

Sustainable public procurement *from rhetoric to practice*

***Dispelling myths and exploring effective solutions.
A case study from Sweden.***

Version 1.1 - March 2016. Layout: TCO Development



Contents

1. Sustainable public procurement is possible.....	3
1.1. Our core proposals are:	4
2. Public spending for the public good?.....	5
2.1. The textile sustainability challenge	5
2.2. Problems that hinder sustainable procurement.....	6
3. The development of sustainable procurement.....	7
3.1. International initiatives	7
3.2. Development within the EU	8
3.3. New EU Directive	10
3.4. Policy and regulations in Sweden – a retrospective	11
Main aspects of current Swedish law	11
4. Procurement procedures under current rules.....	13
4.1. Today's procurement process	13
Mandatory criteria	14
Other award criteria	14
Specific contractual terms.....	14
4.2. Third-party certifications in the new EU directive.....	15
5. Myths and obstacles to sustainable public procurement	16
5.1. Myths about sustainable public procurement	16
5.2. Obstacles to sustainable procurement	19
Lack of knowledge, leadership and desire to set sustainability criteria	19
Unclear regulations	19
Weaknesses in the legislation.....	19
6. Ways forward.....	21
6.1. Better application and clarification of legislation.....	21
Leadership and greater legal and commercial competence.....	21
Opportunities for dialogue and negotiation.....	22
Harmonised criteria can lead to greater effects and lower costs.....	22
Holistic and life cycle perspective.....	22
Improved statistical basis.....	22
Importance of good monitoring.....	22
6.2. Third-party certifications – part of the solution	23
Useful throughout the entire procurement process.....	23
Easier monitoring	23
Ensures that criteria meet requirements for transparency, scientific rigour and objectivity	23
Many goods and services already meet the criteria	23
Comparison of third-party certifications for environmental and social sustainability	24
7. Conclusions	25

1. Sustainable public procurement is possible

In this chapter, we explain the purpose of the report and provide some background on the organizations behind it.

Public procurement is extensive in Sweden and other countries. Establishing carefully considered criteria for goods and services can make this procurement a strong driver of sustainable development. For a long time, legislation in this area was weak and unclear, but despite remaining shortcomings, there are now considerable opportunities to set criteria aimed at environmental protection and social responsibility.

In practice, however, far from all public procurement has a focus on sustainability. While there are some good examples among municipal, regional and national authorities, a host of shortcomings remain. This report examines several causes, including a lack of knowledge about the problems and solutions, weak leadership and a lack of will to set sustainability criteria, incorrect interpretation of the rules, and a regulatory framework that is both unclear and weak. In this report we focus on the scope for sustainable procurement that does exist, and we dispel a number of myths. We also look at the regulatory framework and its shortcomings. The basis for the regulatory framework is determined at the EU level, but we focus on circumstances in Sweden and the need to develop national rules and guidance, as well as the need to influence the EU Directive.

Our ambition is that this report will help contracting authorities to make better use of public funds to benefit the things that the public thinks are important. We believe this is not the same as procuring goods and services for the lowest price.

Nor do we believe that the public's engagement ends with qualitative products. On the contrary, there is a strong commitment to sustainable development and the public's interest in ethical purchasing is growing. As such, the general public is running ahead of their elected officials, who prefer to restrict the mandate of contracting authorities to take responsibility. We hope that our report can help to reduce the gap and push sustainable procurement further up the agenda.

A unique coalition lies behind this report. New Wave Group (NWG) operates a large group of companies covering a range of brands, and has embarked on a journey towards far-reaching environmental criteria and social conditions in the manufacturing of clothing and textiles. Then there are the organisations behind leading sustainability certifications with environmental and social criteria: Fairtrade Sweden, KRAV, the Marine Stewardship Council, Ecolabelling Sweden, the Swedish Society for Nature Conservation and TCO Development. Finally, there is 2050, a powerful driver of environmental and climate issues in the nexus between politics, research and business.

