

Green public procurement – legal base and instruments supporting sustainable development in the construction industry in Poland

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Abstract. In the respect of value, public procurement in the construction industry belongs to one of the largest ones in the domestic market. Therefore, green procurement for construction works should become the center of attention of public authorities in a broad sense, due to its scale and importance for the sustainable development. The authorities and contracting entities who spend public money should have the opportunity to apply such legal articles and instruments that allow them to both optimize public expenditures and consider the environmental factor, such as decreasing carbon emission. To make the idea of sustainable development a reality as European Union's the most vital aim, EU law is implemented in Poland. Local authorities' duty is to appropriately shape their policies and use the vital instrument of sustainable development, namely green public procurement. This paper presents a comparative analysis of legal regulations to illustrate the actual Polish and EU laws concerning the construction industry. Even though the generally applicable law allows to implement the idea of sustainable development efficiently, local self-government units in their regional policies do not report any need for specific solutions, or they do so only occasionally.

1 Legislation in Poland and the European Union

In the existing European Union (EU) law and economy public procurement is the vital instrument influencing the way the markets of individual EU countries operate and, as a result, the European Union as a whole. The quality of law becomes the factor indispensable for the completion of public contracts reliably, taking into consideration the specificity of the ordering institution and the context it works in, which positively influence the execution of its policies and aims.

According to the sustainable development principle, the ecological, economic and social aspects have equal weight and importance. For this reason caring for the natural environment is one of the main aims of countries and international organizations. Green public procurement (GPP), in accordance with the definition proposed by the European Committee, mean the policy in which public entities include criteria and/or environmental requirements to procurement procedures and search for solutions minimizing the negative influence of products/services on the environment, providing for the whole life cycle of products [1, 2]. In this way they influence the development and enhancement of environmental technologies.

1.1 Provisions of the Polish law

The most important law for the Polish legal order is the Constitution of the Republic of Poland [3], which

in Article 5 and indirectly in Art. 68 and Art. 74 draws attention to the issue of sustainable development. It indicates the duties of the public authority which include the prevention of the negative effects of environment degradation on health, the pursuit of policy ensuring ecological safety of present-day and future generations, protection of the environment and support of citizens' incentives to protect and improve it.

Public authorities, according to Art. 74 of the Constitution of the Republic of Poland, are obliged to adopt a policy that ensures ecological safety for the present-day community and future generations. Therefore, the inclusion of green records in tender documentation should become a common phenomenon in accordance with Art. 74 paragraph 1 of the Constitution of the RP.

In Poland the issue of public procurement is formally regulated by the Act of 29 January 2004, Public Procurement Law [4] with the implementing acts. Apart from these, other vital acts constructing the public procurement system in Poland include the following:

- Civil Code [5]
- The Law on Public - Private Partnership [6]
- Construction Law [7]
- Act on Concessions for Construction Works or Services [8]
- The Public Finance Act [9]
- The Law on Liability for Violation of Public Finance Discipline [10].

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GPP development is additionally promoted by numerous documents concerning the development and future of Poland. They include, for instance: „Strategy of Energy Security and Environment - the prospect of 2020” [11], which assumes that green procurement will be one of the instruments supporting environmental improvement and by 2020 they should constitute a half of all orders in Poland; „Efficient State Strategy 2020” [12] stating that spreading the use of GPP will allow for more efficient management of physical and financial resources of public administration; finally „Dynamic Poland” - Strategy for Innovation and Economic Efficiency for the years 2012 - 2020 [13] according to which public procurement should serve the consolidation of ecological behavior, thus enabling the development of products and services characterized by high environmental and social standards.

Polish law is shaped by the law created in the European Union.

