



Mini guide to using the partial performance rule

Mini guide to using the partial performance rule

Purpose of the mini guide

The partial performance rule in §8 of the Public Procurement Act can be used in cases where an existing agreement does not meet your requirements, e.g. for sustainable procurement or to cover a sudden need. Standard products are purchased from the tendered framework agreements. Other products are purchased in addition to the standard range offered.

You can use the partial performance rule on EU tendered framework agreements and contracts, but this requires that the contracting authority has previously committed to purchasing a specific value or quantity during the agreement period.

The purpose of the mini guide is to ensure that you can purchase sustainable products outside of an agreed range on the same terms as agreed goods. This opportunity arises when the products are treated equally at the time of purchase (e.g., in a purchasing system). The mini-guide is for you if you work with procurement or are responsible for contracts and want to use the partial performance rule for purchasing.

You can use the partial performance rule to become more sustainable

Sustainable products are difficult to describe in a tendering process, as the area lacks both standardization and eco-labels. Sustainable products can be UPCY products, reused products, or products made from alternative materials, such as materials collected from land or sea. What these products have in common is that they typically have a very low climate footprint, but no LCA figures. This is because they are not standard goods that are produced on a large scale and therefore do not justify a costly LCA calculation. Sustainable products are often developed by innovative small and medium-sized enterprises, often with the help of labor from the margins of the labor market.



The partial performance rule helps drive innovation during the contract period

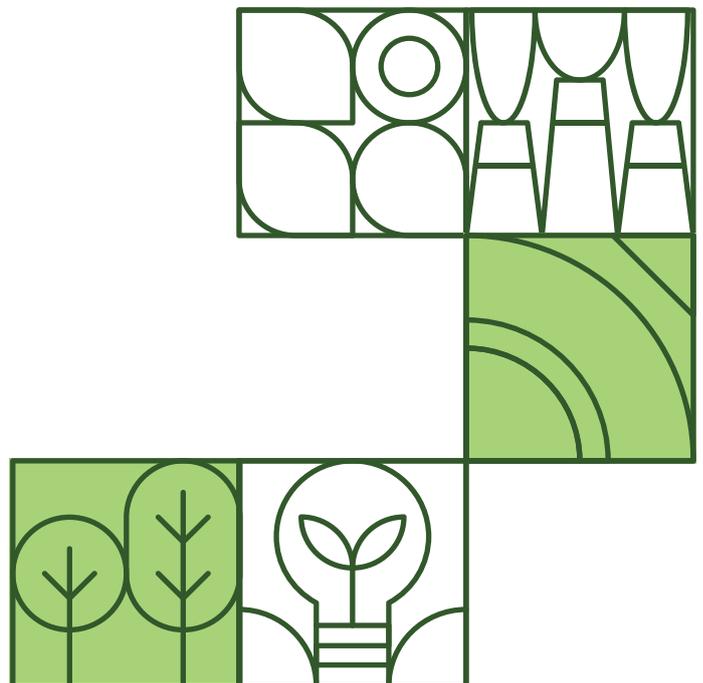
There are three benefits to using the partial performance rule to purchase sustainable products outside the standard range offered in a contract:

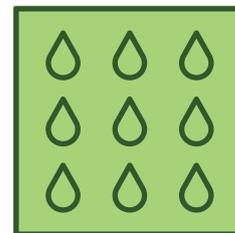
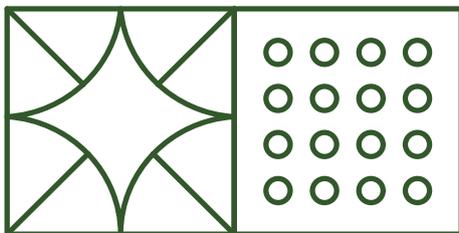
- As a public procurer, you will increase your sustainable climate footprint
- You will stimulate and reward innovative companies for their contribution to ensuring the green transition and continued sustainable development within the industry
- You will help to increase employment among citizens on the margins of the labor market

Template and completed examples

At the end of the mini-guide, you will find a blank template to fill in when you want to use the partial performance rule. In addition, you can see three examples of how the partial performance rule can be applied in practice:

- Examples 1 and 2 – after the contract has started, a desire for other products may arise
- Example 3 – a sudden need arises that is not covered by an agreement





Clarification of terms

Subcontracts

Section 49 of the Public Procurement Act. A contracting authority may offer separate sub-contracts instead of offering a single contract. subsection 2.