The report is based on reviews of studies and on interviews with businesses, contracting authorities, politicians, associations, investigators and researchers. We delve deeper into problems surrounding the production and consumption of textiles, including hazardous chemicals and serious health and safety issues. The issues of clothing manufacture and chemicals are also complicated by shifting fashions, globalised supply chains, limited knowledge and weak legislation.

Public procurement in the EU is worth EUR 2,000 billion per year (2013), almost 20% of the EU's total GDP. In Sweden the figure is around SEK 600 billion, equating to just under 20% of GDP (2011), spread across approximately 20,000 calls for tender from 1,200 authorities.

Two thirds of the contracting authorities are municipalities or their enterprises, with national authorities and county councils accounting for the final third. A little over 30% of the Swedish public contracts are framework agreements.

For the individual purchaser, it can be difficult to set and monitor criteria linked to environmental toxins and harmful substances, for example, as well as living wages and other social conditions. In the report, we therefore examine how third-party certification can make things easier for purchasers and enable sustainable procurement of goods and services.

A number of proposals relating to public and more sustainable procurement are circulating in the current debate. At the time of writing, a couple of official inquiries are being completed and a Swedish legislative process to implement new EU directives is under way. This report is our contribution to the discussion on how sustainable procurement can evolve from rhetoric to a more concrete policy.

1.1. Our core proposals are:

- Contracting national, regional and local authorities should give work on sustainable procurement a real face-lift; political leadership and improved competence among civil servants are two key factors.
- Sweden's new National Agency for Public Procurement should immediately develop progressive advice on how the new opportunities for sustainable procurement, including the use of third-party certifications and life cycle methodology, can be used by contracting authorities, and how criteria can be set in a harmonised way; a series of quick pilot projects is urgently required.
- The Government and the Parliament should clarify, in Swedish legislation and in instructions to the authorities, that criteria concerning third-party certifications are both possible and desirable.
- The Government and the Parliament should tighten up Swedish legislation so that sustainable procurement becomes mandatory and not simply something that "should" happen.
- Sweden should lobby for the EU's directives on public procurement to be revised so that "lowest price" is replaced by "best value".
- Courts should work to ensure that a more uniform practice can be developed, based on the environmental provisions contained in the Treaties of the European Union.

We hope that our proposals will stimulate thought and debate – and above all action – on more sustainable procurement.

2. Public spending for the public good?

In this chapter, we ask whether sustainability criteria are being set when spending public money. What problems are there? Is sustainable procurement voluntary, possible or mandatory?

Essentially, public procurement by the authorities involves the use of public money, primarily tax revenue. In order to make good use of resources, there has long been a sharp focus on procuring goods and services at the lowest price. This takes place within the EU as a single market, based on principles that promote competition and low prices, which are cornerstones of trade in a market economy, both within and between countries and regions.

In Sweden, the award criterion of “lowest price” is applied in 50% of calls for tender, while the criterion “most economically advantageous” is used in around 44% of cases, with the remaining 6% unclassified.

However, the question arises whether applying the lowest price principle in all situations really benefits the issues that the general public values most highly. Although clear quality criteria exist for goods and services being procured, the public – and their elected representatives – in many cases have a broader perspective on what is considered the best use of public money. Repeated opinion polls have shown, for example, that environmental problems concern the public more than public finances.

Several studies of Sweden, other countries, the EU as a whole and the global situation indicate that many targets relating to the environment and sustainable development are not being reached. Under the current measures and laws, 14 of the Parliament’s 16 environmental quality objectives will not be met. “A non-toxic environment”, “reduced climate impact” and “zero eutrophication” are among the objectives that are most difficult to achieve. Within the EU, the situation is at least as problematic. Over 400,000 Europeans die every year due to air pollution and the target of halting the loss of biodiversity by 2020 will not be met under today’s initiatives. Taking a global perspective, the picture is exacerbated by extensive poverty, with as many as a billion people chronically malnourished and more than double that living in deep poverty. In many parts of the world, people’s social circumstances and their working conditions are utterly unacceptable.

