

Green Public Procurement: U.S. Case Study

**Christopher R. Yukins
George Washington University Law School**

**International Conference for Advancing
Public Procurement (ICAPP) 24**

Dublin - November 11, 2024



Christopher Yukins

- Lynn David Research Professor of Government Procurement Law, George Washington University Law School

Strategies for Environmental Sustainability

Planning

Contractor
Qualification

Eco-Label

Technical
Evaluation

Life-Cycle
Cost



Steven L. Schooner

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.



U.S.-EU Trade and Technology Council
Working Group on Climate and Clean Tech

**Joint U.S.-EU Catalogue of
Best Practices on Green Public
Procurement**

EU-U.S. Trade and Technology Council



- The catalogue was released as part of the [sixth ministerial meeting](#) of the Trade and Technology Council (“TTC”), which took place in Leuven, Belgium, on 4 and 5 April 2024. The meeting was co-chaired by European Commission Executive Vice President Margrethe Vestager, European Commission Executive Vice President Valdis Dombrovskis, United States Secretary of State Antony Blinken, United States Secretary of Commerce Gina Raimondo, and United States Trade Representative Katherine Tai, joined by European Commissioner Thierry Breton, and hosted by the Belgian Presidency of the Council of the European Union.
- The “EU-US Trade and Technology Council provides a **forum for the United States and European Union to coordinate approaches to key global trade, economic, and technology issues** and to deepen transatlantic trade and economic relations based on these shared values. It was established during the EU-US Summit on 15 June 2021 in Brussels.”



U.S. Green Procurement Initiatives

- **QUALIFICATION: Requiring major Federal suppliers to publicly disclose emissions and set reduction targets.** This initiative would center on *contractor qualification* (known as “responsibility” in U.S. procurement.) Under a [proposed rule](#) published in November 2022, to be considered qualified (“responsible”), major federal contractors (those with over US\$50 million in annual federal obligations) would be required to publicly report their annual corporate-level GHG emissions and set targets to reduce them. Major contractors would also be required to disclose climate risks and vulnerabilities that may affect their future economic stability or their ability to deliver goods and services that are critical to Federal agency missions (see summary table below).
- **TECHNICAL EVALUATION/TARGETED MATERIALS: Launching a Buy Clean initiative for low-carbon materials.** This initiative promotes purchase of *low-carbon materials* in the construction industry. In February 2022, the Biden Administration [launched its Federal Buy Clean Initiative and Task Force](#) that will “promote use of construction materials with lower embodied emissions and pollutants across their lifecycle.”




U.S. Green Procurement Initiatives

- **LIFECYCLE COSTS: Changing Federal procurement rules to minimize the risk of climate change, including factoring in the social cost of greenhouse gas (SC-GHG) in procurement decisions.** This initiative seeks to require agencies to *consider lifecycle costs of sustainable alternatives*. Under [Federal Acquisition Regulation \(FAR\) Part 7](#), federal agencies must already consider the life-cycle cost of alternatives in procurement decisions. In 2021, President Biden issued [Executive Order 14030](#), which directed regulators to amend the FAR to “ensure that major Federal agency procurements minimize the risk of climate change, including requiring the social cost of greenhouse gas emissions to be considered in procurement decisions and, where appropriate and feasible, give preference to bids and proposals from suppliers with a lower social cost of greenhouse gas emissions.” The Biden administration says that it “aims to strengthen lifecycle cost approaches to include the SC-GHG—the incremental future economic damages caused by each ton of carbon pollution—can be a valuable tool to guide agencies toward investments that are compatible with the low-carbon economy of the future.” In September 2023, the White House [announced](#) that it was directing federal regulators to incorporate SC-GHG estimates into a wide range of federal agency actions, including each agency’s procurement function. In October 2021, regulators had [issued](#) a request for comments on minimizing the risk of climate change in federal acquisitions, and a draft proposed rule (FAR Case 2021-016) is [under review](#).



U.S. Green Procurement Initiatives

- **ECO-LABELS: Maximizing the procurement of sustainable products and services.** This initiative stresses the *use of approved eco-labels to identify sustainable products* for acquisition, and *calls for purchase of those products whenever practicable*. In September 2021, the Biden administration issued a [proposed rule](#) to update [FAR Part 23](#) to “focus on current environmental and sustainability matters and to implement a requirement for agencies to procure sustainable products and services to the maximum extent practicable.” Specifically, the proposed rule would call on agencies to purchase the products identified by the U.S. Environmental Protection Agency (EPA) under various eco-labels. Under the [proposed revised FAR 23.103](#), agencies would be required to “procure sustainable products and services . . . to the maximum extent practicable.” Procuring sustainable products and services would be considered practicable unless the agency could not acquire products or services (i) competitively within a reasonable performance schedule; (ii) that meet reasonable performance requirements; or (iii) at a reasonable price.
- **MANAGEMENT SUPPORT: Establishing the Net-Zero Emissions Procurement Federal Leaders Working Group, including a Buy Clean Task Force, to drive strategy and implementation.** This initiative is part of the federal government’s *overall strategy for reducing climate change*. These federal officials would work within the Biden administration’s broader [Federal Sustainability Plan Strategy Mix](#), which includes procurement as a core pillar of the Biden administration’s overall plan for meeting sustainability goals.



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 456 ecolabels worldwide
 - Compare [EPA Framework](#) for assessing ecolabel standards vs. [EU Procurement Directive Art. 53](#) / *Max Havelaar* (CJEU C-368-10)

Catalogue Demonstrates Parallel Developments – EU / US



Planning

- U.S. – “Maximum extent practicable” by purchasing agencies
- EU – Member States’ National Action Plans



Contractor Qualification

- EU – Vendors can be excluded if violate environmental requirements
- US – Proposed rule stalled: vendors that do not measure GHG=non-qualified



Eco-Labels

- US – New final rule follows EPA recommended eco-labels
- EU – Directive allows eco-labels



Technical Evaluation

- EU -- Member States incorporate environmental standards in evaluations
- US -- New rule encourages agencies to evaluate for sustainability



Life-Cycle Costs

- EU – EU publishes [Life-Cycle Costing tool](#)
- US -- New rule encourages agencies to evaluate life-cycle costs



U.S.-EU Trade and Technology Council
Working Group on Climate and Clean Tech

**Joint U.S.-EU Catalogue of
Best Practices on Green Public
Procurement**

Some Lessons from the U.S. Experience

- Planning and a coordinated strategy – even against a time limit
- Some initiatives stumbled because of cost and political opposition
- Very little assessment of relative effectiveness in reducing global warming
- Regulatory implementation left open issues of:
 - Agency inertia and accountability
 - Trade barriers and intergovernmental cooperation
 - Supply chain impact
 - Management commitment
 - Political “clock”

Conclusion

cyukins@law.gwu.edu