

PANEL: GREEN PUBLIC PROCUREMENT (GPP)

MEASURING SUSTAINABILITY (MARCH 19, 2021)



AGENDA

- **Chair: Désirée Klingler** (LLM Yale Law School, PhD University of St. Gallen)
 - How to regulate, and **how to measure sustainability in public procurement** (20 min)
 - Contact: desiree.klingler@yale.edu
 - Paper on “Measuring what Matters in Public Procurement”: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3718077
- **Speaker 1: Steven Schooner** (Professor of Public Procurement Law at George Washington University)
 - Sustainability efforts and dimension in **US federal procurement** (20 min)
- **Speaker 2: Marc Steiner** (Swiss Federal Administrative Court)
 - Paradigm shift from competition based on price to competition based on quality in **Swiss public procurement law** – a precondition for green public procurement and innovation? (20 min)
- **Speaker 3: Roberto Caranta** (Professor of Administrative Law at University of Turin)
 - Public Procurement Management for Sustainable Development, and life-cycle costing in **EU public procurement** (20 min)
- **Questions & Answers** by Chair and Audience (15 min)

WHY REGULATE SUSTAINABILITY?

Market failure

- Inefficient distribution of goods and services **by the free market**, leading to loss of economic value
 - Imperfect competition
 - Public goods and common goods
 - **Externalities like pollution**
 - **Poorly defined property rights (Coase theorem)**
 - Transaction costs, agency problems, information asymmetry, incomplete markets, adverse selection and moral hazards
 - Bounded rationality of people
 - Macroeconomic business cycles

Government failure

- Economic inefficiency caused **by government intervention**, leading to reduced social welfare
 - Imperfect information (negotiations)
 - Enforcement and administration costs (red tape)
 - Principal-agent problems
 - Interest groups and political self-interest (opportunism)
 - Regulatory capture (corruption)

INSTRUMENTS TO INTERNALIZE EXTERNALITIES

- **Regulatory instruments** or “Command & control approach” (mandatory rules)
 - FDR EO prohibiting employment discrimination for contractors (same for sustainability?)
- **Market-based instruments:**
 - Pigouvian **tax** (e.g., mark-down for non-sustainable project)
 - Subsidies/**Incentives** (e.g., mark-up for sustainable project)
 - Better-defined property rights (zero transaction cost unrealistic)
 - “Cap and trade” or license to pollute?
- **Behavioral economics:**
 - **Disclosure** rules (e.g., publish which contracts/contractors were sustainable)
 - Default rules or **nudge** theory (e.g., use sustainable project as default, and let contractor “opt out”)
 - Moral suasion: “attempt to **coerce private** economic activity via **governmental exhortation** in directions **not already defined** or dictated by existing statute law”

REGULATORY APPROACH TO INTEGRATE SUSTAINABILITY

- Regulatory instruments:
 - **Selection criteria:** requirements for contractor selection, e.g., ISO 14001
 - **Award criteria:** “the most advantageous tender”, including sustainability weighting and life-cycle costs, may require eco labels like FSC or LEED certificates
 - Life-cycle costing (Art. 68 PP Directive 2014): acquisition costs, costs of use, maintenance costs, and recycling costs
 - In Switzerland: 95% of construction contracts require sustainability (Reporting Set 2017)
 - In EU (2009-10): 26% of contracts included GPP criteria; 38% of contract value included GPP criteria (CEPS 2012)
 - **Technical specifications:** requirements for production process (performance requirements)
- In most regulations, sustainability still optional, not mandatory

INTERNATIONAL EFFORTS TO INTEGRATE SUSTAINABILITY

International & Regional Efforts

- **International** :WTO-Government Procurement Agreement
 - GPA 1994: "most **advantageous** tender", sustainability not mentioned
 - GPA 2012: mentions work programs for "sustainable procurement"
- **EU**: Public Procurement Directives
 - PP Directive 2004: "most **economically** advantageous tender" or **MEAT** (Art. 53), promoting sustainable development mentioned in recitals
 - PP Directive 2014:
 - Award criteria: "most economically advantageous tender, which may include **price-quality ratio**, including **environmental aspects**" (Art. 67)
 - Award principles: Member states **may** rely on best price-quality ratio, taking into account sustainability criteria (Art. 76)

