Nordic Council
of Ministers

NORDIC GUIDELINES – GREEN PUBLIC PROCUREMENT

How to use environmental management systems and
ecolabels in EU tenders

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BACKGROUND

These guidelines were produced through a Nordic Council of Ministers' project *Green Growth through Public Procurement*.

The Green Growth Project involves co-operation between Sweden, Finland, Denmark, Norway and Iceland. The project aims to create a common understanding of the implementation of green public procurement policies in practice.

The core activities in the project were national workshops held from May to September 2016 in each of the five Nordic Countries, with 20–30 participants attending each workshop. Participants included legal and environmental experts as well as procurers, suppliers and representatives from labelling and certification organisations.

At each workshop the same 10 questions relating to environmental management systems (EMS) and 10 questions on ecolabels were discussed, enabling all representatives to give their views on how EMS and ecolabels should be used in public procurement. Since the Nordic project focuses on green procurement, issues relating to social responsible procurement were not discussed as such, though the new regulations on labelling also cover such issues. The questions discussed at the workshops are presented in Appendix 1.

The EU Public Procurement Directives (2014)¹ provided a welcome opportunity to promote environmental management systems and labelling schemes. The directives have recently been transposed into national legislation in all the Nordic Countries.

The information and recommendations given in these guidelines are based on input from the national workshops. The legal interpretation of the Public Procurement Directives' clauses on the use of EMS and ecolabels in procurement is also based on the EU Commission publication *Buying green! – A handbook on green public procurement* (3rd Edition), which outlines opportunities to pursue green public procurement under the 2014 directives.

The target group for this manual includes public purchasers and other stakeholders – especially suppliers – who already have some knowledge of EU tendering rules, but who want to gain further insight into the rules for using EMS and ecolabels in line with the 2014 directives.

¹ Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC ("the Public Sector Directive"). In this guide, the term "the directives" also covers the Directive 2014/25/EU ("the Utility Sector Directive") and its equivalent rules. The Directive 2014/23/EU (Concessions Directive) does not have any specific rules about EMS and labels.

ENVIRONMENTAL MANAGEMENT SYSTEMS (EMS) AND ECOLABELS IN BRIEF

Environmental considerations can be included in all phases of a call for tender:

- Defining the subject matter of the contract.
- Defining environmental technical specifications.
- Excluding tenderers.
- Selecting tenderers.
- Awarding the contract.
- Designing contract performance clauses.

These guidelines explain how environmental management systems (EMS) and ecolabels can be used to draw up specific environmental requirements in the relevant phases of an EU tender, and as inspiration for the specific formulation of requirements.

What is an EMS?

An environmental management system (EMS) concerns an entire company or organisation and its operations – not only its products or services – so for this reason it cannot serve as a technical specification or an award criterion. However, the existence of an EMS may instead be used as a selection criterion (when it is proportional to the contract) in order to ensure that the selected bidders have the necessary environmental technical capacity and knowledge to carry out the contract. EMS may also be required as part of the contract performance conditions. Rules on the use of EMS are laid down in Article 62; Quality assurance standards and environmental management standards; within the Public Procurement Directive 2014/24.

EMS IN BRIEF

An EMS is a systematic approach used voluntarily around the world by an organisation to handle, monitor and continuously improve its environmental performance. The EMS is the responsibility of the top management of the organisation. This responsibility involves delimiting the scope, defining the related policies and goals, and allocating the resources needed to operate the EMS to achieve the desired goals.

An EMS can be certified by a third party in accordance with a scheme such as EMAS or ISO 14001.

EMS systems usually follow the on-going process **Plan-Do-Check-Act**:

Environmental management systems widely used in The Nordic Countries include ISO 14001, Eco Lighthouse (Norway), Eco Compass (Finland), Swedish environment Base (Sweden) and EMAS (Eco-Management and Audit Scheme).

What is an ecolabel?

Ecolabels are granted to specific products or services, and ecolabels can be used as part of technical specifications, award criteria and contract terms. Ecolabels cannot serve as selection criterion, however. Rules on the use of ecolabels are laid down in Article 43 Labels; within the Public Procurement Directive 2014/24.

ECOLABELS IN BRIEF

Ecolabelling is a voluntary method of environmental performance certification practised around the world. An ecolabel identifies products or services that are proven to be environmentally preferable overall, within a specific product or service category.

The International Organization for Standardisation (ISO) has identified three broad types of voluntary labels. Widely recognised ecolabelling schemes come under the strongest Type 1 designation.

TYPES OF ECOLABELS

Type I (ISO 14024)

A voluntary, multiple-criteria based, third party programme that awards a license that authorises the use of environmental labels on products indicating the overall environmental preferability of a product within a particular product category, based on life cycle considerations.

Type II (ISO 14021)

Informative environmental self-declaration claims.

Type III (ISO 14025)

Voluntary programmes that provide quantified environmental data on a product, under pre-set categories and parameters defined by a qualified third party, based on life cycle assessment, and verified by the same third party or another qualified third party.

Source: Global Ecolabelling Network.

Type I ecolabels (see definition in the table below) widely used in the Nordic Countries include The Nordic Swan Ecolabel (Nordic Ecolabelling Board), The EU Ecolabel (EU Commission), Bra Miljöval/Good Environmental Choice (The Swedish Society for Nature Conservation), and TCO Certified (TCO Development).

There are also a number of other labels with environmental requirements, such as the FSC label (Forest Stewardship Council).

Photo: unsplash.com

MARKET ANALYSIS AND DIALOGUE

Before contracting authorities determine their requirements for EMS and/or ecolabels, it is important to analyse the market situation and to engage in dialogue with the market. Fortunately, the 2014 directive clarifies the scope for market dialogue, and states that the public authorities should always have the opportunity to engage in market dialogue (see Article 40). This dialogue may address the environmental or technical requirements of the intended purchase or input, regarding the wording of environmental aspects of tender documents, including contract notices, technical specifications, deadlines etc. The advice provided by potential tenderers must not lead to a significant distortion of competition or any violation of the principles of equal treatment and transparency.

