

The background of the slide is a photograph of the Charlotte skyline, featuring several prominent skyscrapers under a clear blue sky. In the foreground, a multi-lane highway bridge with concrete pillars spans across the frame, with some greenery and trees visible below it.

Law As Technology: A Case Study in Green Procurement

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10th International Research Study of Public Procurement
Procurement, technology and value creation

NIGP

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Introductions

Tom Daley, DLA Piper



Chris Yukins, GW Law School



Context questions

Procurement and technology policies and strategies:
Green Procurement



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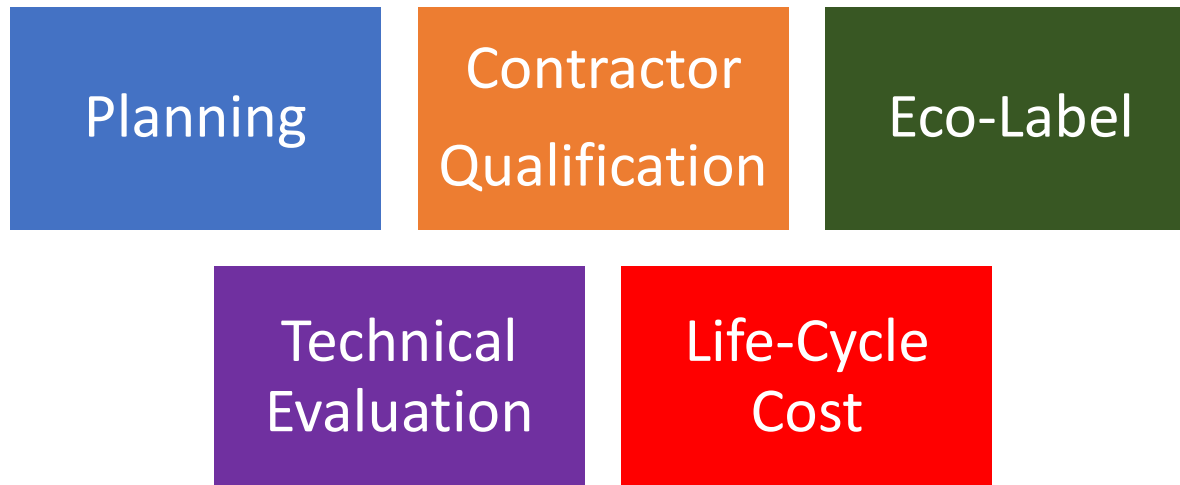
What Law as a Technology Teaches Us

Our Goal Today

- *Objective: Assessing law as a sort of “operating system” (a guiding technology) for procurement*
- *Procurement is a laboratory for assessing “legal realism” (law reflects society) versus a principles-based (Cartesian) approach to law (society reflects law)*
- *Environmentally sustainable procurement (“green procurement”) is the experiment in that laboratory – does treating law as an operating system that reflects and bends to social realities explain how green procurement is evolving, or should principles guide the development of green procurement in the law?*
- *The answer to this question is critical both to the success of green procurement and to the interface of European and U.S. procurement systems*

