Public Procurement Law in the European Union

3

Willem A. Janssen

Abstract

This chapter discusses EU public procurement law. Public authorities in the European Union must comply with the rules of European public procurement law when purchasing works, supplies, or services on the market. Being able to maneuver swiftly within the legal scope of these rules is of utmost importance because it enables professionals in the public procurement context to make purchasing decisions in compliance with the law and its objectives. These rules often allow for, or even stimulate, efficient and effective procurement in line with a public organization's objectives and tasks. Particular attention is, therefore, paid in this chapter to how the law allows for sustainable and social public procurement. This type of legal knowledge is necessary for public procurement to be able to contribute to solving societal challenges, such as climate change and social injustice. Accordingly, the aim of this chapter is to provide an understanding of EU public procurement law by delving into its objective, sources of law and the legal principles. The scope of these rules is also discussed and some of the most prominent aspects of the procedural rules are highlighted considering sustainability and social objectives. Finally, this chapter describes the remedies for aggrieved bidders to gain legal protection.

Keywords

EU public procurement law · Principles · Sources of law · Equality · Transparency · Proportionality · Procedures · Legal protection

W. A. Janssen (✉)
Centre for Public Procurement (UUCePP) and Centre for Regulation and Enforcement (RENFORCE), Faculty of Law, Economics and Governance, Utrecht University, Utrecht, The Netherlands
e-mail: w.a.janssen@uu.nl

J. Grandia, L. Volker (eds.), *Public Procurement*,
https://doi.org/10.1007/978-3-031-18490-1_3

Learning Objectives

After studying this chapter, the reader will be able to:

- Understand the roots, objective(s), and sources of EU public procurement law.
- Explain the importance and role of legal principles.
- Understand the law's scope and know when it applies.
- Explain the legal possibilities to purchase sustainable and social outcomes.
- Understand the remedies for aggrieved bidders to gain legal protection.

3.1 Introduction

Public authorities in the European Union ('EU') must comply with the rules of EU public procurement law when purchasing works, supplies, or services on the market. Being able to maneuver swiftly within the legal scope of these rules is of utmost importance because it enables professionals in the public procurement context to make purchasing decisions in compliance with the law and its objectives. These rules often allow for, or even stimulate, efficient and effective procurement in line with a public organization's objectives and tasks. Particular attention is, therefore, paid in this chapter to how the law allows for sustainable and social public procurement. This type of legal knowledge is necessary for public procurement to be able to contribute to solving societal challenges, such as climate change and social injustice.

Accordingly, the aim of this chapter is to provide an understanding of EU public procurement law by delving into its objective in Section 3.2, sources of law in Section 3.3, and the legal principles in Section 3.4. The scope of these rules is discussed in Section 3.5 and some of the most prominent aspects of the procedural rules are highlighted considering sustainability and social objectives in Section 3.6. Section 3.7 describes the remedies for aggrieved bidders to gain legal protection.

3.2 Public Procurement Rules: The Internal Market and Discrimination Law

EU public procurement law finds its roots in the EU's ambition to establish an internal market, which broadly stated is aimed at contributing to peace and prosperity in the EU. Since the 1970s, these rules aim to create an internal market for public procurement by breaking down barriers to trade between the Member States of the EU. The enactment of specific legislation on public procurement has, thus, focused on banning protectionist decisions of public authorities. These authorities could

prefer to award a contract to their own national, regional, or local bidders instead of their foreign counterparts (Arrowsmith, 2014). Furthermore, the objectives of national public procurement laws in the EU Member States are often more extensive and include the fight against corruption through procurement procedures by making public spending transparent and a focus on achieving best value for taxpayer's money through the competitive process. Given the fact that EU law always has supremacy over national law, however, these national objectives and rules cannot obstruct the application of EU law and, thus, the creation of the internal market. The same is true for the individual objectives that a public organization has identified for a specific public procurement procedure. Accordingly, stimulating the local economy by awarding a contract to a local market participant instead of allowing foreign bidders to participate in a procedure is generally not allowed.

3.3 The Sources of EU Public Procurement Law

To understand EU public procurement law means initially recognizing the layered nature of the law. It means that it is important to understand that international law including the Government Procurement Agreement ('GPA') that applies to situations in which market participants from outside of the EU wish to gain access to a European public procurement procedure, European law including primary, secondary, and tertiary law, and national procurement laws on the EU Member State level are of importance, see Figure 3.1. In this, the EU level of law is discussed. On this level of law, the hierarchy of legal sources is relevant to understand which level of law is more important when applying and interpreting legal questions. For instance, primary law precedes secondary law, and the former is, thus, of a higher hierarchy.