Whether consumption of goods and services in Sweden and Europe is private or public, the situation is at risk of worsening as long as it remains at an unsustainable level and as long as clear and strict sustainability criteria are not set within purchasing and procurement programs. The production and consumption of textiles is unfortunately a prime example of the challenge faced, from a global perspective.

2.1. The textile sustainability challenge

Textile consumption is growing rapidly around the world, as more and more people increase their spending power. Global production of textiles stands at more than 85 million tonnes per year, or over 10 kg per world citizen. Many garments are throwaway items, while others very rarely get worn. The reuse and recycling of textiles is generally low in every country. The overall consequence is a rapid rise in production which – although providing employment and making a valuable economic contribution in the producer countries – usually leads to serious environmental problems and work environment issues.

Heavy water use tends to accompany the cultivation of fibres such as cotton, and chemical biocides are routinely used over large areas of land, except on organic plantations. Emissions from textile factories, not uncommonly in Asian countries with weak environmental legislation and controls, can pollute land and water, which threatens human health, biodiversity and agriculture.

The use of chemicals in textiles varies greatly. There is a big difference between a simple t-shirt and an all-weather jacket, but harmful substances are often used in both cases, for example in growing the fibres and in the dyeing process. These substances can have acute or chronic environmental and health effects due to their status as harmful to the environment, allergenic or toxic, which includes being carcinogenic or toxic for reproduction.

Chemical use is currently on the rise in the area of textiles, partly due to growth in production, and partly because more chemicals are being used per kilo of material. Various new functions are also leading to more advanced use of chemicals. Textiles with antibacterial properties, or those that are treated with flame retardants or preservatives, often contain an advanced blend of different chemicals that may be harmful to varying degrees..

Antibacterial substances risk increasing antibiotic resistance in society, while several brominated flame retardants and fluorinated preservatives are considered harmful to the environment and human health. Nevertheless, use of many such chemicals is permitted. In addition, there is often a lack of knowledge about what environmental and health effects the blends of substances may have, which is a major issue.

Chemicals in figures

Harmful chemicals can often be found in finished textiles. A t-shirt from southern Asia can therefore leach harmful substances into the Baltic Sea, for example, when it is used, laundered or discarded in Sweden. Studies show that chemical use ranges from around 0.8-1.9 kg per garment.

2.2. Problems that hinder sustainable procurement

A major study of public and private textile procurement in Sweden with a focus on the issue of chemicals – in which over 40 people from more than 25 organisations were interviewed – highlighted four types of obstacles to achieving sustainable procurement:

- **Lack of knowledge:** There is a major lack of knowledge regarding environmental issues, not least as related to harmful chemicals, and on the legal scope to set environment criteria in public procurement. Traditional economic considerations dominate, particularly among personnel with responsibility for procurement.
- **Communication barriers:** In contrast to private players – who can purchase what they want based on the core values they support and the knowledge bank they themselves choose to build – legislation prevents contracting authorities from establishing good and long-standing contacts with suppliers, which makes it more difficult to develop sustainable value chains.
- **Concern over legal disputes:** Lack of clarity in legislation and practice, combined with the risk of being brought before the courts, causes many contracting authorities to shy away from setting strict criteria concerning environmental protection and social sustainability. Checking of qualification criteria and assessment of tenders are seen as particularly difficult points to deal with.
- **Limited opportunities to set criteria:** In the study, several respondents felt that criteria could only be set for chemicals in the procured finished products, while some were of the opposite opinion. Others state that criteria must not be disproportionately high, which in itself creates a lack of clarity and problems with setting limits.

The issue of clothing manufacture and its impact on the environment, the working environment and social rights has received a great deal of attention in recent years, not least in Sweden. However, it is only one of a host of issues where Swedish private and public consumption of goods and services makes a nationally and globally unsustainable impact on people and the environment. Since public procurement involves huge amounts of money, it also offers considerable opportunities to make a positive difference, as long as the regulations embody such an ambition – and as long as there is space for all the players involved to enact that ambition.