1.2 EU regulations in Poland

The reform of the public procurement law at the European level which took place in 2014 involved the introduction of changes facilitating GPP development and the encouragement to apply it. Poland, as a EU member, is thus required to include EU legislation in her domestic legal order. At present, however, the Public Procurement Law stays in accordance with the following: the so-called Classic Directive (2004/18/WE) [14] concerning the coordination of the procedures of granting public contracts for construction works, deliveries and services; the so-called Utilities Directive (2004/17/WE)[15] that coordinate the procurement procedures of entities operating in the water, energy, transport and postal services sectors; the so-called Remedies Directives (2007/66/WE [16], 89/665/EWG [17], 92/13/EWG) [18]; and the so-called Defence Procurement Directive 2009/81/WE [19] that coordinates contracting procedures for construction works, deliveries and services by institutions and entities ordering in the defence and security sectors, changing the 2004/17/WE and 2004/18/WE Directives. The Directives stress the importance of the contract offering the best value for money but also allow to include environmental issues in the subsequent stages of the public procurement procedure:

- at the description of the object of contract stage (Art. 23 Dir. 2004/18/WE),
- at the contractor selection stage (Art. 45, 48 i 50 Dir. 2004/18/WE),
- at the stage of optimum tender selection through the environmental evaluation criteria (Art. 53 Dir. 2004/18/WE),
- at the stage of determining terms and conditions (Art. 26 Dir. 2004/18/WE).

On 28th March 2014, new Directives concerning public procurement were published: Directive of the European Parliament and of the Council 2014/24/UE of 26th February 2014 [20] on public procurement and repealing Directive 2004/18 / EC; Directive of the

European Parliament and of the Council 2014/25/UE of 26th February 2014 [21] on procurement by entities operating in the water, energy, transport and postal services, repealing Directive 2004/17/WE; Directive of the European Parliament and of the Council 2014/23/UE [22] of 26th February 2014 on the award of concession contracts. The Directives came into force on the twentieth day following its publication in the Official Journal of the EU. The deadline for the implementation of the directives into the legal systems of EU Member States falls on 18th April 2016.

The noteworthy element of the implementation of EU Directives is the amendment introduced by the Act of 29th August 2014 amending the Public Procurement Law, which came into force on 19th October 2014. It changed, among others, the criteria for bid evaluation introducing the solutions included in Article 67 of the new Classic Directive to Polish law. Yet the new Classic Directive offers greater possibilities for GPP than those only relating to bid evaluation criteria. It allows to exclude the contractors (Art. 24 paragraph 1 point 3-8) who committed a crime against the environment. To prove that a bid fulfils the orderer's requirements, the the orderer may demand, for instance (Art. 25 paragraph 2 PPL), a certificate issued by an independent entity dealing with certifying the compliance of the contractor's activities with European standards of environmental management if the orderers indicate environment management measures which the contractor is to use while executing the construction works or services contract, referring to the environmental management system and audit (EMAS) or environmental management standards based on European or international standards certified by bodies operating under the laws of the European Union, European or international standards concerning certification. The contractor may also submit equivalent certificates issued by entities established in another Member State of the European Economic Area or other documents confirming the use by the contractor of equivalent quality assurance measures and the use equivalent environmental management measures.

The orderer may withdraw from the terms of reference through the Polish , European or international standards if they provide an accurate description of the contract by indicating the functional requirements. These requirements may include the description of the impact on the environment (Art. 30 paragraph 6.).

Non-price criteria (Art. 91 of PPL) concerning the bid evaluation criteria enumerated in the contract notice and/or in the specification of essential terms of the contract (SETC), depending on the public procurement procedure type. On the basis of this provision the contracting authority chooses the best tender basing on the bid evaluation criteria specified in the SETC.

The current legal status allows it to be „the price or price and other criteria relating to the object of the contract, in particular the quality, functionality, technical parameters, environmental, social, innovation, service, term of the contract and operating costs”.

The use of sustainable public procurement is promoted by the European Commission and the Council of Ministers of Poland. The main activities for the implementation of GPP have been undertaken by the Public Procurement Office (PPO) and the strategic document is the National Action Plan on sustainable procurement for the years 2013-2016 [23]. Thus the Public Procurement Office undertook activities aiming to inform, train, educate and counsel in order to spread and promote tender procedures with solutions contributing to the sustainable development and innovations in the domain of environment protection.

GPP implementation is also mentioned in the European Commission's Communication of 3rd March 2010: „Europe 2020 strategy for smart, sustainable and inclusive growth”[24]. According to this document public procurement plays a key role as one of the market-based instruments used to achieve a smart, sustainable growth and inclusive growth while ensuring the most efficient use of public funds.

2 The structure and characteristic of the public procurement market

In Poland, as well as in the Member States of the European Union, a significant part of the demand for products, services and works comes from public institutions, including the administrations of various levels.

