

THE PRINCIPLE OF BALANCE: AN ENVIRONMENTAL APPROACH TO THE PRIMARY AND SECONDARY OBJECTIVES OF PUBLIC POLICY PROCUREMENT

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ABSTRACT

We present in this article the results of research³ that aimed at the theoretical reconstruction of the principle of balance in public procurement with environmental approach, from its content supported by primary and secondary policy objectives. We performed qualitative, deductive and documentary analysis techniques in collected data from reports, case studies and substantive legal instruments issued within the Organization for Economic Cooperation and Development (OECD), which evidenced standards of good environmental practice for public procurement. At least in theory this allowed the formulation of a series of factors for the application of the principle of balance in environmentally sustainable public procurement systems.

Keywords: environmental approach; primary policy objectives; principle of balance; public procurement; secondary policy objectives.

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*O PRINCÍPIO DE EQUILÍBRIO: UMA ABORDAGEM AMBIENTAL
DOS OBJETIVOS PRIMÁRIOS E SECUNDÁRIOS DA POLÍTICA
DE CONTRATAÇÃO PÚBLICA*

RESUMO

Este artigo mostra os resultados da pesquisa baseados na reconstrução teórica do princípio de equilíbrio da contratação pública com foco ambiental, a partir de seu conteúdo fundamentado em objetivos de política primário e secundário. Para tanto, foram utilizadas técnicas qualitativas e dedutivas e análise documental das informações coletadas em relatórios, estudos de casos e instrumentos jurídicos substantivos emitidos no âmbito da Organização para a Cooperação e Desenvolvimento Econômico–OCDE- em que foram evidenciados padrões de boa praxis ambiental para contratação pública. Isso permitiu a formulação de uma série de fatores para a aplicação, pelo menos em teoria, do princípio de equilíbrio no panorama dos sistemas de compras públicas ambientalmente sustentáveis.

Palavras-chave: *abordagem ambiental; contratação pública; objetivos políticos primários; objetivos políticos secundários; princípio de equilíbrio.*

INTRODUCTION

The principle of balance in public procurement was established as the relational bridge between the contract as a political-legal institution and its connotations in the field of public policies that emanate from government management. Regarding the development of this important concept, we refer to the OECD doctrines on public procurement, which permits to identify a pattern of good practices considering primary and secondary policy objectives related to transparency, anti-corruption, social responsibility and environmental sustainability. According to this sequence, we first present the theoretical and conceptual assumptions of the principle of balance based on the OECD context of public procurement and the principles that compose it. We also explain them based on the data we collected (from reports, case studies and substantive OECD legal instruments on public procurement with environmental focus). Second, we present the conceptual and contextual development of the so-called environmental or green procurement, followed by its approach in primary and secondary policies. From them, we define a series of standards related to the application of the principle of balance in environmentally sustainable public procurement, obtained through techniques of analysis of qualitative, deductive and documentary information.

1 THE PRINCIPLE OF BALANCE IN PUBLIC PROCUREMENT

In the context of the Organization for Economic Cooperation and Development (OECD)⁴ public procurement is a matter of strategic importance within the so-called doctrine of public governance. Thus, the OECD has promoted an agenda that favors innovation, integrity and inclusion in the public sector, giving priority to digital, anti-corruption and environmental issues.

The principle of balance is originated from OECD guiding principles for public procurement whose guidelines are widely disseminated, and its international context has given rise to a series of standards of good

4 The OECD is an international organization whose overall objective is to establish evidence-based international standards in order to propose solutions to a variety of social, economic and environmental challenges. Currently, 37 countries are members of the OECD, participating in the daily work of the OECD, providing new perspectives and improving the relevance of public policy debates on strategic issues at the global level.

practices to be observed by stakeholders⁵ in the area of state contracts. The main points of the procurement relationship are highlighted, especially those related to governance and who manage, support and harmonize them with primary and secondary policy objectives of public procurement. In this sense, Romero Molina and Gómez Monterroza (2020, p. 286) state that

It is important to note that the guiding principles of public procurement are of great importance in the legal configuration of public procurement systems and their mandates must be fulfilled by all stakeholders who interact in public procurement. The catalog of principles is innumerable and varies according to the legal configuration of the public procurement systems prevalent in the world, but there has been a consensus – at least in the OECD’s view – recognizing a set of principles that can be found in each stage of the public sector procurement cycle that are conducive to promote transparency, struggle against corruption, efficiency, innovation and, in general, seek internationally accepted standards of good practices in contexts such as what has occurred in recent years within the scope of the OECD.⁶

That is why the OECD in its recommendation on public procurement in 2015 foresaw a set of 12 guiding principles – including balance – which must be present in all pre-contractual, contractual and post-contractual stages, as established by the OECD⁷:

[...] a vision that was driven by values of anti-corruption, environmental preservation, innovation and efficiency of public procurement processes. “Public procurement from an OECD perspective is structured based on 12 principles derived from the recommendations of the Public Procurement Council, which is part of the Public Governance Committee of the aforementioned international cooperation agency that can be identified in the recommendations issued in 2008, and subsequently replaced in 2015, in which it is worth highlighting the development of the following integrated principles (GÓMEZ, 2020, p. 26).