This leads on to the question of what specific sustainability criteria are actually set, or not, when spending public funds. What does the legislation say? Do they make sustainable procurement something that is voluntary, possible or mandatory? How has the issue developed over time in Sweden and internationally? Is public money really being spent for the public good?

3. The development of sustainable procurement

In this chapter, we describe how the idea of sustainable procurement has developed over the years at international level and within the EU and Sweden.

3.1. International initiatives

At the international level “Exercising leadership through government purchasing” was one of the points highlighted as a key measure in changing unsustainable consumption patterns in the extensive Agenda 21 action plan from the UN Conference in Rio in 1992. Many of the more than 170 countries that took part in the Rio

Conference, almost exactly 23 years ago, then attended the follow-up World Summit for Sustainable Development in Johannesburg in 2002, which also asserted the importance of actions at all levels to:

“Promote public procurement policies that encourage development and diffusion of environmentally sound goods and services.”

The summit in Johannesburg was the starting point for a UN process that led to the Rio+20 conference in 2012 adopting the 10-Year Framework of Programmes on Sustainable Consumption and Production, with sustainable procurement as a core strategy. And today the issue is at the forefront of negotiations for setting international “Sustainable Development Goals”, which will apply after 2015.

Given that public spending accounts for around 15 percent of GDP in the OECD countries and up to twice that in developing countries, there is great potential for public procurement

to support sustainable development if, as the UN’s environmental programme UNEP states:

“public organizations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life-cycle basis in terms of generating benefits not only to the organization, but also to society and the economy, whilst significantly reducing negative impacts on the environment”.

An important component of UNEP’s work is finding synergies between sustainable procurement and the use of ecolabels, which can “help define the sustainability of products and guide purchasing choices of individuals, businesses, and public authorities”; projects with this focus are under way in various countries around the world.

A key dimension of the international policies on sustainable development is the content of international trade agreements and particularly WTO’s “Agreement on Government Procurement”, which was most recently revised in 2012. The agreement is binding and lays a framework for regional and national regulations, including within the EU.

International chemical regulations

There are not the same broad international agreements in the area of chemicals that there are for the climate, biodiversity and air pollution, for example. Only a fraction of known harmful substances are internationally regulated. The most ambitious agreement is the Stockholm Convention, but this regulates a little over 20 substances, compared with the 1,400 or so that the EU previously judged to be harmful

3.2. Development within the EU

Within the EU, public procurement legislation has its roots in legislation from 1971. By the time Sweden joined what was then the EC, four different directives from the early 1990s were in force, aimed at establishing a full internal market. In these, and even more clearly in a later draft of directives from 2004, the regulatory framework represented a strong expression of the fundamental commitment to free trade contained in the Treaties of the European Union. The following five principles of trade, aimed at ensuring efficient, predictable and consistent actions, lie at the heart of the public procurement directives, which were revised most recently in 2014:

The principle of non-discrimination

The 'principle of non-discrimination' means that it is prohibited to discriminate suppliers, directly or indirectly, on grounds of nationality. Even if the contracting authority does not expect any foreign tenders, it may not include requirements that only Swedish companies are aware of or can perform in the contract documents. The contracting authority may not, for example, give preference to a local company.

The principle of equal treatment

The 'principle of equal treatment' means that all suppliers should be treated equally and be placed on an equal footing. All suppliers must, for instance, have access to the same information at the same time.

The principle of transparency

The 'principle of transparency' means an obligation for the contracting authority to create transparency by providing information about the procurement procedure and how it will be conducted. In order for tenderers to be afforded the same opportunities for the submission of tenders, contract documents must be plain and clear and contain all of the requirements regarding the subject matter of the contract. Consequently, suppliers will be able to see what is of greatest importance when choosing a supplier. A 'contract relating to a public works concession' means a contract of the same kind as a works contract but which involves compensation comprising wholly or in part the right to exploit the work. A 'service concession' means a contract of the same kind as a service contract, but which involves compensation for the services comprising wholly or in part the right to exploit the service.

