

## FREQUENTLY ASKED QUESTIONS

# Legal Considerations When Using the CO<sub>2</sub> Performance Ladder in Public Procurement

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## 1. What is the CO<sub>2</sub> Performance Ladder, and how is it used in public procurement in the Netherlands and Belgium?

The [CO<sub>2</sub> Performance Ladder \(CO<sub>2</sub>PL\)](#) is an instrument that helps organizations reduce their carbon emissions, within their own organization, in projects they undertake, and in their sector. The instrument is used as both a CO<sub>2</sub> management system as well as a [procurement tool](#).

Companies that meet the requirements of the CO<sub>2</sub>PL receive a **fictitious discount** on the registration costs of tenders and thus are rewarded with an **award advantage** during the tendering process. In awarding processes that use a points system, companies meeting the requirements of the CO<sub>2</sub> Performance Ladder receive additional points. The higher the level at which an organization performs, the higher the award advantage. The performance of the organization is subject to **audits** performed by an independent and accredited third party.

The CO<sub>2</sub>PL can maximize its **impact on decarbonizing procurement and supply chains** when used as an award criterion. First of all, it rewards companies that are investing in the management and reduction of CO<sub>2</sub> emissions. This can help them compete with less-sustainable companies that may be offering lower prices. Secondly, using the CO<sub>2</sub>PL as a voluntary award criterion provides an incentive for suppliers to take action across the entire company, especially in high-impact areas for the company or project. If a company wins public tenders thanks to the CO<sub>2</sub>PL, this will likely more than offset its investment in terms of the cost of certification, auditing, and emissions reduction measures. Thirdly, the CO<sub>2</sub>PL accelerates emission reduction across business sectors and supply chains.

It is important to note that in the current use of the CO<sub>2</sub>PL, tendering parties can always choose whether they will become certified with the Ladder or not: it is not compulsory.

## 2. Is the use of the CO<sub>2</sub> Performance Ladder permitted under the EU Procurement Directive?

Yes, the instrument is in line with the requirements of the 2014 EU Procurement Directive. It is used by over 200 public contracting authorities in the Netherlands and Belgium (EU member states). There has not been a legal complaint or case made against the CO<sub>2</sub>PL since it started being used in 2009.

Contracting authorities in the Netherlands and Belgium use the CO<sub>2</sub>PL as an award criterion to give an advantage to the bidder with the Most Economically Advantageous Tender (“MEAT”).

## 3. How can the CO<sub>2</sub> Performance Ladder be used to determine the Most Economically Advantageous Tender?

When a contracting authority decides to procure goods, services, or infrastructure based on the Most Economically Advantageous Tender, they can develop different methodologies to evaluate bids based not only on the lowest price but on other **quality considerations**, such



as reducing carbon dioxide emissions, water-quality impacts, or noise pollution. These types of considerations can serve to make the product or service more economically advantageous over its life cycle and help incorporate the true environmental and social cost of procurement.

The contracting authority develops these quality criteria and communicates clearly to companies about how the criteria will be used to determine the most economically advantageous tender.

To use the CO<sub>2</sub>PL as an award criterion, a contracting authority includes in the tender (for example, in an annex to the tender) that there will be an award granted to companies that are making specific efforts to reduce their carbon dioxide emissions and that have a carbon management system in place. This will be in the form of a fictitious discount or another system of bonus points.

Organizations have different ways to demonstrate that they meet the award criterion and therefore qualify for the fictitious discount or award points. Firstly, they can have or obtain a **CO<sub>2</sub> Awareness Certificate for the entire organization**. Alternatively, contractors can also demonstrate their compliance in the form of a **project-level statement** if they are not ready or interested in obtaining organization-wide certification. Finally, contractors can show they meet the award criterion through alternate, equivalent proof (you can find more information on equivalent proof under Question 5).

It is important to mention that **several different tools and criteria can be used simultaneously** to determine the Most Economically Advantageous Tender. For example, in the Netherlands, the CO<sub>2</sub>PL is frequently used in tandem with a tool called “[DuboCalc](#)” that calculates sustainability and environmental costs of ground, road, and water works projects.

#### **4. The EU Procurement Directive requires contract award criteria to be linked to the subject matter of the contract (Article 67-3). How does the CO<sub>2</sub> Performance Ladder comply with this condition?**

The CO<sub>2</sub>PL should be used as an **award criterion that is linked to the subject matter** of the contract. The award criterion should be specifically and objectively quantifiable, the criterion must be advertised/notified previously, and the criterion must comply with the principles of equal treatment, non-discrimination, and transparency.