As for the principle of balance in public procurement, it was established that it represents

[...] a mandate of coherence between the objectives and policies of the government in relation to the contractual objects that the administration, as the contractual subject, agrees daily and, in any case, must always be compatible and consistent. In this sense, the OECD expressed that the balance in public procurement occurs when

5 Stakeholders must be understood as subjects that have a direct interaction with the theme or issue addressed in a given public policy.

6 The OECD softlaw on public procurement is part of the work on standards and recommendations of the institution’s public governance committee: “Since public procurement represents a substantial part of taxpayers’ money, governments are expected to conduct it with efficiency and high standards of conduct to ensure quality in service delivery and safeguard the public interest” (OECD, [s.d.]).

7 OECD (2008).

the objectives of the secondary procurement policy (integrity, efficiency, business development, innovation, environmental care, etc.) and the objectives of the primary procurement policy (contract, object and clauses) have correspondence, coherence and compatibility (ROMERO MOLINA; GÓMEZ MONTERROZA, 2020, p. 289).

We highlight that the principle of balance is associated with its practical implementation, any of the following risks:

(i) Balancing the objectives of the secondary policy with the main objective of acquisition (delivering the goods and services necessary to fulfill the government's mission in a timely, economical and efficient manner). (ii) The lack of appropriate data or methodologies for measuring the impact of public procurement strategies and policies to address secondary policy objectives. (iii) The absence of legal requirements, insufficient incentives and lack of financial/human resources to measure the impact of strategies and policies to address secondary policy objectives (OECD, 2008).

2 ENVIRONMENTAL OR GREEN PUBLIC PROCUREMENT

The history of green public procurement comes from the principles of the Rio Declaration on Environment and Development, which focus on protecting the integrity of the environmental and global development system, recognizing the “integral and independent nature of the Earth, our home” (PNUMA, 1992a). There are 27 principles regarding environmental protection and sustainable development that compromise the action of the state and humanity in general. These principles are in line with the Agenda 21 program, specifically its Chapter 8 regarding the integration of the environment and development in government decision making, in which it is possible to highlight the “Integrating environment and development at the policy, planning and management levels; Providing an effective legal and regulatory framework; Making effective use of economic instruments and market and other incentives; Establishing systems for integrated environmental and economic accounting”(PNUMA, 1992b). There was an evolution in the theme due to the subsequent development of the concept of sustainable public procurement, understood as:

[...] the process by which organizations meet their needs for goods, services, projects and public services in such a way that they achieve high performance based on a complete life cycle analysis, which translates into benefits not only for the organization, but also for society and the economy, reducing damage to the environment (LASSO RUALES, 2018, p. 31).

The criteria of sustainability and environmental responsibility in public procurement have become a necessary standard of good practice. According to Pernas García (2011, p. 134), green public procurement aims at “Reducing the environmental impact of public procurement and encouraging a change in the behavior of economic agents and the development of more environmentally friendly and innovative products, services and projects.” This is how the so-called “green contracts” appear in the scenario of legal materialization of public policies related to responsible hiring, in which “Recent developments in Law of Contracts highlight the importance of environmental protection as an aspect to be taken into account in decisions regarding public purchases” (OLLER RUBERT, 2010, p. 1).

Specifically a definition of green public procurement, Lopez Donaire (2015, p. 134) states that

[...] it is a market instrument for environmental protection, as it is an effective means not only for reducing the environmental impact of public consumption, but also of guiding the behavior of economic agents towards environmental protection standards that go beyond the minimum established by the Legal System and to encourage new forms of production and consumption. The procurement authority does not act as guarantor of compliance with environmental legislation, as this is not and cannot be his/her function, but rather as the promoter of socially responsible conduct on the part of economic agents.

Likely, Palmujoki, Parikka-Alhola and Ekroos (2010, p. 250) affirm that

Green public procurement is the definition of environmental criteria and compliance with the legal principles of free movement of goods, transparency and equal treatment of bidders. Important in legal matters is the objectivity of the award criteria, so that they are linked to the object of the public contract. In some cases, however, this link needs at least some kind of justification related to the requirements and their importance from an environmental point of view. In general, if a buyer wishes to address environmental issues detailed in the contract award criteria, these requirements may also need more precise justification.

According to Gómez (2020, p. 80), the OECD expresses about its standard of good environmental practices in public procurement that

Care for the environment and the criteria of sustainability and ecological responsibility are undoubtedly a thematic axis of good practices in public procurement systems. In this regard, the inclusion of environmental clauses and the purchase of goods and services that reduce the environmental impact must have a high degree of importance in all stages of public procurement. It is important to note that all OECD countries have implemented environmental strategies in public procurement and that at least 69% carry out measurements and evaluations of them.