The multiplicity of EU projects and related funds allocated to spending causes that public procurement is one of the main elements that stimulate economic growth. Yearly public institutions in the EU spend about 2 trillion euros for tenders, which represents 19% of Gross Domestic Product of the European Union [25].

2.1 The structure of the public procurement market

The value of the public procurement market in Poland in the subsequent years is presented in Table 1. In 2011 – 2014 the size of this market significantly exceeded 130 billion PLN annually. A large slowdown in procurement was recorded in 2015, influenced mainly by the change of the threshold from 14,000 to 30,000 euros, from which the PPL provisions should apply. The change has been in force since October 2014, so only in 2015 the effects were fully seen. A large share of this market belongs to construction works contracts, with an average of over 40%.

Table 1. Public procurement market value in Poland, own study based on [26]

Year	The value of order (billions PLN)	The percentage of the value of contracts awarded on construction works [%]
2011	144.1	39.0%
2012	132.7	45.0%
2013	143.2	38.0%
2014	133.2	40.0%
2015	38.4	60.0%

The value of orders executed by public administration units greatly exceeds the value of contracts awarded

by other entities obliged to apply the PPL Act, which Table 2 illustrates. Entities other than government administration and local government which are also obligated to apply the PPL such as courts, public schools, public hospitals, etc., were summarized (“Other entities”).

Table 2. A percentage of the total value of contracts awarded by entities obliged to obey PPL, own study based on [26]

	Government administration, central and field	Local government	Other entities
2011	6.69%	52.62%	40.69%
2012	7.21%	48.44%	44.35%
2013	6.00%	50.25%	43.75%
2014	5.65%	51.44%	42.91%
2015	5.76%	49.31%	44.93%

The decrease in the number of orders in 2015 is also a result of the change of the threshold above which public orders are obliged to use the PPL Act. Local government has a significant influence on the shape of this market. Table 3 presents the share of individual contracting in the total number of orders in the years 2011 – 2015.

Table 3. Percentage of individual contracting in the total number of public procurement, own study based on [26]

Year	Total number of contracts awarded	Government administration central and field	Local government	Other entities
2011	186 232	6.90	40.64	52.46
2012	188 478	6.68	40.71	52.61
2013	210 352	5.92	41.40	52.68
2014	174 886	5.54	42.95	51.51
2015	140 482	5.81	39.52	54.67

Green public procurement can be a powerful tool for innovative approaches and an encouragement for entrepreneurs to develop new products and services focused on the environment. They may significantly influence the execution of local and regional aims within the scope of sustainable development.

The concept of sustainable procurement is inextricably linked to sustainable development. It indicates an integrated approach of ordering institutions to public procurement voluntarily respecting environment protection (the so-called Green Public Procurement) and important social interests.

One of the most vital positions in activities executing the principles of sustainable development belongs to the construction industry. Communication from the Commission of 16th July 2008 „Public procurement for a better environment” [1] indicates 10 sectors with the highest potential for GPP. Construction ranks in the first place among them (including raw materials such as wood, aluminum, steel, concrete and glass; as well as construction products, such as windows, wall and floor coverings, heating and cooling equipment, aspects concerning the maintenance of buildings and end-of-life

services, building maintenance and execution of works contracts in place).

Table 4. The percentage of construction works in total orders by type of authorities, own study based on [26]

Year	Government administration, central and field	Local government	Other entities
2011	34.55%	38.37%	27.08%
2012	38.26%	37.30%	24.44%
2013	34.47%	36.30%	29.23%
2014	37.2%	42.37%	20.43%
2015	39.13%	43.36%	17.51%

It was estimated that, among others, in this sector the offered opportunities to improve the environment, public spending, the potential impact on the supply side, the example to private or corporate consumers, political sensitivity, the existence of relevant and easy-to-use criteria, the availability of suitable products on the market and economic efficiency are vital. Therefore, a product card was created for Construction, providing a set of recommendations related to public works procurement including the provision of related services (for instance, including cooling, electricity supply, heating and ventilation). All phases of design, construction, operation and decommissioning of office buildings were taken into consideration. For each of these criteria proposals for environmental criteria were given.

One of the EU legislation related to green procurement is Directive 2010/31/UE [27] concerning energy performance of buildings and Directive 2012/27/UE [28] for energy efficiency, which translate into activities rationalizing energy consumption on the side of contracting authorities.