Any decision to use EMS or ecolabels in a call for tender should always be considered case by case, depending on the subject matter, the scale of the procurement, and risks related to the contract. The market situation for EMS and ecolabels differs considerably between different industries and product groups. Through market dialogues procurers can gain insights into how potential bidders in the relevant industry are working to improve their environmental profile, and also learn about

the extent to which they use EMS or ecolabels. Requirements should be defined according to information gained during the market dialogue. You may also ask labelling organisations and certification bodies about the situation in the market. Furthermore, the market dialogue can be used to clarify what other documentation tenderers should be able to provide to prove their compliance with environmental requirements, as this may differ between different sectors.

Early communication is crucial

If you wish to use a certain EMS or ecolabel as a minimum condition, you should first check whether the desired EMS or ecolabel is available for the market in question, in order to ensure that you will still be able to obtain competition in your call for tender. If you set a minimum requirement on EMS or ecolabelling it is recommended to give bidders enough time to achieve the relevant EMS or ecolabel, and to meet the appropriate requirements. This could for instance be done by making a pre-information notice in the EU Journal (TED), to keep potential suppliers have a chance to receive information and be prepared for the requirement. Releasing communications in good time and entering into market dialogue at an early stage will help

POSSIBLE QUESTIONS TO ASK STAKEHOLDERS DURING MARKET ANALYSES AND DIALOGUES RELATING TO EMS

- What EMS are available on the market?
- Are the different EMS equivalent to each other?
- Do they fulfil the requirements set out in Article 62 of the 2014 directive?
- How many potential suppliers have an EMS, and are they certified?
- How many potential suppliers on the market is being excluded if EMS is required?
- Would requiring an EMS affect prices?

suppliers who want to be competitive and sustainable to duly obtain the environmental management system or the ecolabel required.

How to use requirements fruitfully

If the availability of EMS or ecolabelled products or services are limited, you may instead choose to use EMS or ecolabels only later in the process as a contract term, with only the winning supplier or suppliers are obliged to obtain a license for an ecolabel or a certified EMS. This can be done for instance by giving a 12-month implementation period after the

start of the contract within which the supplier must implement an EMS or obtain an ecolabel license. If there is only a limited number of ecolabelled products, you can also choose to use environmental labels as an award criterion, and thus give points or positive weighting to bidders offering ecolabelled products. Using ecolabels as part of an award criterion can motivate the producers to obtain an ecolabel. In this way you will contribute to an environmental improvement and make ecolabelled procurements easier in future tenders in the same market.

POSSIBLE QUESTIONS TO ASK STAKEHOLDERS DURING MARKET ANALYSES AND DIALOGUES RELATING TO ECOLABELS

- What ecolabels are available on the relevant market?
- Are the different labels equivalent? (If, for instance, you intend to require an EU Ecolabel, how do other labels document compliance with the requirements behind the EU Ecolabel?)
- Do the labels comply with Article 43 of the 2014 directive?
- How many potential suppliers can deliver products or services with these ecolabels?
- How would requiring ecolabels affect prices?

We suggest that you contact the relevant ecolabelling organisation to answer the question as to whether the label complies with Article 43. Appendix 2 contains a form that ecolabelling organisations can be asked to fill out and you can see how Ecolabelling Denmark and FSC Denmark have filled out this form, for the Nordic Swan ecolabel, the EU Ecolabel and the FSC Label respectively.

GENERAL CONDITIONS FOR USING EMS

Contracting authorities may require EMS in the selection criterion, in order to ensure that the selected bidders have the necessary environmental technical capacity and knowledge to carry out the contract. EMS may also be required as part of contract performance conditions. The important factor when requiring EMS is that the requirement must be related to and proportional to the subject matter of the contract.

Using EMS as a selection criterion

Environmental management can be part of the required documentation for minimum suitability and selection requirements. Coverage by an environmental management system should therefore be included as a minimum requirement, by which means the contracting authority can ask tenderers to confirm that they comply with specific environmental management systems or standards. Tenderers failing to do so will be disqualified from the selection phase.

Accordingly, the contracting authority should state in its procurement documents which system the requirements refer to, and which parts of the tenderers' activities the EMS should cover. The tenderer will confirm this by indicating compliance using the European Single Procurement Document (ESPD), which is a self-declaration setting out a business's financial status, abilities and suitability for a public procurement procedure. Through this system bidders can declare whether or not they are able to draw up certificates on EMS (see figure 1).² You can find the ESPD service [here](#).

It is recommended that certification requirements should only be laid down for the specific part of the tenderer's business in which the product in question is produced, or the service or works are provided. This should also ensure that sub-contractors supplying parts of the service will also have to comply with the stipulated environmental management requirements.

FIGURE 1 EXTRACT FROM ESPD SELECTION CRITERIA, SECTION D: QUALITY ASSURANCE SCHEMES AND ENVIRONMENTAL MANAGEMENT STANDARDS

D: Quality assurance schemes and environmental management standards ▼

Article 62(2) of Directive 2014/24/EU sets out the following selection criteria ⓘ

☐ **Certificates by independent bodies about quality assurance standards >**
Will the economic operator be able to produce certificates drawn up by independent bodies attesting that the economic operator complies with the required quality assurance standards, including accessibility for disabled persons?

☐ **Certificates by independent bodies about environmental management systems or standards >**
Will the economic operator be able to produce certificates drawn up by independent bodies attesting that the economic operator complies with the required environmental management systems or standards?