National Efforts

- **U.S.** Federal Acquisition Regulation (FAR)
 - Since 2011, FAR includes "**Sustainable Acquisition Policy**"
 - Part 23.1: "Federal agencies **shall** advance sustainable acquisition by **ensuring** that 95 percent of new contract actions [...] **require** that the products are energy efficient"
- **Swiss** Public Procurement Act (PPA)
 - PPA 1994: award to the "most **economically** advantageous tender" including sustainability
 - PPA 2021: award to the "most **advantageous** tender" including sustainability and life-cycle costs
- **Japanese** Law on Promoting Green Purchasing
 - Introduced in 2001: First jurisdiction with **mandatory** sustainability requirement

MEASURING SUSTAINABILITY

- **Proxies** to measure ecological sustainability
 - Life-cycle costing
 - Sustainability weighting
 - Green labels/standards
 - Infrastructure damages
- **Willingness to pay (WTP)** and stated preference studies
 - CBA Clean Air Act: WTP for increased visibility in national park
 - “How much are you willing to pay for a ticket, riding an energy-efficient train?”
 - WTP often overestimated because not own money
 - Willingness to accept risk (WTA) often underestimated
- **Evaluating health risk**
 - Value of Statistical Live (VSL): WTP for reduced mortality risk, and wage-risk studies; EPA estimated VSL at \$7.4 million; DOT at \$9.6 million (depends on industry and occupation)
 - Burden of disease: Quality-Adjusted Live (QALY) and Disability-Adjusted Life (DALY)



Principles (means)	Quantified Benefits (in numbers)	Monetized Benefits (in dollar amount)
Ecological sustainability	<ul style="list-style-type: none"> - Number of tenders requiring life-cycle costing - Number of tenders asking for sustainability weighting - Number of tenders requiring ecological standards/labels - Damages for destroyed infrastructure (i.e. acid rain) 	<ul style="list-style-type: none"> - Costs saved due to life-cycle costing - WTP for sustainable project (e.g. higher train ticket prices for energy-efficient train) - Avoided damages to infrastructure
Social sustainability	<ul style="list-style-type: none"> - Number of deaths due to unsafe and unhealthy working conditions 	<ul style="list-style-type: none"> - Value of lives saved - Value of lives protected from illness and disability - Avoided liquidated damages for labor law violations

EFFECTIVENESS OF GPP IN ASIA: JAPAN, KOREA, CHINA & THAILAND (UNEP 2017)

- Challenges:
 - **Higher costs:** price differences for green products
 - Lack of availability of sustainable products in market: especially local options
 - Lack of adequate **monitoring and evaluation systems**
- Success factors:
 - **Ecolabelling simplifies** process for staff
 - Basic monitoring/**tracking systems** in place

EFFECTIVENESS OF GPP IN ASIA: JAPAN, KOREA, CHINA & THAILAND (UNEP 2017)

- Results achieved:
 - Japan and Korea **mandatory** GPP
 - Japan: 70% of agencies implemented GPP
 - China: 28 billion USD **spent** on products with environmental labelling in 2014; Korea spent 13 million USD
 - Korea: largest number of product categories certified for GPP (169)
 - Korea: largest number of trained GPP staff (12,900)
 - China: largest number of eco-labelled products (200,000)
 - Japan 410,000 t **CO2 reductions**, China 540,000 t

DISCUSSION QUESTIONS

- Is GPP a myth with no real impact, a **”toothless tiger”**?
- What is more important: how to buy, or **what to buy**?
- Is GPP **effective**, does it reduce emissions?
- How to prevent **“green washing”**?
- What is the best **contractual form** to promote GPP?
- Did the concept of **life-cycle costing** fail?