Construction in accordance with the principles of sustainable development is inextricably linked with the development of modern technologies which support the construction of buildings. It seems necessary to remind the BIM technology which concerns mostly information and the management process in the whole investment process. The solutions developed earlier, for instance in the sustainable construction, will efficiently support the public procurement related to construction works. Green public procurement related to construction works focuses on achieving longevity and high quality solutions in materials, construction and design to improve and shape new building objects by, for example, efficient use of energy, water and other natural resources, as well as the reduction of waste, pollution and the degree of environmental degradation.

2.2 Characteristics of the public procurement market

According to the Public Procurement Office's statistics, the evaluation of tenders for public procurement market is mainly based on the price. Price was the only criterion for the evaluation of tenders for the most procurement procedures (91 – 92 %) in 2011-2014 (Table 5). After the amendment of the PPL Act in October 2014 before which

price was the only criterion for the evaluation of tenders, the price criterion was allowed only when object of the contract is widely available and has established quality. As a result, in 2015 th percentage of procedures in which price was the only criterion decreased to 12%.

Table 5. A percentage of the total value of all contracts awarded where the price was the only criterion, own study based on [26]

Year	Below EU thresholds, publ. in Public Procurement Bulletin (PPB)	Above EU thresholds publ. in Tenders Electronic Daily (TED)
2011	91.0%	73.0%
2012	92.0%	76.0%
2013	92.0%	85.0%
2014	84.0%	75.0%
2015	12.0%	11.0%

For orderers a procedure with price as the decisive factor is a safe one because it consistent with applicable law and does not cause problems in the event of a control. According to Art. 91 paragraph 2 of PPL, the orderer may use the most advantageous offer using not only the price criterion but also other criteria, such as quality, functionality, technical parameters, use of the best available technologies in terms of environmental impact, operating costs, service and the date of contract completion. Including the environmental criteria is therefore voluntary, except two cases: for orders regarding means of transport and transport services (Directive of the EP and the Council (WE) no. 2009/33/WE [29] of 23th April 2009 on the promotion of clean and energy efficient road transport vehicles) and procurement of office, computer and audio-visual equipment (Regulation of the EP and the Council (WE) no. 106/2008 [30] of 15th January 2008 on a Community energy efficiency labeling program for office equipment). For comparison, in some EU countries the application of green criteria is mandatory for certain groups of products (for instance, in Denmark and Germany) or orderers (for example, Belgium) [31]. In other cases, the contracting authority is not obliged to take into account any criteria related to environmental protection. Therefore, the majority of orderers who currently belong mainly to local authorities (Table 2) consider price as the only selection criterion and choose the cheapest bid (Table 6).

Table 6 The number of procedures involving selection of the bidder based on the lowest price [26]

Year	The total number of contracts awarded	Choosing the cheapest bid (the percentage of proceedings)
2011	186 232	88.0 %
2012	188 478	86.8 %
2013	210 352	86.5 %
2014	174 886	85.7 %
2015	140 482	no data

The remaining procedures with more than one criterion the number of criteria typically amounted to 2-3. In the procedures for construction works the situation was

similar. The most frequent criteria, apart from the price one, included guarantee (terms and conditions) and the execution date. In contracts for public works orderers occasionally used such environmental criteria as «energy consumption» or «operating costs».

The most common mode of public procurement in Poland is unlimited tender (more than 90 %).

3 Duties, powers and capabilities of local government units in the area of green public procurement

Public procurement is a legal way to control the spending of public funds by the trustees of these funds, for instance, by local government units. Given the role of public funds in the economy, the public procurement system has become one of the elements of the environmental policy of the Union, including Poland. Therefore, when creating a legal framework for public procurement, a possibility to execute a contract on construction works supporting the sustainable development of the environment and its protection was introduced.

As indicated earlier, the principle of sustainable development in Poland has a constitutional basis, so its character is defined as a political system. Thus, all the entities of public administration should act in accordance with the Constitution. The particular measures for sustainable development that are of a sufficiently high rank include the local development strategies which define the long-term goals and tasks of the municipality and the main directions of development. It is these strategies into which municipalities should include their policies regarding the conduct of public procurement, among others, in the context of their greening.