² Please notice that according to the Swedish Procurement Act it is mandatory for Contracting Authorities to accept, but not to use, the ESPD.

Verification of compliance with EMS requirements

If you have set requirements for EMS, you should explain how bidders should document their compliance with the requirements. This can be noted in the contract notice or other procurement documents.

Contracting authorities may require actual certificates. If you wish to do so, such certificates must be issued by independent bodies and reference should be made to:

- EU eco-management and audit scheme (EMAS),
- Other recognised environmental management systems in accordance with Article 45 of Regulation of the European Parliament and Council (EC) no. 1221/2009, or
- Other environmental management standards based on the relevant European or international standards issued by the approved bodies.

If a tenderer can show that they were unable to obtain the required EMS or a similar EMS within the relevant time limits for reasons beyond their control, then you must consider any alternative evidence that can be submitted by them, such as a technical dossier demonstrating that the requirements are met.

Regulation no. 1221/2009 relates to the creation of an Eco-Management and Auditing Scheme (EMAS), in which organisations may voluntarily participate.

Environmental management schemes under EMAS must fulfil the requirements of Clause 4 of the EN ISO 14001:2004 standard. Thus EN ISO 14001 forms the core of EMAS, but EMAS has not been upgraded to match the current version of EN ISO 14001 from 2015, and it is at present uncertain when and how this will be done.

Article 45 of Regulation (EC) No 1221/2009 relates to relationships with other environmental management systems, and determines that EU Member States may submit a written application to the European Commission to have existing environmental management systems or parts thereof approved, wherever such schemes are certified under suitable certification procedures approved at national or regional level, and regarded as satisfying the equivalent requirements in the 1221/2009 Regulation.

In order for the contracting authority to require compliance with other environmental management systems, it must therefore be a requirement that the European Commission actually approves the system. Currently no system has been approved. However, a couple of systems have applied to be recognised. You are therefore advised to check with your

national EMAS body, or your national body responsible for procurement policies and guidance, to find out whether more EMSs have been approved.

The question as to what other documentation can be considered "suitable" is highly complex. This requires insights into the criteria for each system and how they may be relevant to the subject of the contract. Such considerations will therefore differ from sector to sector. In the absence of a requirement for an EMS, you may lay down requirements for certain specific environmental control measures.

When considering the relevance of requirements for an EMS, the contracting authority should also consider which minimum requirements for the EMS should be regarded as essential, thereby allowing decisions to be made on other suitable documentation.

Photo: unsplash

Photo: unsplash.com

The tenderer should look at the requirements of the desired system, and consider what the most important elements are, and how their fulfilment can best be described. This may, for instance, involve descriptions of:

- The environmental situation.
- Environmental policies.
- Risk assessments.
- Lists of impacts, with evaluation of their significance.
- The goals behind an organisation's own key performance indicators (KPIs), and how KPIs are measured.
- Relevant action programmes or plans.
- Roles and responsibilities in relation to environmental issues.
- Instructions given to personnel.
- Annual evaluations/monitoring and possible adjustments.

In addition, the tenderer ought to ensure that the documentation is approved and signed by top management, in order to demonstrate leadership and commitment.

GENERAL CONDITIONS FOR USING ECOLABELS

Contracting authorities can only require a specific ecolabel if all label requirements are linked to and appropriate for the characteristics of the subject matter of the contract, and the label meets certain standards of objectivity, transparency and market availability. The new 2014 procurement directive allows direct references to an ecolabel in a call for tender without specifying the underlying criteria, which is a difference from the former directive. The rules in the new directives are not limited to ecolabels; other labels can also be used if they meet the following conditions. When public authorities want to purchase works, supplies or services with specific environmental characteristics, they may, through the technical specifications, the award criteria or the contract performance conditions, require a specific label as a demonstration that the works, services or supplies correspond to the required characteristics, if all of the following conditions are fulfilled:

- a) the label requirements only concern criteria which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract.
- b) the label requirements are based on objectively verifiable and non-discriminatory criteria.
- c) the labels are established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate.
- d) the labels are accessible to all interested parties.
- e) the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.

For labels that do not comply with these conditions, you can still refer to individual criteria linked to the subject matter of the contract, without requiring the label as such.

If it is evident that a label does meet the above conditions, it can be included as part of your technical specifications, award criteria or contract conditions. You may then refer directly to the label in the tender documents, without specifying the underlying criteria. But you must still accept other labels which have equivalent requirements and demonstrate that the same objective criteria are met.

If a tenderer can show that they were unable to obtain the required ecolabel or a similar label within the relevant time limits for reasons beyond their control, then you must consider any alternative evidence submitted by them, such as a technical dossier demonstrating that the label's requirements are met.

You must be aware that the link between the ecolabel and the subject matter of the contract can be made in relation to any stage of a product's life cycle, including factors involved in:

- a) the specific process of production, provision or trading of those works, supplies or services; or
- b) a specific process for another stage of their life cycle. These factors do not need to form part of the material substance of what is being purchased, i.e. they do not need to be visible or discernible in the final product or service.

Most ISO Type I ecolabels – like the EU Ecolabel, the Nordic Swan Ecolabel and the German Blue Angel – will meet these conditions. However, other ISO Type I ecolabels might also contain criteria that are not specific to the product or service being purchased, such

as general management requirements. To determine whether this is the case, you should review the full criteria underlying the label before referring to it in your documents – in most cases these criteria are freely available online.

All the criteria behind the Nordic Swan Ecolabel are linked to the subject matter. The Nordic Swan ecolabelling organisations have gone through all the Ecolabel criteria and removed those considered not to be linked to the subject.

This guide does not address how the requirement “that the criteria behind a label must be appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract” should be interpreted, as this will always be a specific assessment in relation to the specific procurement.