Measuring Sustainability in Government Purchasing *(A U.S. Perspective)*

**2021 Virtual Annual Conference
Society for Benefit Cost Analysis**

March 2021

Professor Steven L. Schooner

SSCHOONER@LAW.GWU.EDU

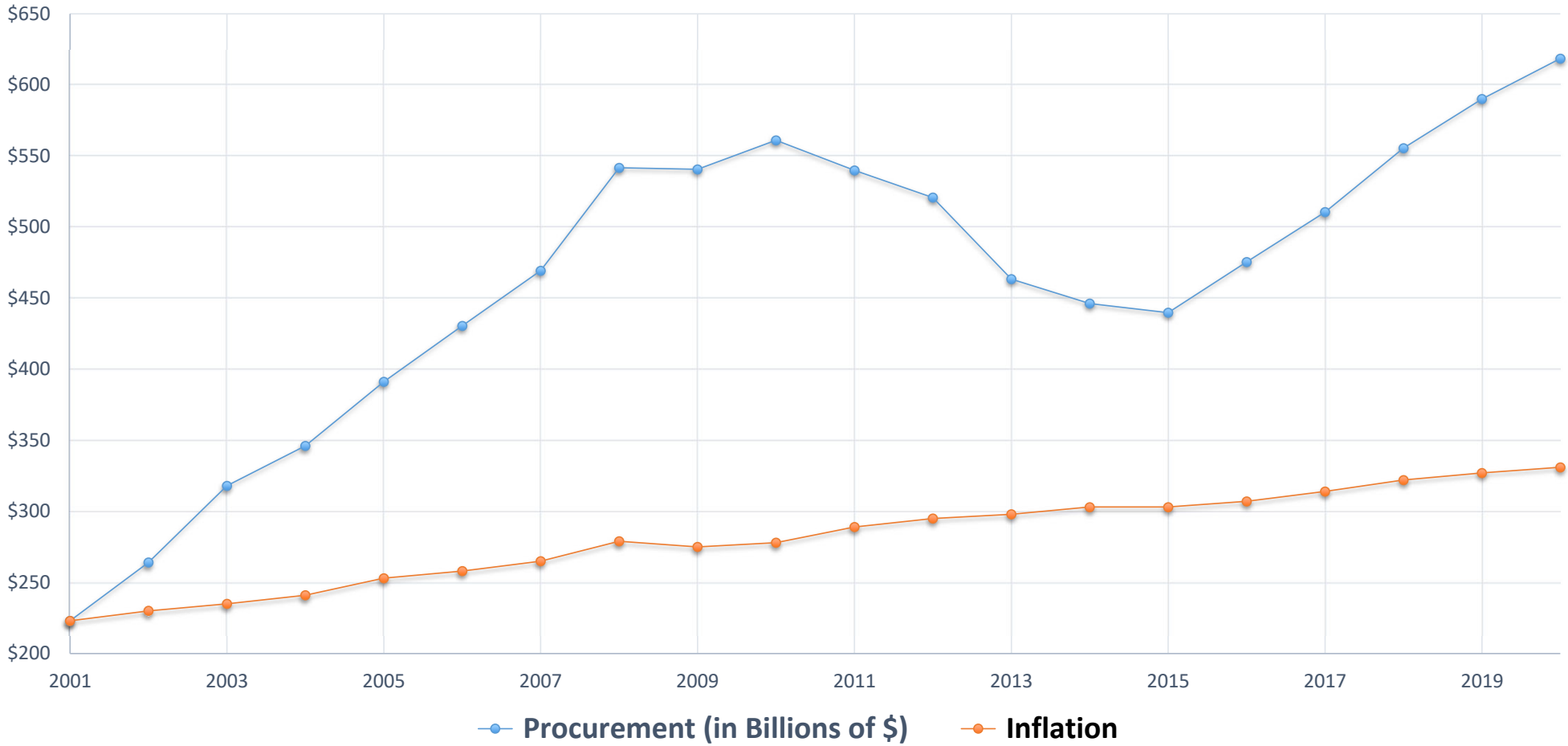
@ProfSchooner



Limited Aspirations (“Procurement”)

- (Predicate:) Not Debating Climate Change
- ***Struggling to Initiate, Accelerate Discussion of Sustainable Procurement in US*** (follow since 1990’s)
 - Biden Administration, New EO (+/-)
- **Enormous (Market &) Scope/Potential/Impact**
 - **Outsourcing Phenomenon (inexorable)**
 - **Federal, State & Local (and, of course, International)**
- **Challenge/Metrics: The Tyranny of Low Price**
- Change Management Strategies

Increase in Federal Procurement Spending Compared to Rate of Inflation: 2001-2020



Data & Performance Assessment: *What Gets Measured Get Managed*

- **IMPEDIMENT:** Low purchase price may lead to a “false economy”
- *Consumer-based approach: value for money, most economically advantageous tender, cost/technical tradeoff, price/quality ratio*
- *Life Cycle Cost (LCC or total cost of ownership, TOC) is a more meaningful (informative) measure.*
 - No dog in fight – LCC v TOC/TCO v LCA (life cycle assessment)
- Basic economic literature - LCC elements include:
 - Purchase Price
 - Transaction Costs
 - Operating Costs
 - Maintenance (Sustainment) Costs
 - Disposition Costs (+/-)
 - **NEEDED CHANGE:** include* ***Externalities, Effects (e.g., Sustainability Considerations)***
 - ***Answer the Q: what do we get for the price premium?***
 - ***How much more do we need to pay for less emissions or for carbon reduction?***

Change Management?