The principle of proportionality

The 'principle of proportionality' means that requirements for the supplier and requirements in the specification must have an obvious link with and be proportionate in relation to the subject matter of the contract. The requirements imposed must be both appropriate and necessary to achieve the aim of the public procurement. If there are several alternatives, the alternative chosen should be the one which is the least intrusive or onerous for the suppliers.

The principle of mutual recognition

The 'principle of mutual recognition' means that diplomas and certificates issued by authorities authorised by a Member State shall also apply in other EU/EEA countries.

In addition to trade rules, the Treaties of the European Union contain various environmental provisions, including one about a high level of protection for people's health and the environment and one about applying the precautionary principle and making polluters pay. Another key component of the EU's environmental work came in 1998 with the "Cardiff process" to integrate environmental considerations into all areas of policy and into the application of legislation, something that was later also enshrined at the treaty-level.

Within the framework of the Cardiff process, the Commission singled out public procurement as a promising instrument in the environmental field and in the same spirit it returned in 2001 with a communication that positively interpreted the opportunities to incorporate environmental considerations into public procurement. This declared that while the directives on public procurement do not contain any express environmental regulations, as long as the five principles of trade are respected and certain other conditions are met, it was possible to impose various types of technical environmental criteria on both products and processes, including

Chemical regulations in the EU

Since the 1960s, a range of laws have regulated industrial chemicals and chemicals in specific areas. The most significant of the broad legal instruments is the REACH Regulation from 2006, which concerns the registration, evaluation, authorisation and restriction of chemical substances.

criteria that are found in certain ecolabels. At the same time, however, the Commission felt that the regulatory framework was far from clear and announced that it had proposed revisions. In a subsequent communication from 2003, about an integrated product policy, the Commission highlighted the importance of applying environmental considerations, based on a life cycle perspective, and since public procurement was once again considered to have great potential in the environmental field, member states were recommended to adopt action plans for green public procurement.

The amended directives on public procurement that were later adopted (in 2004) for the first time contained express references to environmental criteria. These can be found in both the opening preamble and the articles of the Classical Directive on contracts for public works, public supply and public service, for example concerning technical criteria, the use of the underlying specifications in the ecolabels, and social and environmental conditions for the implementation of a contract.

Despite this development, in a communication from 2008 the Commission pronounced on “public procurement for a better environment”, that there were a host of obstacles to green public procurement, including lack of knowledge, “uncertainty about legal possibilities” and “lack of political support”. To combat the problems, a wealth of proposals were presented, largely concerning the implementation of the procurement directives, and these were linked to the action plan, developed in parallel within the EU, for sustainable consumption and production. Since then, the issue of procurement has been on the agenda in practically all the central policy processes in the environmental field, for example in the EU’s renewed strategy for sustainable development, in the EU’s 7th Environment Action Programme, and in several of the EU’s strategic policy processes.

The Commission’s communications from 2001 and 2008 aimed at improving implementation and strengthening the guidance on procurement of “goods, services and works with a reduced environmental impact throughout their life cycle when compared to goods, services and works with the same primary function that would otherwise be procured”. The EU’s member states were urged to get behind the work and more harmonised criteria were called for. At the same time it was repeated that “environmental criteria may be set in public procurement on condition that they respect the fundamental principles of EU law concerning non-discrimination, equal treatment, transparency, proportionality and mutual recognition”.

The possibilities for setting sustainability criteria were therefore underlined by the Commission, but there was still a lack of clarity about exactly what could and could not be done, and therefore even competent contracting authorities encountered problems, while those who lacked any engagement or knowledge at all could simply not set any criteria. This has clearly been shown in several studies in the area of textiles and chemicals, for example. The five principles and how they related to the EU’s general environmental requirements in the treaties created their own problems, despite the Commission’s attempts at interpretation.