The holders of public funds should take into account the costs generated in the whole life-cycle of products and use environment friendly solutions. The selection of a bid for works based on green public procurement should refer to the evaluation of the life-cycle costs (that is, the purchase, use and disposal) and not just the lowest purchase price criterion. Commercially available computational tools help to accurately determine life cycles through the use of various parameters, such as energy consumption, recycling of materials and maintenance costs. The fully balanced public procurement should take account of ecological criteria throughout the whole supply chain and product life cycle.

Green public procurement meets the local government administrations' undertaking to solve the problems relating to environment protection by reducing emissions of greenhouse gases and toxins. They are a powerful tool that should be used by public institutions to reduce CO₂ emissions and the implementation of the chosen environmental objectives.

When the entity is not aware of how to describe the object of the contract to meet the expected criteria for sustainable public procurement, before the relevant procedure begins, under Article 31a-31c of the Public Procurement Law, they may conduct the so-called technical dialogue. As part of the technical dialogue, the entity can obtain advice or information necessary

to prepare the description of the subject of the contract, the essential terms of reference or to determine the conditions of the contract.

The ability to perform a technical dialogue allows for a better understanding of the market and a better preparation of the proper tender procedure. This procedure does not require from the orderer to bear any costs that would arise in the case of ordering the description of the object of contract to an external entity [32]. Thus the public finance law is vital from the point of view of economy.

It is estimated that the technical dialogue is an institution still very rarely used by orderers. Unfortunately, as in many cases its application could facilitate the work of the procuring entity, it can not be subject to any claims on the part of the tenderer. The object of the dialogue may involve all aspects of the contract: the strictly technical, organizational or legal ones. The subject of consultations in the course of the dialogue not only can but also should be areas where there is a deficit of knowledge on the part of the contracting authority, and whose identification is vital from the point of view of the proper preparation and execution of the procedure for public procurement [33]. The technical dialogue, though slightly modified, was regulated also in the new European directives concerning public procurement, whose implementation time fell on the 18th April 2016. According to Art. 40 of Directive 2014/24 / EU - "The new classical directive" and Art. 58 of Directive 2014/25/UE - "The new Utilities Directive" before launching a procurement procedure, the contracting entities may conduct market consultations with the aim of preparing orders and informing contractors of their plans and requirements for the contract. What is more, for this purpose the contracting authorities may use the advice of independent experts, authorities or market participants. The only limitation for the consultation process is a prerequisite that the received help and advice would not cause distortion of competition or violation of the principles of non-discrimination and transparency.

3.1. Environmental certification of buildings

An important element of the implementation of the principles of sustainable development into the area of construction is the process of environmental certification of buildings. For the investment and construction market there exist several types of certificates, with the following available in Poland: LEED (Leadership in Energy and Environmental Design) designed by the U.S. Green Building Council (USGBC) and BREEAM (Building Research Establishment Environmental Assessment Method), managed by BRE Global Ltd., being part of the BRE Group and a subsidiary company of the BRE Trust.

LEED considers those parameters for buildings which remain of the greatest importance: energy saving, rational water consumption, carbon emissions reduction, improvement of the quality of indoor environment, resource management and the sensitivity to effects. The building is assessed according to 10 categories, each

of which consists of a particular number of sub-categories and translates into a percentage result of the certification.

BREEAM is a method of assessment of any building type. The building is subject to a point-based evaluation in the following categories: management, health and well-being, energy, transport, water, materials, land use and ecology, pollution and innovations. The number of points in each category gives a result on the basis of which a design or a building (if the evaluation is performed after it was constructed) is assessed. Having been summed up, the points give the total score.

The BREEAM International Version, which refers to Europe, is designed for the certification of office, industrial and commercial buildings.

It is therefore another tool to take austerity measures, which should be attended to by the investors administering public funds during the design and planning of the investment.

3.2 Own activity of municipalities in the promotion of sustainable development

Another possible action of support for municipalities is that they can join the initiatives supporting sustainable development which, by exchanging experiences and basing on specific rules of conduct, seek to make public procurement green as comprehensively and efficiently as possible. For instance, *Covenant of Mayors – CoM – The Agreement between the Mayors for Climate and Energy*, is a popular European movement bringing together local authorities interested in increasing energy efficiency and using renewable energy sources in the areas they administer. The aim of the movement formed in 2008 on the initiative of the European Commission is to reduce CO₂ emissions by 40% by 2030 (compared to the 1990 base year). The new integrated Covenant of Mayors for Climate and Energy was launched by the European Commission on 15th October 2015 during a ceremony at the European Parliament in Brussels [34].