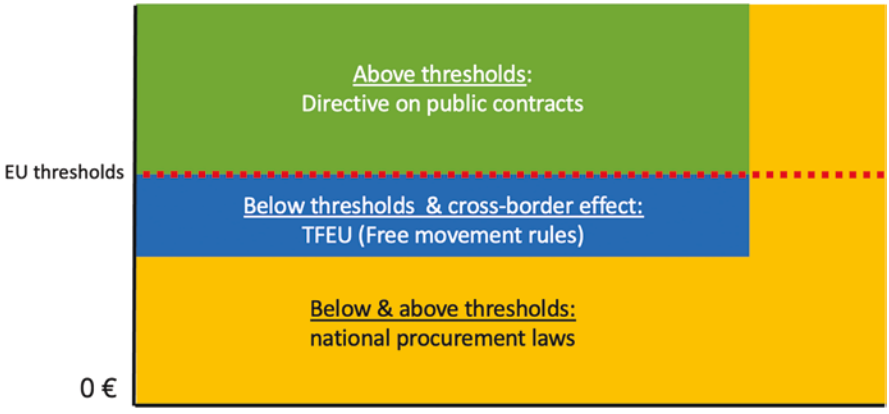

Figure 3.1 Applicability of EU public procurement law

Primary and Secondary Law: Treaties and Directives

Within the EU context, the European Treaties provide the primary law obligations for public procurement in the form of the free movement rules, which are included in articles 34 (supplies), 49 (establishment), and 56 (services) Treaty on the Functioning of the European Union (TFEU). Their objective is the establishment of an internal market in general. However, the most important set of public procurement rules is found in secondary law in the 2014 Public Procurement Directives on public procurement, including Directives on public contracts (2014/23/EU), on concession contracts (2014/25/EU), and on contracts awarded by entities operating in the water, energy, transport, and postal services sectors (2014/25/EU). These Directives can be seen as a further explication of the more general and before mentioned free movement rules. Accordingly, directives must be implemented into the national public procurement laws of the EU Member States. National legislatures are obligated to implement them in their civil or administrative procedural systems and also to add their own rules as long as this does not conflict with the EU law obligations.

The Directive on public contracts, which takes central stage in this chapter, contains a substantial set of procedural obligations for public authorities. The most recent reform of this Directive has showcased the strongest will of the EU legislature to also provide legal possibilities to include social and sustainable objectives in public procurement procedures. In the years prior to 2014, the legislature placed inclusive and sustainable growth at the forefront of the EU's Europe 2020 agenda and put public procurement and the law in the spotlight as one of its main drivers given its substantial economic impact on 14–19% of the EU GDP. This has resulted in many additional and clarified possibilities to include such objectives, such as the possibility to use labels (art. 43) and to award contracts based on the lowest life cycle costs (art. 68), discussed below. Though, in general the Directive does not regulate 'what' contracting authorities procure, but only 'how' they procure. In addition, the law does not contain an obligation to contract out or to liberalize sectors, meaning that contracting authorities can always (jointly) perform tasks with their own financial means and based on their own organizational structures (CJEU, C-26/03, *Stadt Halle*).

EU Thresholds and Cross-Border Interest

The Directive on public contracts, however, only applies if the relevant financial thresholds for either works, supplies, or services are met, which are published by the EU Commission every two years (art. 4 Directive on public contracts). Below these thresholds, national public procurement law or a public organization's own public procurement policy can still be applicable to a public procurement procedure. Noteworthy is the fact that the free movement rules can also apply to procurements below the thresholds if the relevant procurement has a 'cross-border interest', which existence is assessed based on the procurement's technical specifications, the

value of the contract, and the location of the performance of the contract (CJEU, C-147/06, *SECAP*). This means, for instance, that the principles of equality and transparency still apply, which are discussed in Section 3.4.

In addition to the financial thresholds, the Directive on public contracts only applies if it concerns 'procurement', which is defined as *'the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose*' (art. 2 Directive on public contracts). Contrarily, if it concerns the sales of governmental buildings or the auctioning of shares in former state-owned entities, the Directive on public contracts does not apply, but the free movement rules can again still be applicable (CJEU, C-145/08, *Club Hotel Loutraki*). Figure 3.1 shows the different levels of applicability of law.