Using ecolabels as technical specifications

If you have specific minimum environmental requirements that tenders must meet – including a requirement for ecolabelled products – these requirements should be incorporated in the technical specifications as minimum requirements.

Minimum requirements are mandatory, meaning that any bid not meeting the requirements has to be rejected. Hence, before you decide whether to set a minimum requirement on ecolabels, you should ensure that there is an adequate supply of ecolabelled products on the market, to achieve competition in your call for tender.

When defining technical specifications both materials and methods of production or provision can be taken into account – even if these do not ‘form part of the material substance’

Photo: norden.org / Jan Erik Stokke

of what is purchased. This consideration may be applied, for example, in relation to electricity produced from renewable sources or food produced using organic farming methods.

However, since all technical specifications should be linked to the subject matter of the contract, you may only include requirements related to the production of the goods, ser-

EXAMPLE: A MINIMUM REQUIREMENT CONCERNING EU ECOLABELLING FOR HAND SOAP

In italics, please find proposal for text to insert in tender documents

The tendered hand soaps must be marked with the EU Ecolabel (EU Commission Decision of 9 December 2014 on establishing the ecological criteria for the award of the EU Ecolabel for rinse-off cosmetic products (2014/893/EU)). The criteria document can be downloaded from the EU Ecolabel website, and appended as an annex to the tender document.

Requirements for documentation, if applicable, in relation to the fulfilment of the minimum requirement can be structured as follows:

Documentation on the fulfilment of the minimum requirement for ecolabels must be submitted in the form of:

- *a valid licence number for the EU Ecolabel; or*
- *a valid licence number for another ecolabel with similar label requirements – preferably including an account of how the requirements in respect of the label concerned correspond to those for the EU Ecolabel.*

If a tenderer can provide documentary evidence that they did not have any opportunity to obtain the label within the time limits, the tenderer may submit other suitable documentation confirming that the labelling requirements of the EU Ecolabel have been met in practice.

This alternative documentation must be structured in accordance with the documentation requirements in the relevant criteria document, and it may consist of verified documentation or declarations from third parties, or documentation or a declaration from the manufacturer.

It is optional whether you wish to receive documentation on the fulfilment of the minimum requirement for ecolabels. Hence you may choose:

- not to request documentation;
- to request documentation in connection with the submission of the tender; or
- to request documentation from the winning tenderer in connection with the conclusion of the contract.

Source: Ecolabelling Denmark's Toolbox for public purchasers.

vices or work being purchased, rather than requirements relating to the general practices or policies of the operator.

Above an example is presented to show how a requirement for an ecolabel can be formulated in practice.

Using ecolabels as award criteria

At the award stage in the procurement process, all bids which are compliant with the minimum technical specifications are evaluated against a specific set of award criteria – which may consist of a mix of cost and quality criteria.

As with specifications, award criteria can relate to production processes or any other stage of the life cycle, including the ways in which raw materials are sourced, energy or water consumption during the use of the product, and the end-of-life recyclability or biodegradability of a product.

Environmental labels can advantageously be included as part of the award criteria if the market availability of ecolabelled products

is unclear. By using ecolabels as part of the bid evaluation, environmental criteria may be weighed against other criteria, including costs.

Verification of compliance with ecolabel requirements

If you have set requirements for ecolabels in the technical specifications, the award criteria, or contract conditions, you should describe how bidders should document their compliance with these requirements. This can be specified in the tender notice or in tender documents, possibly in the form of a request for a valid license number for the required label. However, you must also accept other ecolabels that adequately demonstrate that the relevant labelling requirements are met. If a tenderer can show that they were unable to obtain an ecolabel within the relevant time limits for reasons beyond their control, then you must also consider alternative evidence submitted by them, such as a technical dossier demonstrating that the relevant label requirements are met.

See the proposed documentation requirements as presented in the examples.

EXAMPLE A SUB-CRITERION CONCERNING EU ECOLABELLING FOR ALL-PURPOSE CLEANER

In italics, please find proposal for text to insert in tender documents

The tenderer is requested to advise whether the tendered all-purpose cleaner is labelled with the EU Ecolabel (EU Commission Decision of 28 June 2011 on establishing the ecological criteria for the award of the EU Ecolabel to all-purpose cleaners and sanitary cleaners (2011/383/EU)).

The criteria document can be downloaded from the EU Commission's website, and appended as an annex to the tender dossier. Positive weighting will be given if the tendered all-purpose cleaner is labelled with the EU Ecolabel or other labels that meet the relevant labelling requirements.

There should also be a description in the tender document of how the response to these requirements will be included in the evaluation. It may be stated, for example, that a tender can be favoured if the response confirms the requirements set in respect of the environment, by confirming that the tendered item bears either the Nordic Swan Ecolabel, the EU Ecolabel, or another label demonstrating that the relevant labelling requirements have been fulfilled.

In addition to stating the criteria for the award, and explaining which factors are given significance in the tender evaluation, the evaluation method should also be described in general terms. This may involve a description of a points model for awarding points on the basis of an assessment of environmental considerations and other qualitative criteria.

Requirements for documentation, if applicable, in the event of a positive response to the above questions can be structured as follows:

If the above questions are answered favourably, documentation must be submitted in the form of:

- *a valid licence number for the EU Ecolabel, or*
- *a valid licence number for another ecolabel with similar label requirements – preferably including an account of how the requirements for the label concerned correspond to the requirements for the EU Ecolabel.*

Other suitable documentation confirming compliance with individual labelling requirements in respect of the EU Ecolabel may also be submitted. If a tenderer can provide documentary evidence that they did not have any opportunity to obtain labelling rights within the deadline, the tenderer may submit other suitable documentation confirming that the label requirements in respect of the EU Ecolabel have been met.