4. Conclusions

The implementation of sustainable public procurement strengthens and justifies the administrative actions, and contributes to the development of a positive image of the purchasing entity. Due to the public interest, including the need to improve the environment, it is necessary to include environmental aspects in public procurement as extensively as possible. The activities of the public administration should relate in particular to supporting the solutions that reduce CO₂ emissions by relating to, for example, energy consumption for heating, cooling, ventilation, hot water and electricity supply, or cold water consumption, which may be attractive to the orderer due to the economic benefits in the short and in the long term.

Municipalities have the opportunity to take into account environmental issues in subsequent stages of the procurement procedures, in particular on the following stage: description of the object of contract (Art. 23 PPL), contractor qualification (Art. 45, 48 i 50 PPL), selection of the best bid by using environmental criteria for tender evaluation (Art. 53 PPL), at the stage of determining contract conditions (Art. 26 PPL), description of the

subject of the proceedings (Art. 29–30 PPL), when creating the specification of essential terms of the contract and the description of the criteria that the orderer will use during bid selection, with an explanation of the criteria and the way of tender selection (Art. 36 paragraph 13 PPL), as well as at the stage of selection of the optimum bid on the basis of the criteria specified in the terms of reference (Art. 91 paragraph 1 and 2 PPL) and signing a contract (Art. 94 PPL). On all of the stages of the proceedings, municipality may take into account environmental issues and pursue a policy of green procurement.

Green public procurement is a specialized tool for environmental protection. Even though in Poland environmental criteria are often overlooked in the plans of spending the public funds by local government units, actions promoting green public procurement should continue to be undertaken, as in the most developed European countries. The increased knowledge of the environment certainly contribute to the increased number of environmental investigations. The orderers who wish to undertake green procurement have adequate legal tools. At the same time, including the elements of sustainable development in green public procurement should be done in a conscious and consistent way, since a sporadic action in the application of environmental criteria will not bring any expected effect.

The public procurement for construction works plays a significant role in the budget of municipalities and, as a result, of the country, allowing to influence not only the environmental aspects but also the economy. Properly managed public procurement system implemented by municipalities has a significant impact on the growth of public trust in government institutions and public expenditures.

The current, mediocre level of implementation of solutions for green public procurement clearly does not correspond with the content of the strategic documents and the necessity of pro-environmental public spending. The number of public procedures in which green procurement are implemented is still small but steadily growing [35]. It can be also seen growing interest in this process among scientists [36].

It needs to be noted that local government units in their policies should take into account the aspect of sustainability, not only because of the constitutional provisions and PPL, but also because of the Public Finance Act, in particular the wording of Art. 44 paragraph 3, which specifies the basic principles of public spending. In accordance with the Act discussed here, expenditure should be done in a purposeful and frugal way, on the basis of the following principles: obtaining the best results with particular expenditures and optimal selection of methods and means to achieve the goals planned. The sense of the principle of effectiveness is described as an optimization of methods and measures to achieve the goals planned or an optimization of results assuming specified expenditures. Efficiency focuses on obtaining the best results from the given outlays; therefore, it is related to efficiency. According to the Supreme

Chamber of Control, the saving is the standard indicating "good management of public money" [37]. Thus, it is clear that GPP for construction works is to fulfill these rules. Yet in each case a deep analysis of all variables is needed to make the right decision.

The evaluation of the policy concerning the implementation of environmental criteria to public procurement for construction works by local government units clearly shows that a continuous enhancement of both orderers' and contractors' skills and knowledge is vital. It is also necessary to change the attitude of the controllers from regional accounting chambers and other supervising institutions, who distrustfully approach any contract based on criteria other than price.

List of abbreviations

EMAS - Eco-Management and Audit Scheme

EU – European Union

GPP – Green Public Procurement

PLN – Polish currency

PPB - Public Procurement Bulletin

PPL – Public Procurement Law

PPO – Public Procurement Office

RP – Republic of Poland

SETC - The specification of essential terms of the contract

TED - Tenders Electronic Daily

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