The guiding lights that were available mainly comprised good examples and advice on the one hand, and judgements in the European Court of Justice (ECJ) on the other. Without going into great detail about the legal cases relating to earlier legislation, we can report that the court underlined, for example, that the criteria set did not need to be solely of an economic nature and that environmental criteria should be integrated into the implementation of EU policy (the *Concordia* ruling, 1999), and that criteria concerning renewable electricity fall within the framework of conditions that may be set concerning the origin of a good (the *Wienstroem* ruling, 2001).

The Commission’s ambition to promote sustainable procurement, together with the previous judgements from the ECJ, coincided a few years later with a drive to develop new strategies for the EU, primarily aimed at handling the economic crisis, the main one of these being the Europe 2020 growth strategy. As a consequence, in 2011 the Commission published a Green Paper on the modernisation of EU public procurement, which stressed the importance of efficient procurement, but also of it supporting general social objectives such as protection for the environment.

3.3. New EU Directive

As part of an effort to, amongst other things, improve the opportunities for green public procurement, new rules were adopted in the EU in 2014, in the form of three EU directives for public procurement, which replaced previous legislation. Although the new rules stick with the five principles of trade and although they do not require procurement to be sustainable, having environmental and social dimensions have been given further prominence.

To start with, the main Public Procurement Directive clearly emphasises the principle of integration:

“Article 11 TFEU requires that environmental protection requirements be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development. This Directive clarifies how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts.”

A general principle was also introduced into the directives, requiring the member states to ensure that, in the performance of public contracts, suppliers comply with applicable obligations in the fields of environmental, social and labour law, which also links to rules on rejecting abnormally low tenders.

Another new feature of the directives is that assessment of a tender can be based on the life cycle cost of goods and services, which means not only “internal costs, such as research to be carried out, development, production, transport, use, maintenance and end-of-life disposal costs but can also include costs imputed to environmental externalities, such as pollution caused by extraction of the raw materials used in the product or caused by the product itself or its manufacturing, provided they can be monetised and monitored”. In the case, for example, of harmful chemicals in textiles, it is however very difficult to make such a monetary assessment of the damage to health and the environment that arises from poor risk management. Quantifying costs in the chemical field has only been done for a few substances, such as cadmium, compared with the tens of thousands of substances on the market that can have a negative impact on sustainability in conjunction with production and consumption or later in the life cycle.

The possibility has also been created for contracting authorities to directly require sustainability certification as proof, for example, that goods or services have certain characteristics, assuming that the certification is determined by a third party, and that there is a clear link to the goods or services in question. As ever, the general trade principles must be followed and equivalent certifications and certain alternatives may be accepted. Being able to refer directly to labels or certifications, instead of previously having to state underlying criteria, makes it considerably easier for contracting authorities that want to set criteria concerning the environment, social considerations or labour law.

We will now look more closely at developments in Sweden over time, and how Sweden is affected by the various EU directives.

3.4. Policy and regulations in Sweden – a retrospective

Swedish public procurement legislation falls within the framework of the EU's general legislation. Implementation is, however, determined to a high degree by additional national rules and guidelines, and by the practices developed by the authorities and how these are interpreted by the courts. Green public procurement began being discussed in more depth in Sweden around the middle of the 1990s. In 1996, the Environmental Advisory Council set out a guiding strategy on the issue, and two years later the Committee for Ecologically Sustainable Procurement was set up, leading to the development of the "EKU tool".

In the Government policy statement of 2000, the Prime Minister stated that "environmental criteria shall be set in all public procurement" and it was in 2003 that the Environmental Management Council began its work. An action plan for green public procurement was released in 2007.

The Environmental Management Council was disbanded during the last parliament, despite protests from municipalities and civil society, and responsibility for the issues was transferred to the Competition Authority. Now the Government is preparing new changes and a commission of inquiry is working on shifting the issues to the new, dedicated Public Procurement Agency that is set to be created in 2015. Alongside this, another commission of inquiry is re-examining the issue of procurement and collective agreements, and how to implement the new EU Directive.