This alternative documentation must be structured in accordance with the documentation requirements in the relevant criteria document, and it may consist of verified documentation or declarations from a third party, or documentation or a declaration from the manufacturer.

It is optional whether you wish to receive such documentation in order to decide whether a response may be favoured. Hence you may choose:

- not to request documentation,
- to request documentation in connection with the submission of the tender, or
- to request documentation from the winning tenderer in connection with or after the conclusion of the contract.

Source: Ecolabelling Denmark's Toolbox for public purchasers.

CONTRACT PERFORMANCE CLAUSES FOR EMS AND ECOLABELS

Contract performance clauses specify how a contract must be carried out. Environmental considerations can be included in contract performance clauses, provided they are published in the tender notice or tender documents, and are linked to the subject matter of the contract. They must of course also meet fundamental principles such as non-discrimination and proportionality.

The requirements in a tender must be verifiable. If this is not the case, suppliers could unjustifiably claim that they meet the requirements and criteria. Contract performance

clauses concerning EMS and ecolabels are also only effective and equitable to all suppliers to the extent that they are monitored and enforced. Setting requirements is not sufficient alone, as it must be accompanied by verification and monitoring.

Depending on the information received during the market dialogue, it is possible to set a time limit during the contract period when the management system or the ecolabelled products need to be in place. Failure to do so would lead to sanctions, as stipulated in the contract.

EXAMPLES OF CONTRACT PERFORMANCE CLAUSES RELATING TO THE MINIMUM REQUIREMENT FOR EMS

In italics, please find proposal for text to insert in tender documents

- *Certificates for environmental management systems or standards specified in tenders as forthcoming must be provided [x] months after the start of the contract at the latest, and retained for the remainder of the contract.*
[# If environmental management standards are required as part of the assessment of the supplier's general suitability, and the Supplier has provided confirmation of this in the ESPD, Part IV of the Selection Criteria, Section D: Quality Assurance Standards and Environmental Management Standards, the contract should instead read: 'Certificates tendered for environmental management systems or standards must be in place at the start of the contract and retained for the entire duration of the contract.']
- *If certificates tendered for environmental management systems or standards expire within the contract period, the Supplier must promptly apply for new certificates.*
- *If the Supplier loses or fails to attain certificates for the environmental management systems or standards specified in tenders during the contract period, this will be regarded as a breach [alternatively, an essential breach] of the contract. This does not apply, however, if the certificates are lost or not attained because amendments have been made to the environmental management measures required in the specific environmental management systems or standards, which necessitate amendments to the fundamental elements of the contract.*

EXAMPLES OF CONTRACT PERFORMANCE CLAUSES RELATING TO THE MINIMUM REQUIREMENT FOR THE EU ECOLABEL

In italics, please find proposal for text to insert in tender documents

The terms of contract must ensure that deliveries comply with the specified requirements during the entire contract period. Provisions that enter into force if repeated deliveries do not meet the agreed environmental requirements may be stipulated, for example, including requirements for ecolabels. This is a way to ensure that favoured environmental conditions are maintained throughout the duration of the contract.

Examples of contract performance clauses:

- *Tendered ecolabelled goods must have a licence for the ecolabels concerned throughout the entire period of the contract.*
- *If the tendered goods' ecolabelling licence expires during the contract period, the Supplier must apply for a new ecolabelling licence for the goods concerned.*
- *If goods lose their ecolabelling licence during the contract period, the contracting authority reserves the right to demand an ecolabelled replacement product for the same price. This provision will not apply if the licence is lost as a result of amendments to the relevant environmental criteria, which necessitate amendments to the fundamental elements of the contract.*
- *The Supplier must report once a year as to how large a proportion of the goods purchased under the agreement is ecolabelled. This information will be used in the contracting authority's environmental reporting. Ecolabelled goods must be labelled with the relevant ecolabel in printed and electronic goods catalogues.*

Source: Ecolabelling Denmark's Toolbox for public purchasers.

VIEWS ON THE INCREASING USE OF EMS AND ECOLABELS

This section contains views and statements obtained from procurers, suppliers and labelling and certification organisations compiled during the national workshops held in conjunction with Nordic Council of Ministers' project Green Growth through Public Procurement.

Views on opportunities to increase the use of EMS and ecolabels

1. Enhanced market dialogues

- Better market dialogues can facilitate the advance preparation of upcoming purchase process. By seeking help and advice from the market and specialised institutes, buyers can promote increases in the use of EMS and ecolabels among commercial operators in the markets. This will make it progressively easier to ensure the right quality and competition for each subsequent contract.
- This will make it easier to evaluate the market supply of companies, products and services that fulfil environmental criteria. Companies, products and services covered by EMS and ecolabels are listed in open databases on the Internet.

2. Simpler and clearer communications

- Communications will become clearer if they can refer directly to EMS or ecolabels instead of referring to multiple individual environmental requirements.
- It should become easier to communicate buyers' green procurement policies to employees, suppliers and other stakeholders.
- Your Green Public Procurement policy will become more visible when products carry ecolabels.
- Contractual requirements will be simplified and clearer to suppliers.

3. Increased focus on EMS and ecolabels

- New opportunities derived from related legislation will intensify – and have already intensified – the focus on the use of EMS and ecolabels for politicians, procurers and suppliers alike.

4. Time saved for the development of criteria and contractual follow-up

- Public authorities will not need to develop their own environmental requirements, since they can instead simply refer to environmental management systems and environmental labels.
- Certificates will serve as documented proof that the relevant requirements are fulfilled.
- Suppliers' time can also be saved if procuring authorities adopt a common approach and make use of the new opportunities.

5. More equal treatment of suppliers

When requiring EMS and ecolabels, the involvement of an independent third party will ensure that the requirements behind the EMS or ecolabel are duly fulfilled.