When the CO<sub>2</sub>PL is used as an award criterion, the **requirements are formulated on a project level**, and it is not necessary for a company to have a CO<sub>2</sub> Awareness Certificate at the company level. For each of the five ambition levels, there are project-level requirements across the four aspects of the CO<sub>2</sub>PL: Insights about emissions (A), emissions reduction (B), transparent communication (C), and participation in CO<sub>2</sub> reduction initiatives (D) (as found in Annex A of the [procurement guide](#)).

For example, on emissions reduction, Criterion 1.B requires that “the contractor demonstrably investigates the possibilities of reducing the project energy consumption” and that “the contractor prepares an independent internal audit report for the project.” At the



higher ambition levels, the requirements become more advanced, so that Criterion 5.B for instance demands the following:

- “1. Based on the analyses in 5.A.2 (about CO<sub>2</sub> emissions), the contractor has formulated a reduction strategy and CO<sub>2</sub> reduction objectives for the material scope 3 emissions of the project. An associated plan of approach has been drawn up, including the autonomous actions to be taken. Objectives are expressed in absolute numbers or percentages in relation to one (or more) relevant reference(s).
2. The contractor provides the client with its emission inventory scope 1, 2, & 3 related CO<sub>2</sub> emissions (internal and external) of the project at least twice a year, as well as progress in reduction objectives and measures taken.
3. The contractor succeeds in achieving the reduction objectives.”

Companies have different **options to demonstrate that they fulfill the requirements** of the CO<sub>2</sub>PL:

1. The company provides a statement about the project that demonstrates that during the execution of the contract it will meet the ambition level with which it has registered for the tender (proof on project level). To ensure comparability, this project statement needs to be audited by an accredited third party.
2. The company provides a CO<sub>2</sub> Awareness Certificate and project file showing that the entire company and the specific project meet the ambition level (proof on company level).

In both cases, the company must demonstrate that it complies with the requirements of the ambition level within 1 year of being awarded the contract.

It is important to note that in Option 2 above (proof on company level), the management system includes multiple requirements related to projects and a list of all projects related to the CO<sub>2</sub>PL must be provided to the external auditors. A sample of these projects is then assessed. Therefore, although the CO<sub>2</sub> Awareness Certificate is organization-wide, it also has concrete impacts on the subject matter of the project put out to tender.

## **5. The EU Procurement Directive requires contracting authorities to accept equivalent means of proof, not just a specific label (Article 43-1). How does this work when using the CO<sub>2</sub> Performance Ladder?**

It is the responsibility of the contracting authorities to accept all labels that confirm that the works, supplies, or services meet the requirements outlined in the tender. Companies are free to demonstrate how they meet the (award) criteria with alternative labels; however, the contracting authority may specify that they also be verified by an accredited third party.

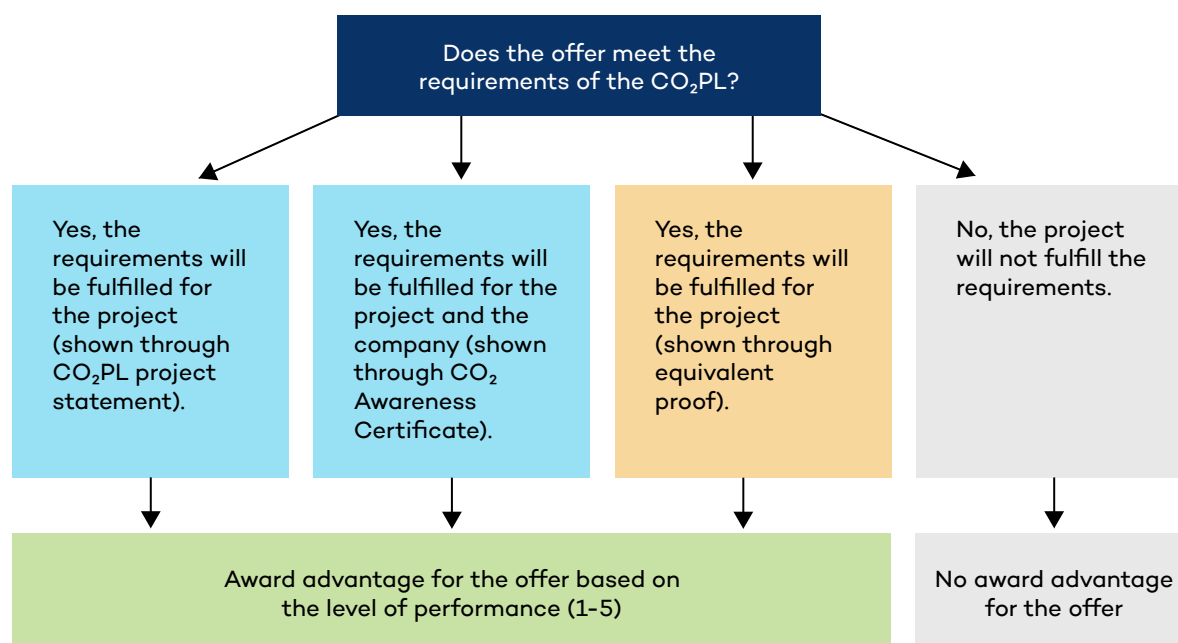
When procuring with the CO<sub>2</sub>PL, contracting authorities therefore need to accept CO<sub>2</sub> Awareness Certificates as well as proof in the form of a project statement or equivalent. With such a project statement, a company can show it will meet the project-level requirements