Tertiary Law

As a tertiary source of law, jurisprudence by the Court of Justice of the European Union ('CJEU', 'Court') and soft-law instruments by the European institutions must be mentioned. The CJEU has the final word on the interpretation of EU law (art. 267 TFEU), which means, for instance, that legal uncertainty caused by the wording of primary or secondary law can be resolved through its case-law. The Court often relies on a teleological (also referred to as 'functional') interpretation of EU law, which means that it uses the objective of EU public procurement law—the creation of an internal market for public procurement—to decide how a specific concept should be interpreted. It means that concepts that define the scope of public procurement law, such as contracting authority or public contract (see Section 3.5), must be interpreted broadly. Exemptions must, contrarily, be interpreted narrowly (CJEU, *Teckal*). Notably, a judgment of the Court applies in all of the EU Member States after publication, making it a rich source of public procurement law even though the legal questions are derived from the legal proceedings in one Member State. Finally, soft-law instruments, often published by the European Commission, are also seen as an authoritative source to interpret the law, but are not generally legally binding, even though debate exists if they are indeed not binding as well. Examples of soft-law in the public procurement context are the EU Commission's Communication on using the public procurement framework in the emergency situations related to the COVID-19 crisis 2020 or the EU Commission's Staff working paper on public-public cooperation 2011.

3.4 The Foundation of the Law: The Public Procurement Principles

The foundations of EU public procurement law are built on the principles of equality, non-discrimination, transparency, and proportionality. Codifying a long line of case-law stemming from the CJEU, article 18(1) Directive on public contracts

obliges contracting authorities to treat economic operators equally and without discrimination and to act in a transparent and proportionate manner. Furthermore, this provision clearly states that the design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. It has been debated in the literature if 'competition' as such is also a principle of EU public procurement law (Sanchez-Graells, 2015). The specific rules on public procurement, such as those related to announcements, award criteria, and exclusion grounds, can be derived from these principles. Understanding these principles, thus, provides a basis to better understand the more specific rules on public procurement, without having to discuss the entire body of rules in this chapter.

In the following sections, the scope and content of the principles of EU public procurement law are subsequently discussed, namely, equality and non-discrimination, transparency, and proportionality.

Equality and Non-discrimination

In the public procurement context, equality intends to prevent prejudice of (groups of) economic operators, distinctions made based on nationality or preferential treatment of (groups of) tenderers in general. It means that similar situations must not be treated differently without any objective justification. As a specification of equality, the principle of non-discrimination requires that discrimination based on nationality is forbidden. Prior to the introduction of this principle in the Directive on public contracts, the CJEU concluded in 1993: 'On this issue, it need only be observed that, although the directive makes no express mention of the principle of equal treatment of tenderers, the duty to observe that principle lies at the very heart of the directive whose purpose is, according to the ninth recital in its preamble, to ensure in particular the development of effective competition in the field of public contracts and which, in Title IV, lays down criteria for selection and for award of the contracts, by means of which such competition is to be ensured' (CJEU, C-243/89, *Commission/Denmark,* par. 33).

In its 2004 milestone case of *Succhi di Frutta*, a case that is nearly relevant for all public procurement issues, the CJEU even went further in its conclusions. The Court stated that 'under the principle of equal treatment as between tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, all tenderers must be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions' (CJEU, C-496/99, *Succhi di Frutta*, par. 110). As such, the principle of equality means that contracting authorities in general must ensure a 'fair' public procurement process. It means that all interested economic operators are subjected to the same competitive conditions in a procedure, meaning that modifications of criteria or bids during a procedure must be met with hesitation (art. 72 Directive on public contracts).

Transparency

The principle of transparency must be read considering the principle of equality. Without transparency, equality is seemingly impossible to achieve. The CJEU concluded in 2003 by stating that 'in that context the Court noted that, in accordance with established case-law, in light of the dual purpose of opening up competition and of transparency pursued by the Directive, that concept must be given an interpretation as functional as it is broad' (CJEU, C-283/00, *Commission/Spain*, par. 48–52). Accordingly, transparency supports the creation of a system of openness, which will lead to increased accountability and prevention of discrimination based on nationality. It is also deemed necessary for the fight against corruption or to prevent any form of conflict of interest (CJEU, C-496/99, *Succhi di Frutta*). The principle of transparency in the public procurement context has been identified to uphold two purposes, which were identified by the Court in *Telaustria* (C-324/98) in 2002: 'That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed' (par. 62). The objective of this twofold purpose is to preclude any risk of favoritism or arbitrariness on the part of the contracting authority. Consequently, this principle requires that 'all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents'. This must be done in such a way that 'all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way' and so that 'the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract' (CJEU, C-496/99, *Succhi di Frutta*, par. 111). This implies that all criteria and conditions of a public procurement procedure must be set in a clear, precise, and unambiguous way, but it also means that economic operators need to be reasonably informed. For instance, from the perspective of transparency, it means that contracting authorities are required to publicly announce a procedure and to include, among other things, the award criteria and the relative weighting given to each of those criteria.