This makes competition fairer than in situations where environmental requirements are not controlled. Where requirements are not controlled, suppliers who can truly demonstrate that they comply with the requirements get the same credit as suppliers who simply claim that they comply.

6. More competent monitoring

- There is a huge need to monitor progress on Green Public Procurement.
- Monitoring will be easier if it can be measured by monitoring purchases from suppliers with EMS and purchases of ecolabelled products and services. This will also make it easier to set political targets for the use of EMS and ecolabels.

7. Clearer legislation

The legal aspects of labelling are significantly clearer now thanks to the 2014 directive than they were under the previous procurement directives.

Views on challenges related to the increased use of EMS and ecolabels

1. Lack of leadership

- Most barriers would disappear if we had a clear political mandate for green public procurement.
- The development of green public procurement is not being effectively monitored. Measurable goals are seldom set, and there is no follow-up or consequences if a green procurement policy is not implemented. There is a lack of willingness and resources to monitor progress, on the side of the contracting authorities.

2. Limited market supply in some product areas

- Contracting authorities typically want as much competition as possible for their tenders, and they prefer not to narrow the market to suppliers who can provide EMS and ecolabels.
- The legal opportunities are better thanks to the 2014 directive, but in practice opportunities to require labels depend on the availability of ecolabelled products within the relevant industry, and this availability varies considerably from product to product or tender to tender.

3. Lack of time and knowledge

- Knowledge here relates to environmental knowledge and market knowledge. Procurers often lack information on different EMSs and ecolabels in use in markets.
- The lack of knowledge of the market can also be a barrier, because procurers may be unwilling to define requirements without knowing more about the consequences of such requirements; i.e. will any suppliers on the market be excluded in a way that has a negative impact on the competition? And if so, how many?
- It is difficult for procurers to assess whether one or the other label is better. This could be investigated during market dialogues, however.
- The lack of knowledge of the effects of EMS and ecolabels on price and environmental benefits may be problematic.
- Market dialogues are insufficient at present, though they are expected to become more prevalent.
- There may be a lack of environmental knowledge among contracting authorities in terms of understanding the complex impacts of EMS and ecolabels in practice.
- There may also be a lack of knowledge concerning which of the requirements underlying the labels can legally be used in a tender. Which of them effectively relate to or characterise the subject of the contract? In practice ecolabels are not equal, as they differ in various details, which may be decisive from the industry's point of view.
- According to the procurers participating in the workshops, selecting criteria to be fulfilled was seen as a safer way to succeed rather than requiring a certain label. For this to be effective, the procuring entities must have knowledge of the most important environmental aspects of each product or service, and understand how these correspond to their own environmental objectives. At the same time, they want the legislation to facilitate the requirement of a certain label.
- Interpreting different kinds of documentation is difficult, and the burden of proof should be on suppliers. However, the procuring entity should consider what added value the requirement of a certified EMS actually gives with regard to achieving their environmental goals.

4. Concerns about the possible exclusion of small and medium-sized enterprises (SMEs)

- Ecolabels are still considered too costly by many SMEs. However, more than 50% of suppliers licensed in Denmark under either the Nordic Swan Ecolabel or the EU-Ecolabel have 50 employees or fewer. But EMSs or ecolabels are still not an integral part of all companies' strategies.
- There is a big difference between sectors. What may be accepted practice in one sector may be irrelevant in another. It will therefore be difficult to construct a set of tools which suit all sectors, and it would be wrong to assume that "one size fits all".
- The costs of obtaining a label amount to more than the actual license fee. These costs cannot be directly included in the product price, and this may be a barrier for companies considering applying for labels. On the other hand, companies with labelled products have reported positive experiences in terms of increased demand and sales of labelled products.

5. Acquisition price remains the crucial factor in tenders

- Environmental considerations – including EMS and ecolabels – do not have sufficient weighting in public tenders.
- There is still a greater focus on acquisition prices than on the total life cycle costs associated with purchasing, using and disposing of products and services.

6. Legal uncertainties

- Legislation may be difficult to interpret, with regard to different practices, impacts, and prolonged processes.

FURTHER INFORMATION

Denmark

- The Danish Competition and Consumer Authority: en.kfst.dk
- Ecolabelling Denmark - guide til offentlige indkøbere: www.ecolabel.dk
- FSC Denmark – guide til offentlige indkøbere: dk.fsc.org/dk

Finland

- The national Green Public Procurement database: www.motivanhankintapalvelu.fi
- The national Public Procurement Advisory Body: www.hankinnat.fi
- Ecolabelling Finland: www.ymparistomerkki.fi
- FSC Finland: fi.fsc.org/fi-fi
- PEFC forest certification: pefc.fi/
- National EMAS body, Finnish Environment Institute: www.ymparisto.fi

Iceland

- Ríkiskaup (Icelandic central purchasing body): www.rikiskaup.is
- Umhverfisstofnun (Icelandic Environmental Agency): www.ust.is
- Website dedicated to GPP: www.vinn.is

Norway

- The national Green Public Procurement body: www.anskaffelser.no
- Ecolabelling Norway: www.svanemarket.no
- National EMAS body, Miljødirektoratet: www.miljodirektoratet.no

Sweden

- Upphandlingsmyndigheten/The National Agency for Public Procurement: www.upphandlingsmyndigheten.se
- Miljömärkning Sverige –guide til offentlige indkøbere: www.svanen.se

Other

- EU Commission publication, Buying green! A handbook on green public procurement (3rd Edition): ec.europa.eu
- ICLEI Europe Procura+ manual: www.procuraplus.org
- The Nordic Swan Ecolabel: www.nordic-ecolabel.org
- The EU Ecolabel: ec.europa.eu/environment/ecolabel