of the CO<sub>2</sub>PL when executing the contract. To ensure high-quality, comparable data, the procuring authority can demand this equivalent means of proof to be verified by a third party.

In practice, it is usually more convenient for companies to demonstrate their performance with a company-level CO<sub>2</sub> Awareness Certificate instead of developing a verified project statement for each tender. This is because an Awareness Certificate can demonstrate that the company will be measuring, monitoring, and seeking to reduce carbon emissions for each of its individual projects. Furthermore, it is potentially more cost effective if they are bidding for multiple projects or contracts.

**Figure 1.** Evaluating tenders with the CO<sub>2</sub>PL as a voluntary award criterion.



## 6. How does the contracting authority know that a company will comply with the requirements of the CO<sub>2</sub> Performance Ladder?

A major advantage of tendering with the CO<sub>2</sub>PL for the contracting authority is that **companies are audited by an accredited third party**. This means that procuring parties only need to check whether a project statement or CO<sub>2</sub> Awareness Certificate was submitted by the company instead of reviewing detailed technical proof.

Companies are audited across the requirements of the standard of the CO<sub>2</sub>PL (insight, emissions reduction, transparency, and participation), in accordance with the requirements of the specific ambition level (corresponding to Levels 1 to 5 on the Ladder). Usually, the audits take place after the awarding of the contract and are repeated annually for the CO<sub>2</sub> Awareness Certificate.



The [CO<sub>2</sub>PL handbook](#) contains more information about the requirements for certified organizations, and these are translated to project level in the [Procurement Guide](#). If the company fails to meet these requirements, there are sanctions on the project level. If a company wins a tender with a particular ambition level but fails to achieve this, the contracting authority imposes a financial penalty. The penalty for non-compliance must be clearly stated in the tender documents. It is recommended that this penalty is greater than the award advantage given at the time of the award (e.g., fictitious discount awarded x 1.5 = penalty).

## 7. Is there an example of how contracting authorities have used the CO<sub>2</sub> Performance Ladder as an award advantage in a tender?

The CO<sub>2</sub>PL can be used as an award criterion in different procurement systems, both **within point systems and as a fictitious price discount** (using percentages or a fixed price).

The Dutch Ministry of Infrastructure and Water Management and its implementing agency Rijkswaterstaat have been using the CO<sub>2</sub>PL for over 10 years as an optional award criterion. In tenders using the CO<sub>2</sub>PL, the standard way of working is that bids fulfilling the requirements of the Ladder receive a fictitious discount of 1% when they perform on ambition Level 1 and 5% for performing at Level 5 of the Ladder (also see Question 8). However, this is not a universal approach as the importance of various aspects is considered in consultation with the procuring agency, and the strategy is therefore tailored to the circumstances of the contract and the market.

For example, Rijkswaterstaat Corporate Services, which provides category management for the whole Dutch national government (related to the workplace environment, sustainable mobility and, until recently, catering) uses the CO<sub>2</sub>PL for procuring goods and services. The Corporate Services **procured the [supply, installation, and maintenance of hot drink vending machines for the Dutch Ministry of Defence](#)** and separately, for Rijkswaterstaat. In the [tender process for the Ministry of Defence](#), which was a larger contract but where market experience with sustainability criteria was lower, the CO<sub>2</sub>PL was one of four value-based award criteria, alongside quality, circularity and sustainability, and effective maintenance. Organizations that met the requirements of the CO<sub>2</sub>PL received a fixed discount, and it was decided to only give a reward up to Level 3. All bidders submitted ambition Level 3.