If a contracting authority does not offer separate sub-contracts, the contracting authority must state the reasons for this in the tender documentation. *

The rule on partial performance

Section 8 of the Public Procurement Act. When construction and civil engineering works, the provision of services, or the purchase of uniform goods are awarded as separate sub-contracts, part II or III shall apply to the conclusion of each individual sub-contract, provided that the total value of all sub-contracts corresponds at least to the applicable threshold value.

Subsection 2. Notwithstanding paragraph 1, a contracting authority may award a sub-contract without following the rules in part II or III when the following conditions are met:

1. The estimated value of the sub-contract in question is less than DKK 596,408 excluding VAT for goods and services or less than DKK 7,455,100 excluding VAT for construction works, cf. however, section 9.
2. The total value of sub-contracts awarded without applying the rules in part II or III shall not exceed 20% of the total value of all sub-contracts into which the proposed works, proposed purchase of similar goods, or proposed provision of services are divided.*

Award criteria

Section 162 of the Public Procurement Act. A contracting authority shall identify the most economically advantageous tender on the basis of one of the following award criteria:

1. Price,
2. costs, or
3. best price-quality ratio

Subsection 2. When applying the award criterion of costs, all types of costs may be taken into account, including prices and life-cycle costs, cf. section 166.

Subsection 3. When using the award criterion of best price-quality ratio, cf. subsection (1)(3), the tender shall be assessed on the basis of subcriteria such as qualitative, environmental, and social aspects.

Subcriteria may include:

1. quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental, and innovative characteristics, and trade and the conditions thereof;
2. the organisation of the staff to be responsible for the performance of the contract and their qualifications and experience, where the quality of the staff to be responsible for the performance of the contract may have a significant impact on the level of performance of the contract; or
3. customer service, technical assistance, and delivery conditions.

Subsection 4. When applying the award criterion in subsection (1)(3), the contracting authority may set the price or costs so that competition is based solely on qualitative subcriteria. **

* *LBK No. 10 of 06/01/2023 (Applicable)*

Certificates, standards, norms, and labels

Section 157 of the Public Procurement Act. A contracting authority may require an applicant or tenderer to submit certificates from independent bodies confirming that the applicant or tenderer meets specific quality assurance standards. If the contracting authority requires compliance with specific quality assurance standards, it must refer to quality assurance systems based on the relevant European standards series certified by approved bodies.

Subsection 2. A contracting authority must accept equivalent certificates from bodies in other Member States.

Subsection 3. A contracting authority must always accept other appropriate documentation if

1. an applicant or tenderer is unable to obtain the required certificate for a quality assurance standard or an equivalent certificate within the applicable time limit for reasons not attributable to that applicant or tenderer, or
2. an applicant or tenderer does not have the required certificate for a quality assurance standard, even though it has been possible to obtain it within the applicable deadline, and the contracting authority can ascertain that the proposed quality assurance measures correspond to the measures required in relation to the required quality assurance standard, without the resources that the contracting authority must use for this, after a specific assessment, exceeding to an unreasonable extent the resources that the contracting authority would have to use to establish that the tenderer possesses the required quality assurance standard.

Section 158 of the Public Procurement Act.

A contracting authority may require an applicant or tenderer to submit certificates issued by independent bodies confirming that the applicant or tenderer complies with specific environmental management systems or environmental management standards. If the contracting authority requires compliance with specific environmental management systems or environmental management standards, the contracting authority must refer to the EU Eco-Management and Audit Scheme (EMAS), cf. Regulation (EC) No 1221/2009 of the European Parliament and of the Council, or to other recognised environmental management systems in accordance with Article 45 of Regulation (EC) No 1221/2009 of the European Parliament

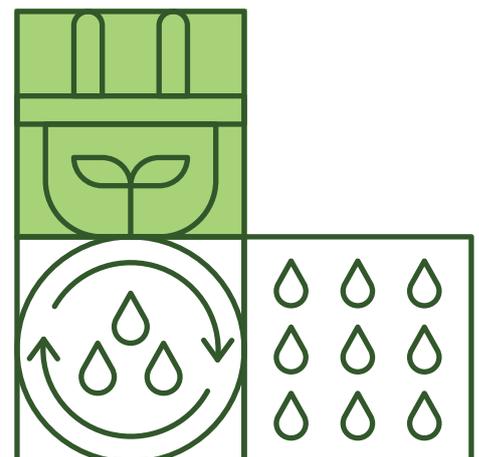
and Council Regulation (EC) No 1221/2009 or other environmental management standards based on the relevant European or international standards issued by approved bodies.