We highlight that environmental aspects cannot discriminate against potential competitors; on the contrary, they must guarantee their competition. In no way it is a criterion of distortion of contractual transparency policies, but a unifying one, i.e., it does not break the equality of possible participants in the selection process.

3 PRIMARY POLICY OBJECTIVES IN PUBLIC PROCUREMENT FOCUSING ON THE ENVIRONMENT

The main objectives of contractual policy (contract, object and clauses) can be found in the constituent elements of the principle of balance in public procurement, i. e., those postulates aimed at directly satisfying the needs related to goods and services in the public sector. Thus, it is possible to determine the existence of primary policy objectives in the elements and stages related to public procurement in which the inclusion of model and type clauses has been uniform on the part of the OECD and the EU that have developed in depth standards for good environmental practices of procurement. In any case, they constitute responsibility of stakeholders interested in public procurement. In this sense, Romero Molina and Gómez Monterroza (2020, p. 290) state that:

[...] the impact of the principle of balance “explains the viability of public contracts, as it is not possible to conclude a contract whose object is not consistent with the objectives of public policies, because this would become an unbalanced practice.” These assumptions become more relevant when the analysis is carried out in conjunction with the so-called planning principle, as highlighted by Professors Romero Molina and Moreno Molina⁸

In addition, the OECD’s Going Green report has effectively monitored OECD standards (OECD, 2015, p. 25) on the environment in public procurement, providing complete and updated information on the subject under discussion in the fields of econometrics, politics and public management. The following points were highlighted in the above-mentioned OECD document:

- (i) GPP can be an important engine for innovation, providing the industry with incentives to develop jobs, products and services that respect the environment. (ii) GPP can also provide financial savings for authorities, especially considering the full life cycle costs of a contract and not just the purchase price. (iii) Authorities implementing GPPs will be better equipped to face evolving environmental

⁸ See Romero Molina and Moreno Molina (2015, p. 27).

challenges, for example, to reduce greenhouse gas emissions or move towards a more circular economy.

The standard of good balance practices with environmental focus, regarding the objectives of the primary contractual policy, contemplates the development of the following variables:

- **Model environmental clauses in public contracts:** it is necessary to consider the implementation of the so-called standard clauses, related to the protection and preservation of environmental sustainability criteria during contractual activities in the public sector, using pre-established clauses allowing the protection of natural resources.
- **Environmental criteria to select contractors:** According to what we have previously explained, the environmental criteria must be considered in the pre-procurement stages that lead to the selection – in any modality – of contractors, who in any case must assume main and accessory obligations. Thus, from the outset, they must strive to preserve and mitigate the environmental impact of their imminent procurement performance. It is necessary to consider first and foremost environmental criteria when awarding public sector contracts, not only from a preventive approach, but also to compensate for the potential impact that may be generated on natural resources as a result of the implementation of a contractual object.
- **Agreement on obligations related to the preservation and mitigation of environmental impacts during the execution of the agreed contractual objects:** the convention or agreement of obligations of the contracting parties is closely related to the previous rules regarding the possibility of reducing and mitigating the environmental impact of public procurement activities, especially in the supply of goods and services sector necessary to management.

4 SECONDARY POLICY OBJECTIVES IN PUBLIC PROCUREMENT FOCUSING ON THE ENVIRONMENT

Another element of the principle of balance in public procurement is constituted by the objectives of the secondary procurement policy, which are determined according to factors exogenous to the stages, content and obligations agreed upon in public sector contracts. They are specifically related to compliance with regulations and respect for the rights of third parties in procurement relations. In terms of balance, the defining pattern

of good environmental practices in relation to secondary objectives of the contractual policy is based on the following points:

- **Prohibitions on hiring bidders with history of environmental crimes:** taking into account extra-contractual factors, we must consider the prohibition to hire for the public sector those who commit environmental crimes. This duty and control are responsibility of the so-called procurement authorities, who are in charge of the materialization of this sanctioning variable.
- **Compliance with regulations for environmental protection during public procurement processes:** management systems, and risk reduction/management programs associated with environmental damages and/or accidents that may occur as a result of the execution of the agreed contractual objects must be implemented.

CONCLUSION

Based on the proposed exercise aimed at the theoretical reconstruction of the principle of balance in public procurement from the environmental point of view, we defined in Box 1 a standard of good practices reconciling the objectives of primary and secondary procurement policies in which the requirements of coherence and compatibility are met and observed.

Chart 1 – Standard of good practices to balance primary and secondary objectives in public procurement with environmental focus

Primary procurement policy objectives	Secondary procurement policy objectives
Environmental Protection Management Plan (model clauses)	Prohibitions on procurement bidders with record of environmental crimes
Environmental criteria for selection of contractors and award of public contracts	Compliance with regulations for the protection of the environment during public procurement processes
Agreement on obligations related to the preservation and mitigation of environmental impacts during the execution of the agreed contractual objects	

Source: the authors.

Finally, the status of green procurement public policy must be reaffirmed as a consequence of the environmental sustainability criteria that humanity currently demands and must be headed by public management, i. e., the contractual authority of the state, in each of its dimensions.

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