In a separate tendering process, Corporate Services procured [hot drink vending machines for Rijkswaterstaat](#). The tender was smaller than the example described above but took place in a more developed market. In this tender, attention was given to obtaining products for the vending machine from fair, transparent supply chains. Given the 8-year duration of the contract, suppliers were given 1 year to achieve Levels 1–3 (if applicable) and 2 and 3 years to achieve Levels 4 and 5, respectively. All tenderers submitted a bid with ambition Level 5. The winning bidder had secured an 8-year contract with a specific coffee cooperative, shortening the supply chain, and ensuring stability and a fair price for the farmers, which enabled the local producers to invest in sustainability.



The CO<sub>2</sub>PL can also be used when contracts are awarded based on a point system. For example, the Dutch municipality of Ede used the CO<sub>2</sub>PL to [procure playground equipment and maintenance](#). Companies could get a maximum of 100 points for the quality award criteria (80 for a high-quality project plan, and 20 for the CO<sub>2</sub>PL). Depending on the ambition level of a company on the CO<sub>2</sub>PL, the scores were as follows: 100% for Level 5, 80% for Level 4, 50% for Level 3, and 0% for Levels 2 and 1. The tender also clearly described penalties in case of non-compliance and explained the option of submitting equivalent, third-party verified proof.

You can find more project cases on the [website](#) of the CO<sub>2</sub>PL.

## 8. How much of a discount should a contracting authority offer?

**This is up to the contracting authority to decide.** The idea is that the higher the level at which a company performs, the higher the award advantage. In general terms, it is suggested to link a **progressive award advantage** to each level of performance, recognizing that Levels 4 and 5 of the Ladder require a significant investment on the part of the company to consider and act on their Scope 3 emissions.

Several Belgian authorities are currently implementing pilot tenders with the CO<sub>2</sub>PL. They have decided to only give a progressive award advantage up to Level 3 of the Ladder to give Belgian companies enough time to implement the requirements and get certified. Achieving Levels 4 and 5 of the Ladder requires far-reaching activities from companies that could not be implemented within 1 year of submitting a bid.

When tendering with the CO<sub>2</sub>PL, the Dutch infrastructure agency Rijkswaterstaat, the Dutch railway administration ProRail, and the Flemish Road and Traffic Authority (AVW) generally use the following fictitious discounts:

CO <sub>2</sub> Performance Ladder Level	Fictitious discount on tender price used by Rijkswaterstaat	Fictitious discount on tender price used by ProRail	Fictitious discount on tender price used by the Flemish Road and Traffic Authority
1	1%	1%	2%
2	2%	2%	4%
3	3%	4%	6%
4	4%	7%	6%
5	5%	10%	6%



## 9. Where can I find further information?

You can find more information on the website of the CO<sub>2</sub>PL: [www.co2performanceladder.com](http://www.co2performanceladder.com).

The [Procurement Guide 3.1](#) is the most recent version of the document that forms the core of the CO<sub>2</sub> Performance Ladder as a tendering tool.

There is also a [practical guide](#) for companies who want to get certified on the CO<sub>2</sub>PL, and the CO<sub>2</sub>PL [handbook](#) that contains all the normative requirements of the CO<sub>2</sub>PL certification scheme.

- Animation: [Procurement with the CO<sub>2</sub>PL](#)
- Animation: [Obtaining a certificate on the CO<sub>2</sub>PL](#)
- Explainer video: [What is the CO<sub>2</sub>PL? The essentials in 4 minutes](#)
- Explainer video: [How to use the CO<sub>2</sub>PL? An explanation in 10 minutes](#)
- [Webinar](#) about the CO<sub>2</sub>PL and practical experiences from Belgium and the Netherlands
- [Research](#) about the impact of the CO<sub>2</sub>PL

Are you interested in starting to use the CO<sub>2</sub>PL? We are here to support you! Please get in touch with SKAO to discuss the opportunities. You can reach out to George Thurley via [george.thurley@skao.nl](mailto:george.thurley@skao.nl), +31 (0)30 711 6800.



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