Subsection 2. A contracting entity shall accept equivalent certificates from bodies in other Member States.

Subsection 3. A contracting entity shall always accept other appropriate documentation if

1. an applicant or tenderer is unable to obtain the required certificate for an environmental management system or environmental management standard or equivalent certificate within the applicable deadline for reasons not attributable to them, or
2. an applicant or tenderer does not have the required certificate for an environmental management system or environmental management standard, even though it has been possible to obtain it within the applicable deadline, and the contracting authority can establish that the proposed measures correspond to the measures required in relation to the required environmental management system or the required environmental management standard, without the resources that the contracting authority must use for this, or a specific assessment, inappropriately exceeding the resources that the contracting authority must use for this, or a specific assessment, exceeding to an unreasonable extent the resources that the contracting authority would have to use to establish that the tenderer has the required environmental management system or the required environmental management standard. *

* *LBK No. 10 of 06/01/2023 (Applicable)*



Sustainability

Sustainable development is based on reducing climate impact and ensuring balanced resource utilization. Planning and action must aim to maintain these ideals for the future. Sustainability affects all levels, from the local to the global. The 1987 report by the World Commission on Environment and Development: Our Common Future (the Brundtland Report) defines sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."

You can find more inspiration on the Danish Technological Institute's website about the Sustainability Wheel and on the Business Guide's website about Sustainable and Green Transition.

CSR

CSR (Corporate Social Responsibility) is also referred to as social responsibility, sustainability, and triple bottom line. Regardless of the term used, CSR is about companies demonstrating responsibility in relation to the surrounding community. It is about doing business in a way that minimises negative impacts and maximises positive value for people, the environment and the economy.

Circular economy

The circular economy is a model of consumption and production in which the life cycle of products is extended, primarily thanks to better environmentally friendly design that makes it easier to repair, reuse, and reproduce old products, improved durability, better waste management, and new business models based on leasing, sharing, repair, and reuse. It contrasts with the traditional linear economy of new purchases and a 'use-and-throw-away' culture. The linear economy also requires many products to be produced cheaply with readily available materials and energy.

