle costing approaches give weight to financial considerations only, so including this in the minimum quality weighting is illogical.**

Suggestion: The derogation set out in Article 98(5) should be narrowed to either refer to certain categories of procurement (e.g. standardised supplies or commodities) or to exclude labour-intensive services. The inclusion of life-cycle costing in the minimum quality weighting, as provided for in Article 98(4), should be removed.