Proportionality

Within EU law, the proportionality principle as a general principle of law means that, among other things, the actions of the EU shall not go beyond what is necessary to achieve the objectives of the Treaties (article 5 TFEU). More specifically, the principle of proportionality requires in the public procurement context that all conditions and criteria must be proportionate and reasonable in relation to this subject matter of a contract (the so-called link to the subject matter of the contract). Consequently, this principle is relevant in relation to the exclusion grounds, the award criteria, the selection criteria, and the number of criteria. It means that, for example, asking for a bank guarantee of one million euros for a public service

contract of 75,000 euros without any significant risks would seem disproportionate. It also means that criteria related to the general business operations of a bidder, including Corporate Social Responsibility policies, are not allowed. Similarly, it seems that a requirement to perform a contract for 100% by long-term unemployed persons would also be disproportionate (CJEU, C-31/87, *Beentjes*). Also, for instance, award criteria are perceived to be connected to the subject matter of the public contract where they concern the works, supplies, or services to be provided under that contract in any respect and at any stage of their life cycle.

3.5 The Scope of EU Public Procurement Law

In general, EU public procurement law applies if the public organization awarding the contract is a 'contracting authority', and if the contract qualifies as a 'public contract', unless an exemption is applicable.

Who Must Follow the Rules: Contracting Authorities

The concept of 'contracting authority' refers to the state, a regional or local authority, a body governed by public law, or an association formed by one or more such authorities or one or more such bodies governed by public law (art. 2(1) sub 1 Directive on public contracts). Depending on the national governmental organization, this means that municipalities, provinces, autonomous regions, directorates, and ministries are often undisputedly under a duty to tender. In the *Beentjes* case of 1988 (C-31/87), the CJEU decided that the State is a functional concept, meaning that the Court considers generally if the composition of an entity, assigned tasks, and dependency on other authorities to decide if an entity is a contracting authority. In this light, much more debate has taken place before the CJEU about the interpretation of the concept of a 'body governed by public law'. The latter is defined as a body that (1) '[is] established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character', (2) '[has] legal personality', and (3a) '[is] financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; (3b) or are subject to management supervision by those authorities or bodies; or (3c) have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law' (art. 2(1) sub 4 Directive on public contracts). The first two criteria are cumulative, whereas the third is alternative in which all three options aim to establish that a dependency relationship exists between the body governed by public law and the involved authorities.

An extensive line of case-law before the CJEU has provided insights into how the criteria of a body governed by public law must be interpreted. There is, for example, no definition of 'needs in the general interest, not having an industrial or commercial character', but the Court has provided insights into what is relevant

when considering this concept. It is irrelevant if an entity is set up as an entity under public or private law (CJEU, C-470/99, *Universale Bau*). Also, if market parties do not provide a need in the general interest on the market, this is an indication that it concerns a 'needs in the general interest, not having an industrial or commercial character' (CJEU, C-18/01, *Korhonen*). Contrarily, if there is strong competition on the market, the opposite conclusion can be drawn. As the Directive on public contracts summarizes: 'A body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered as being a "body governed by public law" since the needs in the general interest, that it has been set up to meet or been given the task of meeting, can be deemed to have an industrial or commercial character' (Recital nr. 10 Directive on public contracts).

The provision of commercial activities on the market in addition to tasks in the general interest do not make it impossible for a contracting authority to exist (CJEU, C-411/04, *Mannesmann*). When it comes to the phrase 'for the most part', it refers to more than half (CJEU, 337/06, *Bayerische Rundfunk*). In addition, not all payments result in a dependency relationship and only include those that are granted without the need to fulfill a specific contractual requirement (CJEU, C-316/18, *Cambridge*). Finally, supervision means that the involved authorities can influence the decision-making of a body governed by public law but that supervision after such decision-making (ex post) is insufficient to speak of supervision (CJEU, C-373/00, *Truley*). Contrarily, incidental supervision as opposed to continuous supervision can still lead to sufficient supervision in the end (CJEU, C-237/99, *French Social Housing Corporations*).