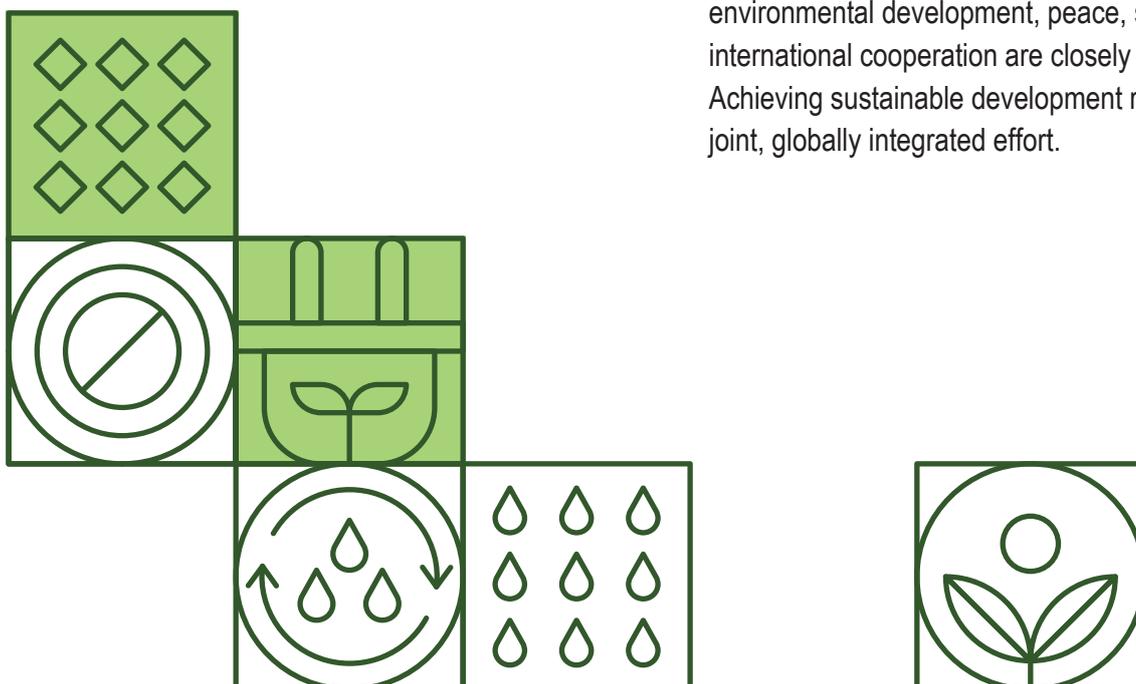
ESG

ESG is a way of structuring sustainability work that is becoming increasingly widespread in both Danish and foreign companies. ESG stands for Environment, Social, and Governance, covering the environment and climate, social conditions, and corporate behavior, respectively.

UN17

The Global Goals consist of 17 specific goals and 169 sub-goals that commit all 193 UN member states to completely eradicating poverty and hunger in the world, reducing inequalities, ensuring good education and better health for all, decent jobs, and more sustainable economic growth. They also focus on promoting peace and security and strong institutions and on strengthening international partnerships.

The SDGs thus recognize that social, economic, and environmental development, peace, security, and international cooperation are closely interlinked. Achieving sustainable development results requires a joint, globally integrated effort.



Other concepts

Definition of upcycling, recycling, and downcycling It is almost in the wording of the three terms. The difference between upcycling, recycling, and downcycling is whether a product is created with greater, equal, or lesser value than the product you already had.

Upcycling. A process in which treating or reprocessing a product creates greater value than the product originally had. An example of upcycling is using scraps from clothing production to make new products—e.g., by producing other clothing or making bags from the scrap material.

The purpose of upcycling is to reuse waste products and avoid having to use new resources. It is therefore about using as much of the residual products as possible and giving waste and scrap a new lease of life.

Recycling. When you give a material or product the same value it already had. In other words, it's about keeping a product or material in the cycle it's already in. It might sound complicated. But it's easier than you might think.

Our deposit system is a good example. Here, glass, plastic, and metal are reused. This means that they remain in the same cycle for longer instead of becoming waste. Realistically, however, these materials cannot be reused indefinitely. Therefore, some may argue that recycling deposit products is actually downcycling, which is the last form of recycling.

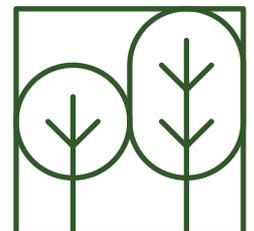
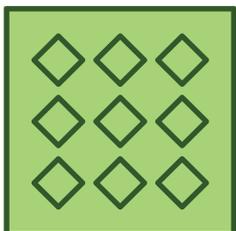
Downcycling. When a product is transformed into another product that has a lower value than the product it had before. This may sound like a bad solution. But it is not (at least not always). It is not always possible to upcycle and recycle products, and when that is the case, it is better to downcycle than to let the material go to waste.

An example of downcycling is when old clothing scraps are turned into rags and dishcloths. Although dishcloths and rags do not have the same value as clothing for most people, it is still better than throwing them away.

Reuse and recycling

Reuse. In everyday language, the terms recycling and reuse are often used synonymously, but there is a clear difference. Recycling is when a discarded product, material, or substance is used in the same form and for the same purpose as when it was discarded. This includes, for example, second-hand clothing, furniture from flea markets, used cell phones, or glass bottles with a deposit.

Recycling. When, for example, the glass from this bottle is turned into new glass bottles or windows, this is referred to as recycling. Paper that is reborn as recycled paper is another typical example of recycling, but often the recycling transformation is more surprising. For example, plastic bottles and cans can be turned into sleeping bag filling, fleece sweaters, toys, insulation, and much more. Old bicycles, pans, chair legs, and other metal can be melted down into cans, knives, aluminum foil, and many other metal products, while food scraps and other bio-waste can be used for biogas and fertilizer.