APPENDIX 1

Questions discussed at the national workshops

How can the rules on the use of Environmental Management Systems (EMS) in the new procurement directive be interpreted and used in practices:

1. How can EMS legally be used in the different phases of a tender? What recommendations can be given to public purchasers about when EMS can best be used in the different phases of a tender?
 - market dialogue
 - selections criteria
 - contract terms
2. What is the best legal way to formulate selections criteria and contract terms? Good advices on how criteria and contract terms could be formulated.
3. How should the reference to Regulation 1221/2009 art 45 be interpreted?
4. What EMS (environmental management systems) are available on the Nordic market? Are they equivalent? Do they fulfill the requirement set in the Directive? -Which process can be recommended to clarify this? Who should be involved in the process?
5. How can suppliers verify the requirements by other means of documentation?
6. What are the possibilities opened in the new directive in terms of: simplification, third party environmental guarantee on the supplier level both for goods and services
7. What guidance do public purchasers need in order to be able to assess the alternative means of proof; e.g. checklists?
8. How could the rule on to time limits for obtaining EMS work in practice?
9. Barriers to increased use of EMS in public tenders seen from respectively purchasers, providers and others: e.g. price, knowledge, limited number of EMS registered companies on the market and others.
10. Opportunities to increased use of EMS in public tenders seen from respectively purchasers, providers and others: e.g. market dialogue and others.

How can the rules on the use of eco-labels in the new procurement directive be interpreted and used in practices:

1. How should the requirements that the criteria behind the Eco-label must be 1) linked to and 2) be appropriate to define characteristics of the subject matter of the contract be interpreted?
2. What other possible means of proof can be used by suppliers? And what means of proof should be accepted by the contracting authorities? What guidance do public purchasers need in order to be able to assess the alternative means of proof; e.g. checklists?
3. Can different labels be seen as equal, i.e. are they comparable? E.g., would all type-I-labels be regarded as equal? Or should all criteria behind the label be the same?
4. How could the rule on time limits for obtaining ecolabels work in practice?
5. How can Eco-labels legally be used in the different phases of a tender? At what stage of a tender should labels be included? Recommendations for public purchasers about the use of eco-labels in:
 - market dialogue
 - definition of the subject matter of the contract
 - selections criteria
 - technical specifications
 - award criteria
 - contract terms
6. What is the best legal way to formulate requirements, criteria and contract terms? Good advices on how the requirements and criteria could be formulated.
7. What are the possibilities and challenges opened in the new directive in terms of requiring Eco-labels as means of proof?
8. What eco-labels on the Nordic market fulfill the requirements set in the Directive? Which process can be recommended to clarify this? Who should be involved in the process?
9. Barriers to increased use of labels in public tenders seen from respectively purchasers, providers and others: e.g. price, knowledge, limited number of eco-labeled products on the market and others.
10. Opportunities to increased use of labels in public tenders seen from respectively purchasers, providers and others: e.g. focus on TCO-price, market dialogue and others.

APPENDIX 2

Labels and the 2014 directive requirements for labels

How the Nordic Swan Ecolabel and the EU Ecolabel meet the 2014 Commission directive's requirements for labels

The information given below shows how the Nordic Swan Ecolabel and the EU Ecolabel satisfy the requirements of the 2014 EU Commission directive on labelling. The information is for guidance, and Ecolabelling Denmark accepts no liability for any loss or damage arising out of the content of this document or other people's use thereof.

REQUIREMENTS FOR ECOLABELS OF THE 2014 COMMISSION DIRECTIVE	THIS IS HOW THE NORDIC SWAN ECOLABEL FULFILS THESE CONDITIONS	THIS IS HOW THE EU ECOLABEL FULFILS THESE CONDITIONS
Label requirements only concern criteria which are linked to the subject matter of the contract.	Yes, all the Nordic Swan Ecolabel requirements are linked to the subject matter of the contract, provided that the client supplies the same subject that has become the Nordic Swan Ecolabel. The requirements only relate to the product or services and do not concern the general situation of the licence applicant (supplier) as regards the environment.	Yes, all EU Ecolabel requirements are linked to the subject matter of the contract, provided that the client supplies the same subject that has become the EU Ecolabel. The requirements only relate to the product or services and do not concern the general situation of the licence applicant (supplier) as regards the environment.
Label requirements are based on objectively verifiable and nondiscriminatory criteria	Yes, the criteria are written in clear and precise language, and the criteria are objective and verifiable. The criteria do not discriminate, as all products or services that meet the requirements may be given an ecolabel irrespective of the company or its location.	Yes, the criteria are written in clear and precise language, and the criteria are objective and verifiable. The criteria do not discriminate, as all products or services that meet the requirements may be given an ecolabel irrespective of the company or its location.

REQUIREMENTS FOR ECOLABELS OF THE 2014 COMMISSION DIRECTIVE	THIS IS HOW THE NORDIC SWAN ECOLABEL FULFILS THESE CONDITIONS	THIS IS HOW THE EU ECOLABEL FULFILS THESE CONDITIONS
<p>Labels are established using an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate</p>	<p>Yes, the Nordic Swan Ecolabel meets the requirements of the international standard for type 1 ecolabels (ISO 14024), which include requirements for transparent and open procedures. Specifically, all criteria are distributed for general consideration. To enable a decision to be made, a decision mandate is granted from each of the Nordic countries. This decision mandate is granted by a national body in each country that has representatives for trade, industry, consumer and environmental organisations and also the authorities.</p>	<p>Yes, the EU Ecolabel meets the requirements of the international standard for type 1 ecolabels (ISO 14024), which include requirements for transparent and open procedures. Specifically, all criteria are distributed for general consideration and all interested parties have the opportunity to respond. All decisions on the criteria for the EU Ecolabel are discussed by the European Ecolabelling Board (EUEB). This board consists of member states and a number of European interest organisations for business, the environment and consumers. The EUEB must approve proposals for the criteria and these subsequently undergo an approval procedure within the Commission. The final resolution is made by the "Regulatory Committee", whereby each member country has a number of votes depending on the size of the country. The resolution is passed by a qualified majority.</p>
<p>Labels are accessible to all interested parties.</p>	<p>Yes, all products and services that meet the requirements may be accorded the label. All the Nordic Swan Ecolabel criteria are available at http://www.nordic-ecolabel.org/criteria/product-groups/</p>	<p>Yes, all products and services that meet the requirements may be accorded the label. All EU Ecolabel criteria are available at www.ecolabel.dk and the EU Commission's website for the EU Ecolabel: http://ec.europa.eu/environment/ecolabel/</p>