What Objects Are Subjected to the Rules: Public Contracts

Contractual agreements that fulfill the requirements of a 'public contract' are under a duty to tender. A 'public contract' is a contract 'for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services' (art. 2(1) sub 5 Directive on public contracts). Public contracts can, thus, be subdivided into 'public works contracts', 'public supply contracts', and 'public service contracts'. Accordingly, it means that a public contract when (1) it concerns a written agreement between one or more economic operators and one or more contracting authorities must be concluded, (2) a selection has been made by the contracting authority (CJEU, C-9/17, *Tirkkonen*), (3) it concerns a contract for pecuniary interest. The CJEU has clarified that a 'contract for pecuniary interest' means that the 'contracting authority which has concluded a public works contract receives a service pursuant to that contract in return for consideration' (CJEU, C-451/08, *Helmut Müller*, par. 48). In this light, 'consideration' is interpreted broadly and can also include tax benefits or accrued rights. In this light, it must also be noted that such a contract can come in the form of a framework agreement (art. 33 Directive on public procurement).

A public contract differs from a concession contract, which is regulated by the Directive on concession contracts. The latter concerns 'a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the execution of works to one or more economic operators the consideration for which consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment' (art. 5(1) Directive on concession contracts). Accordingly, the award of a works or services concession covers the transfer of an operating risk in the exploitation of those works and services, enclosing demand, or supply risk or both (CJEU, C-206/08, *Eurawasser*). Finally, the concept of economic operator with which a contract is closed is interpreted broadly and includes 'any natural or legal person or public entity' (art. 2(1)(10) Directive on public contracts) (Manunza & Meershoek, 2020).

Exemptions from the Duty to Tender

Even though a public contract might be under a duty to tender by a contracting authority, the Directive on public contracts contains various exemptions, which mean that a direct award can take place. Noteworthy are, among others, the exemptions for public contracts awarded and design contests organized pursuant to international rules (art. 9 Directive on public contracts) and specific exclusions for service contracts (art. 10 Directive on public contracts). Of particular relevance are also the exemptions for contracts awarded between public authorities, which have been subjected to much debate (Janssen, 2018; Manunza & Meershoek, 2020). The exclusive right exemption allows for such cooperation without the need for a public procurement procedure. In this case, it concerns service contracts awarded to a contracting authority that has been granted an exclusive right and is therefore the only operator allowed to perform the contract (art. 11 Directive on public contracts, CJEU, C-220/06, *Correos*).

Gaining importance in practice is the exemption for public contracts awarded to a separate legal entity, which is controlled by the awarding contracting authority and can also be exempted. This separate legal entity then also needs to perform 80% of its turnover for the controlling contracting authority (art. 12 Directive on public contracts, CJEU, C-107/98, *Teckal*). Finally, contractual cooperation between contracting authorities—instead of with a separate legal entity—can also be exempted if it, among other criteria, 'establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common' (art. 12 Directive on public contracts). It is clear that a cooperation for waste collection would fall under this exemption (CJEU, C-480/06, *Commission/Germany*), whereas it is debated if back-office services such as IT and HR services would as well (CJEU, C-796/18, *Stadt Köln*).

3.6 Legal Possibilities to Enable Sustainable and Social Purchasing

If a public contract needs to be awarded in compliance with EU public procurement law, a contracting authority could award this contract with the objective of achieving a sustainable and social outcome (Sjåfjell & Wiesbrock, 2016). In the following sections, the more specific rules for public procurement procedures are discussed in this light. The leitmotiv of this discussion is found in the legal possibilities to include these sustainable objectives (Arrowsmith & Kunzlik, 2009) and social objectives (McCrudden, 2007) in such a procedure. Relevant in this non-exhaustive overview are at least market consultations, the procedures and reserved procedures, the technical specifications and labels, exclusion, award criteria, and contractual conditions.

Market Consultations

Market consultations can be useful to explore what is on offer on the market prior to the start of a public procurement procedure. This is particularly relevant for contracting authorities that are unaware of the market structure or for those authorities that are unsure what type of providers, such as social enterprises or SMEs to aim to provide sustainable or social outcomes, are active on the market. Article 40 Directive on public contracts explicitly provides for this possibility but leaves open how these consultations are organized. To organize these consultations, contracting authorities may seek advice from independent experts or market participants. This advice may be used in the planning and conduct of the procurement procedure. However, it may not have the effect of distorting competition and cannot result in a violation of the principles of non-discrimination and transparency by offering a competitive advantage to the involved parties.