About public procurement and tenders

Purpose

The purpose of the Public Procurement Act is to establish procedures for public procurement so that effective competition ensures the best possible use of public funds.

Public procurement refers to the process whereby public authorities, such as ministries, local authorities, or state-owned enterprises, purchase goods or services from the private sector.

The rules for public procurement ensure that public funds are used correctly when public authorities make purchases from the private sector.

* LBK No. 10 of 06/01/2023 (Applicable)

The general principles

The general principles that apply in the EU naturally also apply to the tendering of contracts within the EU. This is stated directly in recital 1, first paragraph, of the preamble to EU Directive 2014/24/EU on public procurement, which reads: "The award of public contracts by or on behalf of Member State authorities must be carried out in accordance with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and freedom to provide services, as well as the principles derived therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency." (ed.). The principles are also discussed in Article 18(1) of EU Directive 2014/24/ EU, which stipulates that contracting authorities must treat economic operators equally (equal treatment), without discrimination (non-discrimination), and act in a transparent (transparency) and proportionate (proportionality) manner. The provision is implemented in Section 2(1) of the Public Procurement Act, which also mentions the principles of equal treatment, transparency, and proportionality.

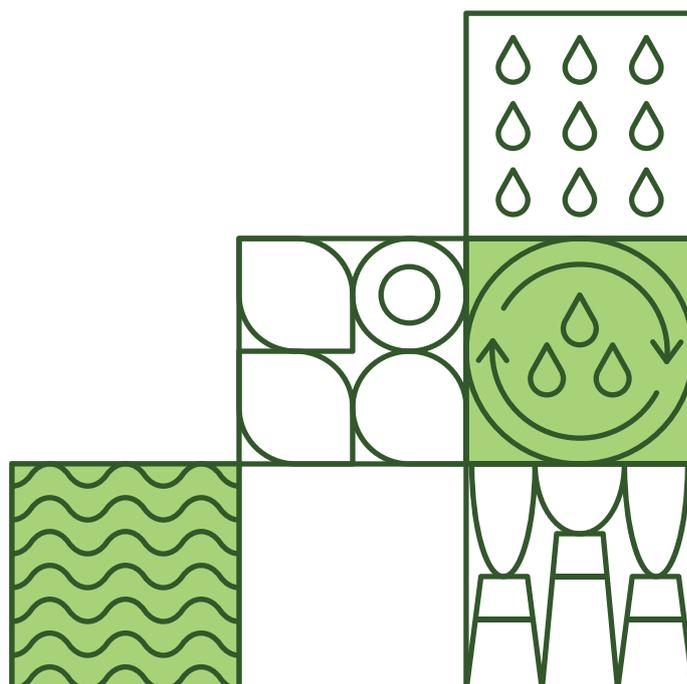
Subcontracts

A division of the contract may be advantageous for small and medium-sized enterprises (SMEs), as SMEs find it easier to bid for and win smaller contracts. The provision is thus intended to create greater dynamism and competition in the market.

Contracting authorities are free to determine the size and subject matter of individual sub-contracts. The contract may be divided geographically, by subject area, by institution, etc. This follows from the explanatory notes to Section 49 of the Public Procurement Act:

"The division of the contract may, for example, be a quantitative division, a geographical division, or a division into different contract subjects."

A division into different contract subjects involves a qualitative division, taking into account the different tenderers' professions and specializations, by adapting the individual sub-contracts to the specialized sectors or in accordance with different subsequent project phases. It could, for example, be relevant to make a qualitative division of the contract in a food tender, where one sub-contract could relate to meat, while another sub-contract could relate to dairy products.