- Mandate & Prioritize ... Legislate & Regulate
- **Rethink Performance Measurement**
- Install, Empower Leaders
- Educate, Highlight, Discuss
- Create Communities of Practice, Certifications
- Incentivize, Recognize, Reward

References (with Markus Speidel):

- ***‘Warming Up’ to Sustainable Procurement*, 60 *Contract Management*, Issue 10, 32 (October 2020), <https://ssrn.com/abstract=3697429>**
- ***Sustainable Public Procurement: Mandates, Metrics, and Incentives to Overcome the “Tyranny of Low Purchase Prices,”* *CLEEN database* (<https://www.thecleenproject.org/>), <https://airtable.com/shr6gkJNdfbqeW9CL/tblyk9wypoLm2JDiS>**

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**The paradigm shift from
competition based on price
to competition based on
quality in Swiss public
procurement law – a
precondition for green
public procurement and
innovation?**

Judge Marc Steiner,
Swiss Federal Administrative Court
(personal opinion)

Purpose and topics of the presentation

- Three layers of mindsets on public procurement policy
- The Swiss reform of the regulation on public procurement (keywords: competition based on quality, sustainability, innovation)
- “Emergency protectionism” as a post Covid-19 response?
- No green recovery plan without fostering sustainable public procurement!

Testimonial on legal history from a Swiss perspective I (3 archaeological layers)



World Trade Institute Bern, May 2018

Testimonial on legal history from a Swiss perspective II (3 archaeological layers)

- Layer 1: Swiss internal market not really stimulated, market opening not the main focus, political environment favouring protectionism and collusion of bidders
- Layer 2: Swiss Internal Market Law, Cartel Act, GPA 1994, Public Procurement Regulation 1994; open markets, competition (based rather on price?); bidders can challenge award decisions
- Layer 3: GPA 2012 / EU directives 2014 / new Swiss regulation on public procurement: Governance/preventing corruption, competition based on quality, sustainability and innovation (completing the goals according to layer 2)

Lived Legal History

- **90ties (GPA 1994 / market access, competition [based to much on price] and money / purity principle concerning internal market / collateral damages of (simplistic form of) capitalism not considered as they should be**
- **2002 “Helsinki Bus Case” CJEU (policy consistency requires substantial concept of green public procurement)**
- **2004 Directives 2004 (notably 2004/18/EC)**
- **2012 Revision WTO Government Procurement Agreement (stressing green public procurement)**
- **2012 “Max Havelaar” Judgment CJEU (social aspects)**
- **2014 New directives (notably 2014/24/EU; strategic use of public procurement / Europa 2020 / sustainability concept)**
- **2016 Transposition in Germany (GWB; paradigm change)**
- **2019 New Swiss Procurement Code including sustainability as aim and purpose of public procurement regulation**

Sustainable (Public) Procurement: WTO Symposium 2017



GOVERNMENT PROCUREMENT: SYMPOSIUM — GENEVA 22 FEBRUARY 2017

Symposium on sustainable procurement

Work programme on sustainable procurement of the committee on government procurement⁽¹⁾

Centre William Rappard (WTO Headquarters), Room W

Geneva, 22 February 2017

Sustainable (Public) Procurement: WTO Symposium 2017



WORLD TRADE
ORGANIZATION

GPA/W/341

30 May 2017

(17-0000)

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Committee on Government Procurement

KEY TAKE-AWAYS FROM THE COMMITTEE'S SYMPOSIUM ON SUSTAINABLE PROCUREMENT

HELD IN THE CENTRE WILLIAM RAPPARD (WTO HEADQUARTERS), GENEVA, ROOM W,
22 FEBRUARY 2017

Report by the Secretariat

The WTO-GPA-rules on award criteria

Article X GPA 2012

Technical Specifications and Tender Documentation

9. The evaluation criteria set out in the notice of intended procurement or tender documentation may include, among others, price and other cost factors, quality, technical merit, environmental characteristics and terms of delivery.