Procedures and Reserved Procedures

The Directive on public contracts contain various types of procedures. Noteworthy are the competitive procedure with negotiation (art. 26(4) and 29 Directive on public contracts), the open procedure (art. 27 Directive on public contracts), the restricted procedure (art. 28 Directive on public contracts), the competitive dialogue (art. 30 Directive on public contracts), and the innovation partnership (art. 31 Directive on public contracts) or the negotiated procedure without prior publication (art. 31 Directive on public contracts).

Each procedure has its own procedural requirements, in which differences can at least be found in (1) the length of a procedure in terms of time limits, (2) the various selection and evaluation phases that are applied, and (3) the amount of negotiation that can take place with economic operators or involvement of the contracting authority. To exemplify the first and the second points, for instance, an open procedure is characterized by the possibility for interested economic operators to submit

a tender in response to a call for competition, and the minimum time limit for the receipt of tenders shall be 35 days from the date on which the contract notice was sent. Contrarily, a selection takes place prior to the evaluation in restricted procedures, meaning that 'any economic operator may submit a request to participate in response to a call for competition containing the information' and contracting entities may limit the number of suitable candidates to be invited to participate in the procedure. In relation to the second point, solutions that are not readily available 'off the shelf' can be procured via a competitive dialogue or an innovation partnership, given that these procedures allow for involvement of the contracting authority in the development phase of a product. Alternatively, if there can be no competition given that only one economic operator can provide a solution, then the negotiated procedure without prior publication can be used.

Should contracting authorities wish to award public contacts to sheltered workshops or to social enterprises, the so-called reserved procedures can be useful, because contracting authorities can reserve the right to participate in such a procedure. These procedures are only available if the national legislature has decided to implement them in national law (optional implementation). The first reserved procedure allows a contracting authority to organize a procedure for sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons (art. 20 Directive on public contracts). An important legal requirement is that at least 30% of the employees of those workshops, economic operators, or programs are disabled or disadvantaged workers, which categories can be further filled in by national law.

The second reserved procedure allows a contracting authority to limit participation to social enterprises in the field of health, social, and cultural services (art. 77 Directive on public contracts). These entities must, among other things, have their objective in the pursuit of a public service mission, reinvest their profits with a view to achieving the organization's objective, and have its structures of management or ownership based on employee ownership or participatory principles, or require the active participation of employees, users, or stakeholders. The idea behind these procedures is that these market participants would otherwise struggle to compete in a 'normal' procedure and allows a contracting authority to specifically stimulate these entities on the market.

Technical Specifications and Labels

The technical specifications lay down the characteristics required of a work, supply, or service and/or thus allow a contracting authority to focus on sustainability aspects (art. 42 Directive on public contracts). Accordingly, these specifications must allow for access of economic operators to a procurement procedure and are not allowed, for instance, to ensure that only a single market participant can participate. To simplify this process, contracting authorities often refer to a label in a public

procurement procedure to stimulate social and sustainable purchasing. Examples of these labels are ISO certificates, such as ISO9001 and ISO14001, or sector-specific labels, such as FSC for sustainable wood and Cradle-to-Cradle certification for circular construction. From a legal perspective, it is important that the specific requirements of a label are linked to the subject matter of the contract, such as the description of the product and its presentation (art. 43 Directive on public contracts, also see Sect. 3.3 on proportionality). Furthermore, the requirements of the label must be drawn up based on objectively verifiable criteria, using a procedure in which stakeholders in a sector can participate. Accordingly, the label must be accessible and available to all interested parties. To ensure flexibility, however, contracting authorities should always allow for alternatives that fulfill the same requirements instead of the label itself (CJEU, C-368/10, *Max Havelaar*). Consequently, contracting authorities are not allowed to require economic operators to have adopted a certain corporate social or environmental responsibility policy, because this concerns the general functioning of a participant instead of their bid in a procedure.