The rule on partial performance

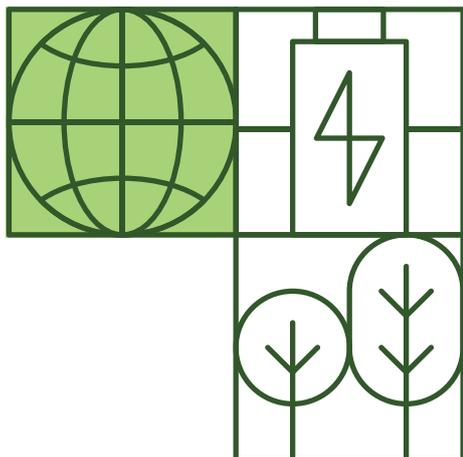
The partial performance rule can be used when:

1. The contracting authority is preparing its tender.
2. An unforeseen situation arises during the performance of the contract that requires the rapid award of a sub-contract to a new or existing operator.
3. The contracting authority wishes to award sub-contracts to companies that, for example, offer innovative solutions, particularly environmentally attractive products, or demonstrate a particular degree of social and managerial responsibility.

Prerequisite for applying the rule on partial performance

- The main contract must be put out to tender in an EU tender
- The specific partial purchase must be related to the "main contract"
- The purchase must be considered part of the "main contract" and the value of the purchase must be included in the total contract value
- The total contract value must be binding on the contracting authority
- The estimated value excluding VAT of the purchase in question must be less than DKK 595,344 * for goods or services
- The estimated value excluding VAT of the purchase in question must be less than DKK 7,441,800 * for construction and civil engineering works
- The total value of the relevant "de-lind purchases" awarded without a prior tendering process must not exceed 20% of the total value of the "Main Contract."

**The Competition and Consumer Authority adjusts the threshold values every two years.*



Important information about the rule on partial performance*

Section 2 of the Public Procurement Act does not apply to purchases made in accordance with the partial performance rule in section 8(2) of the Public Procurement Act.

The principles of administrative law apply when applying the rule on partial performance. Unforeseen procurement needs during the contract period may be met by applying the rule on partial performance. As the partial performance rule only exempts partial contracts from Sections II and III of the Public Procurement Act, partial contracts will be subject to Sections IV or V of the Public Procurement Act, and the contracting authority is then thus obliged to assess whether the contract has a clear cross-border interest and to advertise the contract if this is deemed to be the case, or to enter into the contract on market terms in accordance with Section V of the Public Procurement Act if it is deemed not to have a clear cross-border interest.

** LH-Gulve A/S v. Region Midtjylland 19 June 2017 case no. 17/00216*

Good advice

Avoid purchases made in accordance with the rule on partial services exceeding the amount limits (current budget status).

Briefly describe what purchases each sub-contract covers and from whom they were purchased. The contracting authority is advised to prepare a memorandum when the rule on partial performance is applied. The memorandum should contain a brief review of the main contract, the reason for applying the rule on partial performance, and how the contracting authority has applied the rule on partial performance. The memo should be kept with the other tender documents.

Reservations

There is no practice that definitively clarifies the issue of whether the partial performance rule, e.g. in a construction contract, can be applied "across" different goods and services. The contracting authority should therefore consider publishing a preventive notice and following the procedure in Section 411 of the Enforcement Act in order to protect partial performance against the penalty of "ineffectiveness."

Template

Use of the partial performance rule in framework agreements and contracts

Brief description of the tender (general description):	Reason for applying the partial performance rule:

Contract value
Amount (max. 20%) that can be purchased using the partial performance rule:

Enter the binding total contract amount for the tender to which the partial performance rule is to be applied

The total amount when applying the partial performance rule may not exceed 20% of the binding total contract amount and a maximum of DKK 525,344 per partial contract

Produkt/ service: <i>Specify the product or service in the individual subcontract</i>							Remaining amount: <i>Total remaining amount</i>
	Amount	Amount in DKK					
Total per subcontract <i>Specify the value of each sub-contract</i>							

It is recommended that a brief description of what is planned to be purchased from the selected supplier be prepared for each sub-contract.

REMEMBER to journalize the document.

Example 1

Use of the partial performance rule for tenders on standard ranges of furniture and fixtures

Brief description of the tender (general description):

A public contracting authority is offering a contract for furniture and fixtures in a standard range. The contract value is set at DKK 5,000,000.

Reason for applying the partial performance rule: A public contracting authority has just adopted a procurement policy that supports the green transition.

The contracting authority therefore wishes to purchase upcycled and used furniture and fixtures. In addition, the contracting authority wishes to purchase teaching tables made from FSC-certified wood for a local public school. As upcycling and reuse are not part of the contract and are difficult to specify, the contracting authority wishes to use the rule on partial performance to make the purchases.