REQUIREMENTS FOR ECOLABELS OF THE 2014 COMMISSION DIRECTIVE	THIS IS HOW THE NORDIC SWAN ECOLABEL FULFILS THESE CONDITIONS	THIS IS HOW THE EU ECOLABEL FULFILS THESE CONDITIONS
Label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.	Yes, the requirements are set by the Nordic Ecolabelling Board on a mandate from each of the participating Nordic countries. No potential licence applicant may participate in the voting on the Nordic Swan Ecolabel criteria.	Yes, the requirements are set by the "Regulatory Committee", whereby each member country has a number of votes depending on the size of the country. The resolution is passed by a qualified majority. No potential licence applicant may participate in the voting on EU Ecolabel criteria.

How the FSC label meets the 2014 Commission directive's requirements for labels

The information given below shows how the FSC label satisfies the requirements of the 2014 EU Commission directive on labelling, and FSC Danmark accepts no liability for any loss or damage arising out of the content of this document or other people's use thereof.

REQUIREMENTS FOR ECOLABELS OF THE 2014 COMMISSION DIRECTIVE	THIS IS HOW FSC FULFILS THESE CONDITIONS
Label requirements only concern criteria which are linked to the subject matter of the contract.	Yes, FSC stands for sustainable forest management, which includes environmental and social characteristics of that management. It is generally accepted that for products based on wood, the potential environmental and social impacts of the production process are mainly determined by how the forests from which the raw materials originate, are managed. And in many parts of the world, forests are an important livelihood for indigenous peoples and other local populations, which makes the social dimension of sustainable forest management as important as the environmental one. Moreover, in such cases, the social dimension, which includes involvement in decision-making by the local people, is important to determine the meaningful environmental preconditions and objectives of the forest management.

REQUIREMENTS FOR ECOLABELS OF THE 2014 COMMISSION DIRECTIVE	THIS IS HOW FSC FULFILS THESE CONDITIONS
<p>Label requirements are based on objectively verifiable and nondiscriminatory criteria.</p>	<p>Yes, the FSC forest management criteria are written in plain language and are objective and verifiable. They are applicable worldwide, in any type of forest. They have been transferred into Indicators that combine the need for global consistency and equal treatment with the need for adaptation to local, environmental and social, circumstances. Scientists worked with representatives of economic, social and environmental interests in formulating these criteria, a process which is then repeated at national levels. These indicators are published and Certification Bodies (CBs) are tasked to evaluate the performance of the forest managers. These CBs are accredited by one global organisation, on the basis of requirements set by FSC in transparent processes. As regards the chain-of-custody requirements, they are applicable for any kind of businesses or organizations, located anywhere, wanting to produce and/or sell any type of product in which FSC certified forest material has been used. And again, the verification process is done by Certification Bodies that work under the same, global, accreditation regime.</p>
<p>Labels are established using an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate.</p>	<p>Yes. First of all, FSC is an open membership organisation, for organizations and individuals. Governmental bodies can be member if they are involved in forest management. The members are organised in three chambers, to ensure balanced consideration of environmental, social and economic interests. The three-chamber model is applied to all decision-making related to the formulation and revision of standards and related guidelines and procedures.</p> <p>Secondly, all decision-making on normative instruments requires consultations that actively invite also non-members. FSC has procedures that determine how these non-members can be involved.</p> <p>FSC also follows "The Code of Good Practice for Setting Social and Environmental Standards" developed by ISEAL, the global organisation for social and environmental standard systems. This code is supported by "ISEAL Credibility Principles", which includes relevance, engagement and transparency. FSC is the only forest certification system, that is recognised by ISEAL for following "best practice" within the field of standard setting."</p>

REQUIREMENTS FOR ECOLABELS OF THE 2014 COMMISSION DIRECTIVE	THIS IS HOW FSC FULFILS THESE CONDITIONS
<p>Labels are accessible to all interested parties.</p>	<p>Yes, FSC allows the label to be used by any company which is trading finalized products, provided that this company applies the rules, which include the need to have an FSC Chain of Custody certificate (so that its production practices are third-party verified), to source the materials used from FSC certified companies and/or apply the FSC rules for Controlled Wood and/or reclaimed materials, and ensure that the product is composed according to the FSC rules set for it (70% at least certified and/or reclaimed materials, rest being controlled wood). FSC's standards with certification requirements can be found via ic.fsc.org/en/resources (Policy and Standards).</p>
<p>Label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.</p>	<p>Yes, no single economic operator has decisive influence on the label requirements. However, companies that use the FSC label can be a member of FSC, and therewith part of the decision-making structure. They are part of the economic chamber which currently has some 450 members, so the first hurdle is to convince the other economic members about its views. Secondly, the economic chamber as such has only 1/3 of the decision-making power, in all bodies and decisions in which the membership is involved. Any decision requires the consent of all three chambers.</p>

Photo: unsplash.com

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