Technology context and maturity

"Green Procurement" Has Evolved Common Approaches Globally

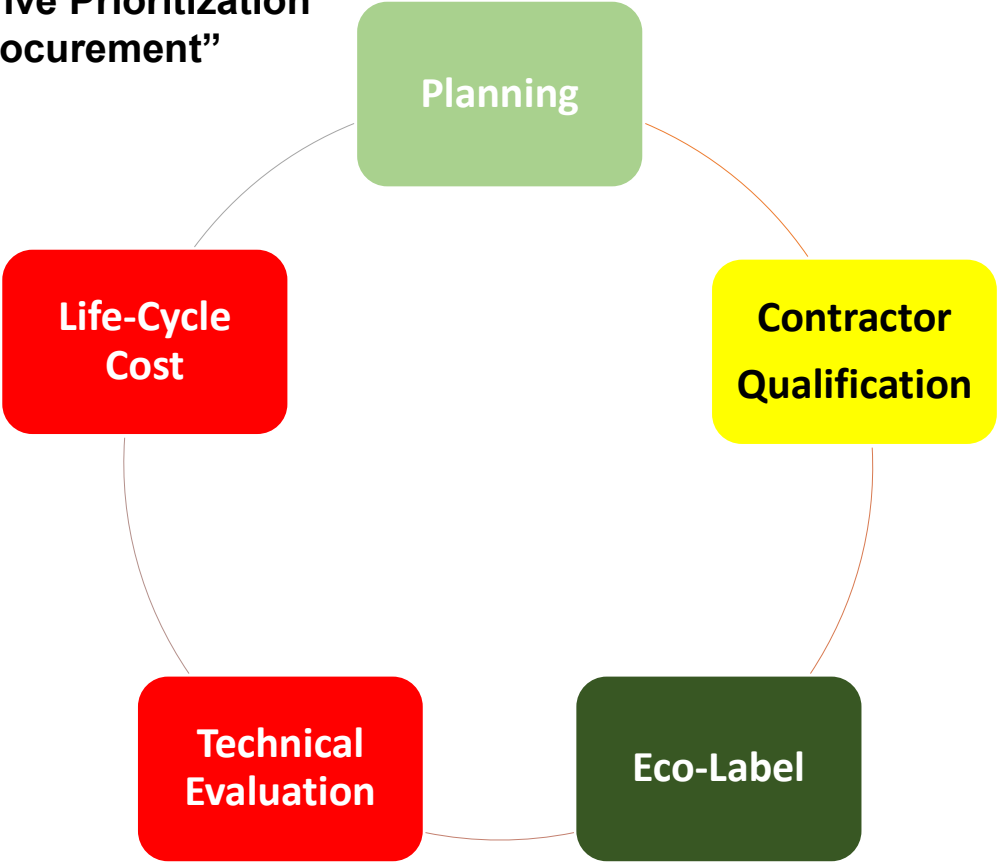


The EU and the U.S., Leading Trading Partners, Have Confirmed That These Are Common Approaches

The joint catalogue reflects a common understanding on how “green public procurement” — public procurement grounded in environmental sustainability — can positively contribute to achieving shared environmental goals posed by climate change. The catalogue identifies key policies, actions and best practices in green public procurement, as part of a broader effort to use public procurement to “catalyze” reductions in the greenhouse gasses which cause global warming.



Economic and Administrative Issues – Including Costs and Harmonization Challenges – Appear to Drive Prioritization of “Green Procurement” Strategies



Planning & Ecolabels: New U.S. Rule on Green Procurement

89 Fed. Reg. 30212 (Apr. 22, 2024)

- New clause FAR 52.223-23, “Sustainable Products and Services” (May 2024)
 - Requiring agencies must **procure sustainable products and services “to the maximum extent practicable”**
 - Applies to all procurements, including micro-purchases
 - Does not apply to weapon systems or to contracts performed abroad
 - Requiring agency is to **list the required sustainable products and services in the solicitation**
 - **Agency may decide *not* to require sustainable goods or services** (FAR 23.103-.104) (and if so must prepare written justification) because of:
 - **Price** not reasonable (life-cycle cost assessment recommended but not mandatory)
 - **Performance** issues (e.g., mission demands, quality, “Buy American” and cybersecurity)
 - **Time** (cannot purchase competitively within a reasonable performance schedule)
 - Requiring agency **lists** sustainable products/services, **evaluates** and **enforces**
- Defines “sustainable products and services” to specify that **products and services must meet, e.g., the Environmental Protection Agency (EPA) Recommendations** of Specifications, Standards, and Ecolabels (“EPA Recommendations”) in effect as of **October 2023**
 - EPA Recommendations include 40+ ecolabels – [Ecolabel Index](#) reports 450+ ecolabels worldwide
 - Compare [EPA Framework](#) for assessing ecolabel standards vs. [EU Procurement Directive Art. 53](#) / *Max Havelaar* (CJEU C-368-10)