Contract value
5,000,000
Amount (max. 20%) that can be purchased using the partial payment rule:
1,000,000

Enter the binding total contract amount for the tender where the partial performance rule is to be applied

The total amount when applying the partial performance rule may not exceed 20% of the binding total contract amount and a maximum of DKK 525,344 per partial contract.

Product/ service: <i>Specify the product or service for each individual sub-contract</i>	Used desks	Used canteen chairs	Used office chairs	Upcycled shelving units	Upcycled office chairs	Teaching chairs made from FSC-certified wood	
Amount	Amount in DKK	Amount in DKK	Amount in DKK	Amount in DKK	Amount in DKK	Amount in DKK	Remaining amount: <i>Total remaining amount</i>
Total per sub-contract <i>Specify the value of each sub-contract</i>	100,000	300,000	250,000	75,000	75,000	150,000	50,000

Example 2

Use of the partial performance rule when purchasing food under a framework agreement offered by a central purchasing body

Brief description of the tender (general description):

A commercial kitchen owned by a number of municipalities participates in a framework agreement for the purchase of food and disposable items offered by a purchasing center. The commercial kitchen has committed to purchasing a specific quantity with a value of DKK 10,000,000.

Reason for applying the partial performance rule:

The board of the commercial kitchen, which produces food for residents in the owner municipalities, wants citizens to have more choices when putting together menus. The contracting authority has therefore conducted a market survey and become aware that there are a number of smaller producers and suppliers of specialty fish and organically produced bread, meat, beverages, and dairy products. In order to meet the board's wishes, the commercial kitchen will therefore apply the rule on partial performance.

Contract value
10,000,000

Enter the binding total contract amount for the tender to which the partial performance rule is to be applied

Amount (max. 20%) that can be purchased using the rule on partial performance:
2,000,000

The total amount when applying the partial performance rule may not exceed 20% of the binding total contract value and a maximum of DKK 525,344 per partial contract.

Produkt/service: <i>Specify product or service on the individual sub-contract</i>	Special fish	Organic meat	Organic bread	Organic beverages and dairy products	
Amount	Amount in DKK	Amount in DKK	Amount in DKK	Amount in DKK	Remaining amount <i>Total remaining amount</i>
Total per sub-contract <i>Specify the value of each sub-contract</i>	550,000	500,000	200,000	400,000	350,000
Description of the specific purchase:	The contracting authority will purchase special fish from Supplier 1 primarily in the spring and fall	The contracting authority will purchase organic meat from Suppliers 2 and 3 over the next two years	The contracting authority will purchase organic bread from Suppliers 4, 5, and 6 during holidays.	The contracting authority will purchase organic beverages and dairy products from Suppliers 7,8, 9, and 10 up to holidays	