Exclusion Grounds

There are obligatory exclusion grounds and facultative exclusion grounds (art. 57 Directive on public contracts). Obligatory grounds must always be applied a public procurement procedure. This exhaustive list includes among other things participation in a criminal organization and bribery. In terms of social public procurement, reference is also made to exclusion for the use of child labor and other forms of trafficking in human beings, and an economic operator must also be excluded if it fails to fulfill its obligations relating to the payment of taxes or social security contributions. These matters must be established by a judicial or administrative decision that is final and binding in accordance with the legal provisions of the country in which it is established or of the Member State of the contracting authority. The list of facultative grounds, which can be applied per specific public procurement procedure, is also found in article 57 Directive on public contracts. This exhaustive list includes conflicts of interest and grave professional misconduct (CJEU, C-465/11, *Forposta*). From a social and sustainable procurement perspective, an economic operator may be excluded if this entity has violated environmental, social, and/or labor laws enshrined in article 18(2) Directive on public contracts. When applying optional exclusion grounds, contracting authorities should pay particular attention to the principle of proportionality (CJEU, C-171/05, *Connexxion*), meaning that automatic exclusions are not permitted (CJEU, C-395/18, *Tim*). Contracting authorities may refrain from compulsory exclusion where it is justified by overriding reasons relating to the public interest, such as public health or the protection of the environment (art. 57 Directive on public contracts). Bidders must also be able to 'self-clean' any offences falling under this category of exclusion grounds to gain a second chance to participate if justified (sub 6).

Award Criteria: Sustainability and Social Criteria and Life Cycle Costing

Award criteria are in a prominent position to include sustainability and social considerations. According to the law, the award of public contracts shall be based on the most economically advantageous tender (art. 67 Directive on public contracts). This is based on the price or cost by using a cost-effectiveness approach such as life cycle costing and may also comprise the best price-quality ratio that must be assessed based on criteria, including qualitative, environmental, and/or social considerations. These criteria may include, for example, quality, the organization, qualification, and experience of staff assigned to performing the contract, or after-sales service and technical assistance, delivery conditions such as delivery date, delivery process, and delivery period or period of completion. Recital nr. 92 Directive on public contracts clarifies that the list mentioned in article 67 is not exhaustive.

Most interestingly for sustainability and social purposes is the use of the lowest life cycle costs (Andhov et al., 2021). Article 68 states that these costs include two categories, namely, (a) costs such as acquisition costs, cost of use such as energy costs, maintenance costs, and end-of-life costs, and (b) costs linked to environmental externalities related to the work, supply, or services during its life cycle such as the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs. Calculation methods must, among other things, be based on verifiable and non-discriminatory criteria and be accessible to all interested parties. To stimulate the lack of life cycle costing, the EU Commission has introduced non-obligatory calculation methods for, for example, vending machines, computers, and indoor lighting.

Example 3.1. Contracting Authorities and Award Criteria

Contracting authorities are currently exploring the use of lowest life cycle costing in their award criteria. This is then preferred over awarding contracts based on lowest price or a best price-quality ratio, because these criteria do not consider environmental externalities. It means that when procuring clothing for the fire department also damage to the environment or mitigation costs thereof during the production phase can be included or that the use of power and the impact on the environment of ICT data centers are also part of the cost calculation and subsequent comparison.

Contractual Conditions

As a closing piece, contract conditions are also a suitable place to include sustainability and social considerations. Article 70 Directive 2014/24/EU states that contracting authorities may lay down these conditions relating to the performance of the contract. These conditions must be linked to the subject matter of the contract

Table 3.1 Overview of relevant legal articles for sustainable and social procurement

Phases of a public procurement procedure	Opportunity to include sustainable and social objectives	Relevant articles in Directive on public contracts
Market consultations	Search for market participants offering sustainable and social solutions or test the suitability of a procedure	Art. 40
Division into lots	Provide opportunities for SMEs offering sustainable and social solutions	Art. 46
Procedures	Choose a specific procedure that is suitable for the required outcome	Art. 26–31
Reserved procedures	Reserve the procedure to sheltered workshops or social enterprises	Art. 20 and 77
Exclusion grounds	Exclude market participants that have violated labor and environmental laws	Art. 57
Technical specifications and labels	Specify the required level of sustainability or social standard or use a label for this purpose	Art. 43 and 45
Selection criteria	Select market participants that fulfill the set requirements in the selection phase	Art. 58
Award criteria	Give sustainability or social considerations a (significant) place in the MEAT criteria and/or use life cycle costing	Art. 67
Contractual conditions	Include contractual conditions related to the sustainable and social performance of the contract	Art. 70

and included in the call for competition or in the procurement documents. This article even explicitly mentions that these criteria may include economic, innovation-related, environmental, social, or employment-related considerations. This is summarized in Table 3.1.

3.7 Remedies for Aggrieved Bidders

Aggrieved bidders that deem that a violation of EU public procurement law has taken place can attempt to act against the involved contracting authority in multiple ways. The remedies that are available depend on how legal protection for bidders is organized on the national level in their respective procedural laws, because EU law must respect the procedural autonomy of the Member States. In general, however, there are at least three options: to file proceeding at a national court, to ask preliminary questions by the national court to the CJEU, or to file a complaint at the EU Commission.