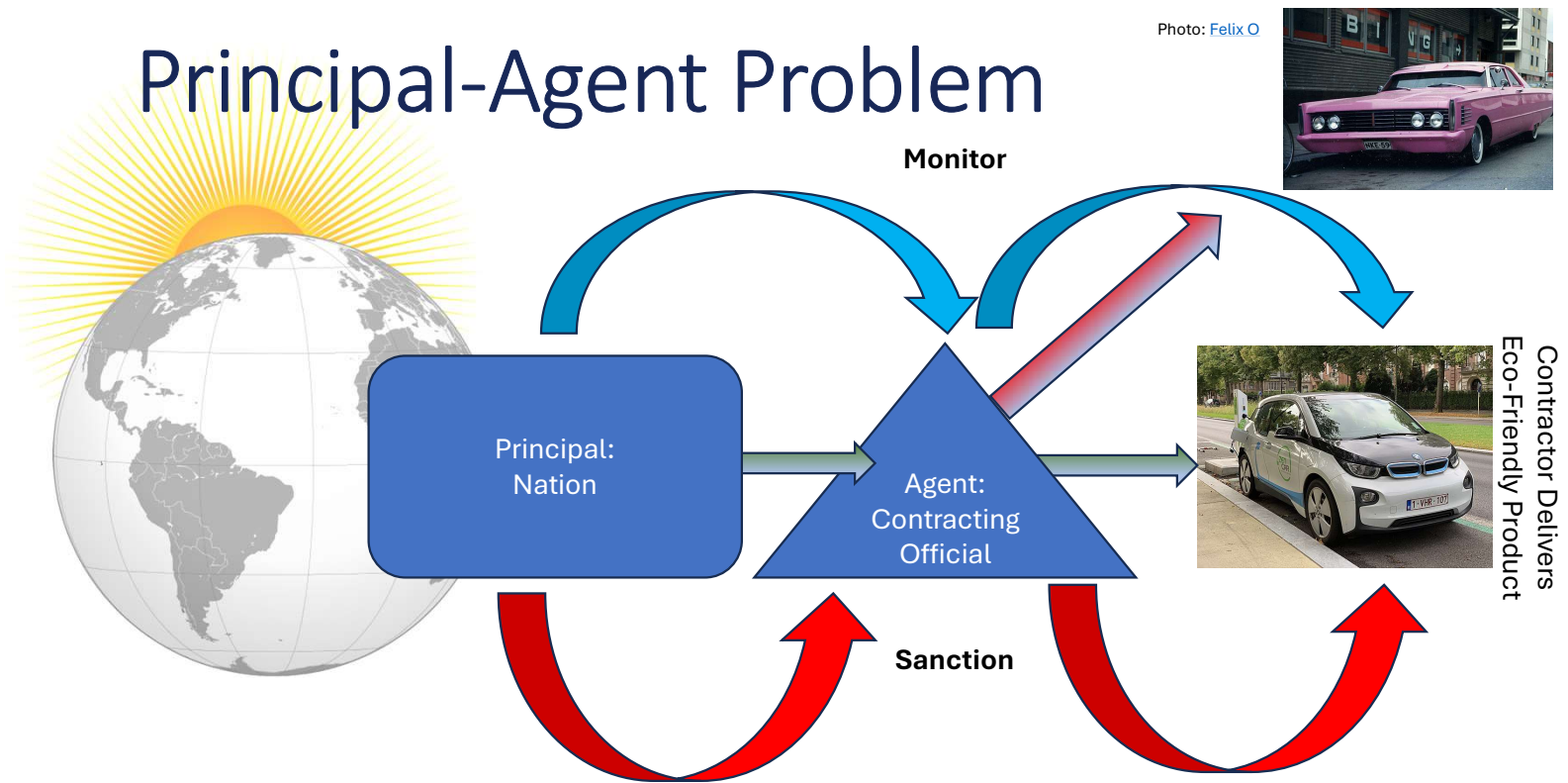




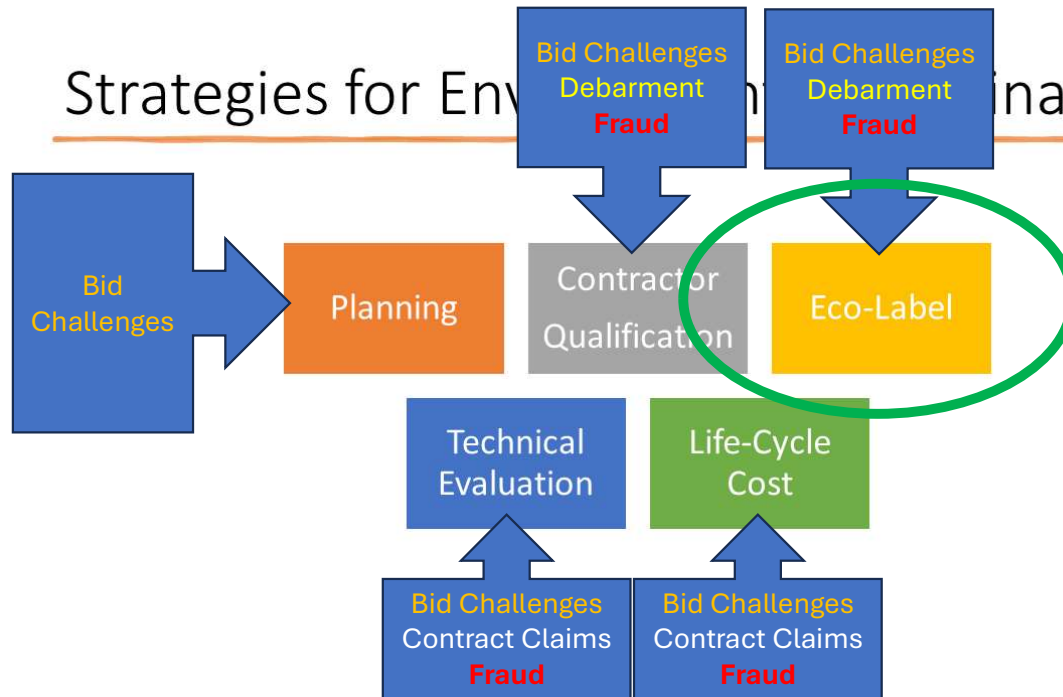
- Section 318 of the most recent National Defense Authorization Act imposes a **one-year bar** against the **Defense Department** **requiring that defense contractors disclose greenhouse gas (GHG) inventory or emissions** as a condition of receiving a defense contract.
- The bar is permanent for “nontraditional” defense contractors.
- This could in effect stall implementation (at least for the Defense Department) of a **pending Biden administration rule** which would require contractors to disclose GHG emissions.

Contract Administration & Enforcement: A Case Study in Transaction Costs and Effective Outcomes

Principal-Agent Problem



Strategies for Environmental Sustainability



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What Does Green Procurement Teach Us?

Assessment Outcomes

- *We see common approaches – suggesting “functionalism” is a sound means of comparing procurement regimes*
- *Green procurement law is being reshaped to match cost and practical imperatives*
- *To maximize to improvements in sustainability (environmental), important to understand this trajectory*
- *The law (this “technology”) becomes a way of rapidly sharing lessons learned in successful sustainability*



Additional information



Q&A



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