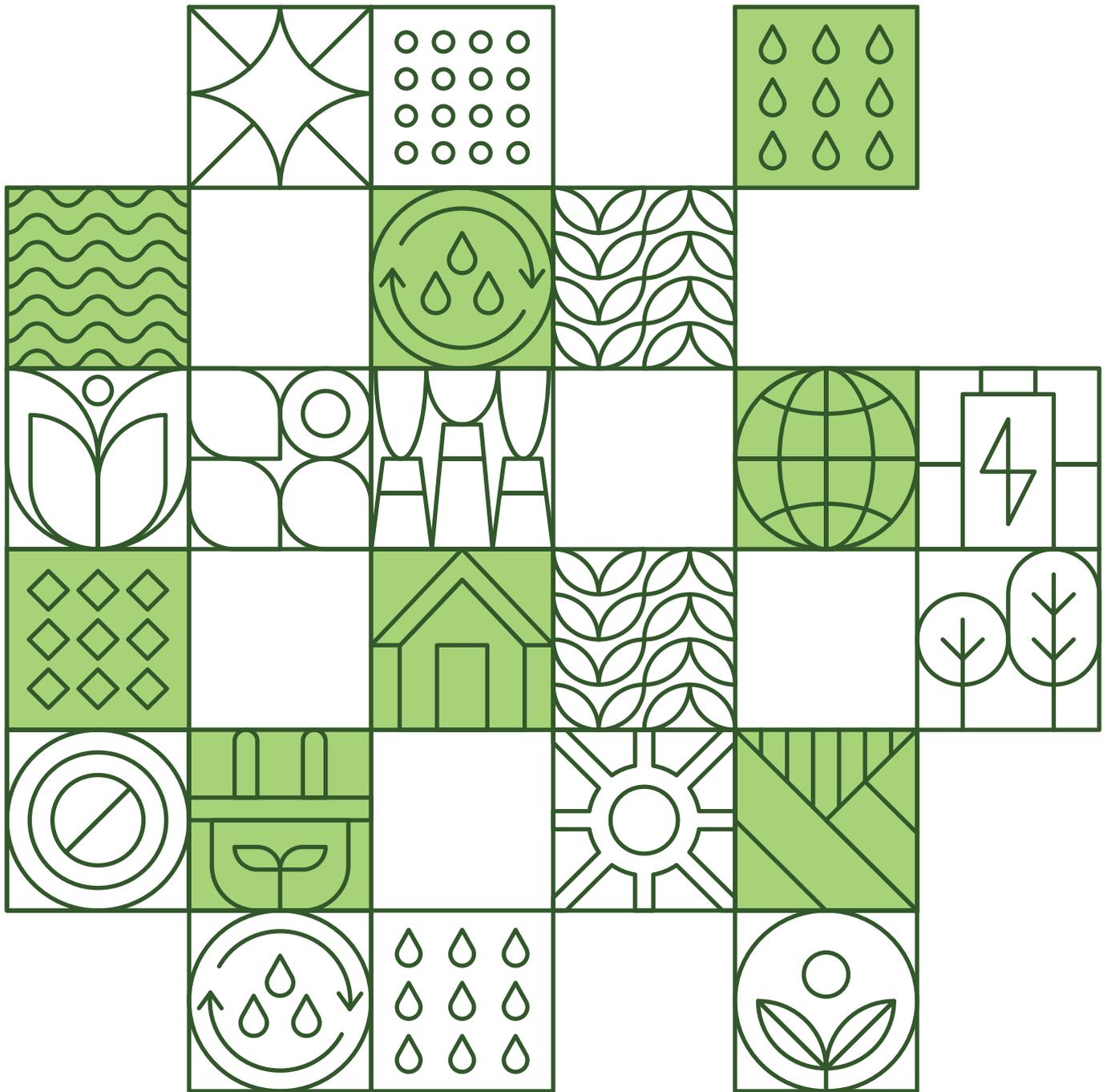
Example 3

Application of the partial performance rule to a framework agreement on office supplies – standard range

Brief description of the tender (general description):
 Three months ago, a public contracting authority entered into a framework agreement with a supplier for a standard range of office supplies. The framework agreement is estimated to have a total value of DKK 2,500,000.
 The contracting authority now wishes to apply the rule on partial services and has therefore undertaken to purchase DKK 2,000,000 worth of office supplies from the supplier.

Reason for applying the partial performance rule:
 The contracting authority has unexpectedly been faced with a request to purchase wastepaper baskets, chair mats, coat racks, and an environmental station, all of which must be made from recycled plastic. These products are not part of the range offered. In order to support the "green transition," the contracting authority wishes to purchase the products using the partial delivery rule.

	Contract value	
	2,000,000	
	Amount (max. 20%) that can be purchased using the partial performance rule:	
	400,000	
Product/service: <i>Specify the product or service in the individual sub-contract</i>	Recycled plastic office equipment	
Amount	Amount in DKK	Remaining amount <i>Remaining total amount</i>
Total per sub-contract <i>Specify the value of each sub-contract</i>	400,000	50,000
Description of the specific purchase:	The contracting authority has purchased wastepaper baskets from Supplier 1, chair mats and coat racks from Supplier 2, and an environmental station from Supplier 3. Total amount: DKK 350,000.	



The material has been produced in collaboration between Aarhus Municipality and VIA University College, financed by the EU Life-IP project on Circular Economy (CEBW).

Subject to errors and omissions

- The mini-guide is not legally binding and has no legal force or effect. The content cannot therefore be enforced by law
- The mini-guide does not express any preference for specific products, service areas, or companies.



VIA University College



En del af løsningen



AARHUS KOMMUNE