The Procedure at a National Court

On the national level, different legal traditions exist when it comes to public procurement law. Depending on the Member State, it can mean that either an administrative court, a civil court, or a specifically assigned tribunal or review board, or a selection of them, is competent to hear public procurement cases. Irrespective of this national forum choice, a claim must initially be filed before a district court in most instances, but national law may depict that a complaint must initially be made at the involved contracting authority. Depending on the system, a summary proceeding can be used in situations where urgency is required, whereas more in-depth legal issues might make a 'normal' proceeding necessary. Subsequent appeals can be made at the competent national court or supreme/high court, which in turn depends on how such appeals are structured on the national level.

Even though national procedural differences may exist, the Remedies Directive (89/665/EEC) provides the European rules for national proceedings in the public procurement context. For instance, this Directive requires a minimum ten-day standstill period after the award of the contract (art. 2a and 2b) and the completion of the public contract. Additionally, this Directive requires all participating economic operators to be informed about the outcome of the procedure. Moreover, this Directive contains provisions relating to interim measures, setting aside decisions that have been taken unlawfully, and the award of damages (art. 2). This Directive must be implemented into the national system of legal protection.

The Preliminary Procedure at the CJEU

If a question on the interpretation of EU law arises during a national proceeding, a national court can pose preliminary questions to the CJEU (art. 267 TFEU). In some instances, such as if this question arises at a court of last instance after which no appeal is possible, the court must pose these questions (CJEU, C-283/81, *CILFIT*). Following proceedings before the CJEU, the national court receives an answer to its question(s). Subsequently, the national court decides on the dispute at hand. Accordingly, it is not possible for aggrieved bidders to pose these questions themselves to the CJEU. Direct access to the CJEU is only possible in very limited number of situations, which do not appear likely in the traditional public procurement law context (art. 263 TFEU).

The Infringement Procedure at the EU Commission

Finally, aggrieved bidders can file a complaint at the EU Commission, claiming that EU law has been violated by a contracting authority. The Commission is not obliged to follow up all complaints and is allowed to set enforcement priorities. Should the Commission decide to initiate proceedings, it means that it can conclude that the involved Member State does not comply with EU public procurement law. If the

Member State does not change its standpoint after a formal notice, then the Commission can file an infringement procedure at the CJEU in which the Court has again the final say on the interpretation of EU public procurement law (art. 258 TFEU). In the unlikely event that a Member State refuses to comply with this judgment, the Commission can re-file proceedings and financial penalties can be imposed (art. 260 TFEU).

3.8 Summary

In this chapter, EU public procurement law has been introduced as a field of internal market law. Aiming to provide an understanding of this field of law, it considered that, when a 'contracting authority' awards a 'public contract', and no exemption applies, these rules, vested in primary, secondary, and tertiary law, are applicable. It means that the principles of equality, non-discrimination, transparency, and proportionality and, most importantly, the Directive on public procurement provide the legal boundaries for a public procurement procedure. While discussing some of the more substantive rules of public procurement, it is argued that the procedural obligations allow for discretion of a contracting authority to procure works, supplies, and services in line with sustainable and social objectives on the market. Hence, the law contains a variety of legal possibilities to not only fulfill the initial need of a contracting authority, but also aid the fight against climate change and social injustice.

References

Andhov, M., Caranta, R., & Wiesbrock, A. (2021). *Cost and EU public procurement law: Life cycle costing for sustainability*. Routledge.

Arrowsmith, S. (2014). *The law of public and utilities procurement* (2nd ed.). Sweet & Maxwell.

Arrowsmith, S., & Kunzlik, P. (2009). Social & environmental policies. In *EC procurement law: New directives, new directions*. Cambridge University Press.

Janssen, W. A. (2018). *EU public procurement law & self-organization*. Eleven Publishers.

Manunza, E., & Meershoek, N. (2020). Fostering the social market economy through public procurement? Legal impediments for new types of economy actors. *Public Procurement Law Review, 6*, 343–358.

McCrudden, C. (2007). *Buying social justice: Equality, government procurement and legal change*. CUP.

Sanchez-Graells, A. (2015). *Public procurement and the EU competition rules*. Hart Publishing.

Sjåfjell, B., & Wiesbrock, A. (2016). *Sustainable public procurement under EU law*. CUP.