EU-Directive 2014/24/EU – Innovation

Recitals 47 and 95:

Public authorities should make the best strategic use of public procurement to spur innovation. Buying innovative products, works and services plays a key role in improving the efficiency and quality of public services while addressing major societal challenges.

The Purposes of the new (Swiss) Federal Act on Public Procurement (FAPP)

Aim and purpose(s) of the law shall be:

- a. Economic and the from an (overall) economic (“volkswirtschaftlich”), ecological and social perspective sustainable use of public funds
- b. Transparency of public procurement procedures
- c. Non-discrimination between bidders
- d. Promotion of an effective and fair competition including measures against collusion between bidders and corruption

The concept of the new Swiss regulation

The contract is awarded to the most (not only economically) advantageous tender; procurement culture needs to be addressed.

social
minimum
standards

prevention
of dumping

environmental
minimum
standards

Procurement and Green Recovery

In addition to price, sustainability (such as labour or environmental protection conditions) can also be taken into account in particular when awarding services and contracts (Art. 29 BöB / IVöB). The most beneficial tender (previously "the most economically advantageous") will now be awarded the contract (Art. 41 BöB / IVöB).
[...] Quality competition among the tenderers is to be brought to the fore.
(www.mme.ch)

Post Covid-19 response: Sustainable Public Procurement and Green Recovery

Switzerland should – considering the importance of its export industry – not envisage a concept of a post Covid-19 protectionism (“Buy Swiss”). Instead a Green Recovery Plan should apply. Sustainable Public Procurement can and must be seen as a key element of every strategy on Green Recovery (especially EU and Switzerland).



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Sustainability in EU public procurement law

2021 Virtual Annual Conference of the Society for Benefit Cost Analysis, Washington D.C.

March 19, 2021

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Conflict?

Internal Market

Sustainability

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3504676

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Inter-institutional dynamics

- Council
- Commission
- Court of Justice



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2014 / Directives

Horizon 2020

New rules, incl. sustainability principle, labels, award criteria
and LCC - generally **not mandatory** at EU level

TODAY, European Green Deal: **more mandatory?**

https://privpapers.ssm.com/soB/paperscfm?abstract_id=3589168#references-widget



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A New Compromise Point

what's the
opposite of
objectivity?



subjectivity, bias, prejudice,
partiality, favor, partisanship,
predisposition, bent,
predilection, proclivity



 Thesaurus .plus



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LC C

Parts or all of the costs over the life cycle of a product, service or works costs, such as:

- costs relating to acquisition
- costs of use, such as consumption of energy and other resources
- maintenance costs
- end of life costs, such as collection and recycling costs
- costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified; such costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs

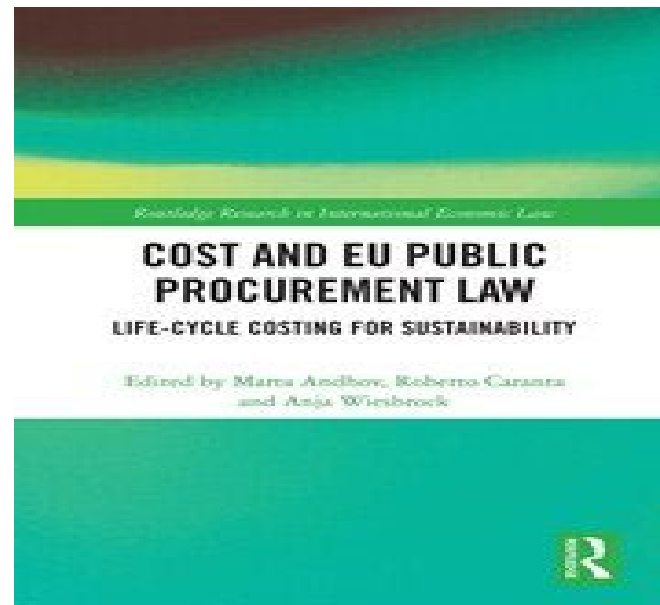


Methodology

- based on objectively verifiable and non-discriminatory criteria. In particular, where it has not been established for repeated or continuous application, it shall not unduly favour or disadvantage certain economic operators
- accessible to all interested parties
- data required can be provided with reasonable effort by normally diligent economic operators, incl from third countries party to the GPA or other international agreements by which the Union is bound



In practice?



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New Research!

<https://sapiensnetwork.eu/>



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