Guidance on textiles and chemicals

The former Environmental Management Council issued guidance for contracting authorities, including requirements for product specification, requirements for compliance with the ILO Declaration on Fundamental Principles, and proposals to use the Nordic Ecolabel (Svanen) and Good Environmental Choice (Bra Miljöval), for example, as verification.

At the time of writing, a review by the Council on Legislation has also been presented, and this suggests how certain parts of the new EU Directive should be applied, as well reporting how certain proposals from two other recent official reports into public procurement should be taken into account. One of these is the official report from the Public Procurement Inquiry, which tackled the issue of sustainable procurement.

Main aspects of current Swedish law

Under current legislation, public procurement is governed by the Public Procurement Act (LOU) and the Act on Procurement in the Water, Energy, Transport and Postal Services (LUF), which aim to implement prevailing EU law, including the five fundamental principles for trade in EU law. Since 2010, Sweden has also had what is termed a "should" rule, requiring that contracting authorities "should" apply environmental and social considerations, on the condition that they are relevant, that they are justified by the nature of the procurement, that they comply with the principles in the general regulatory framework, that the criteria can be monitored and verified and that they actually are monitored and verified.

There are currently no mandatory criteria, as put forward in the Government policy statement of 2000. There is also no form of connection between the procurement regulations and the 16 general environmental quality objectives, with their accompanying clarifications and concrete interim targets, which the Parliament has laid down to guide environmental policy and environmental work in Sweden. One exception is the clearer regulations that apply to national authorities; they are required to have an environmental management system which, amongst other things, drives the authority to environmentally adapt its procurements as far as possible. This expresses an obligation, even though it is unclear exactly what it involves.

Seen as a whole, the regulatory framework is anything but clear on the subject of sustainability criteria, and the practice is at least as opaque. The Public Procurement Inquiry, for example, reported “that the practices of the administrative court of appeal had led to a situation that made the work of the contracting authorities in setting environmental criteria, particularly on animal welfare, more difficult”. With reference to the Gothenburg Administrative Court of Appeal, the inquiry pointed out that a “ruling was interpreted such that environmental criteria that go beyond equivalent criteria in the EU’s harmonised secondary legislation constitute unlawful trade barriers.”

Against the backdrop of this lack of clarity, the inquiry conducted a special analysis of EU law, focusing on the opportunities to set environmental and social criteria. This highlighted two different approaches, which the inquiry named the “internal market perspective” and the “multipolicy perspective”. Just as many others had done, the inquiry did however reach the conclusion that, under certain circumstances, contracting authorities may include environmental and social criteria that go further than the EU legislation. Despite the conclusions of the inquiry, it is the Court of Justice of the European Union that has the final say on disputes in this area, and the uncertainty that remains is an obstacle to more sustainable procurement. The EU Directive therefore needs clarifying, so that it is clear to contracting authorities that they can go further in their criteria than the EU’s harmonised environmental regulations, for example in the area of chemicals, where legislation is patently inadequate.

When it comes to implementation of the new EU directives in Sweden, the process has reached the stage of referral to the Council on Legislation. This body proposes that the majority of the changes in the directives, concerning environmental and social criteria, should be included in Swedish legislation, and some points were clarified that had previously been unclear, for example regarding life cycle costs. On the issue of the general principle of working to ensure that, in the performance of public contracts, suppliers comply with applicable obligations in the fields of environmental, social and labour law, the Government will await the conclusions of the ongoing official inquiries before putting forward new proposals.

Procurement and the EU’s chemical regulations

Several studies show that the chemical legislation, which largely is based on the EU’s Regulation for Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), are not sufficient to meet the Parliament’s goal of a non-toxic environment. Green public procurement has been highlighted as a potentially crucial tool in the work on chemicals.

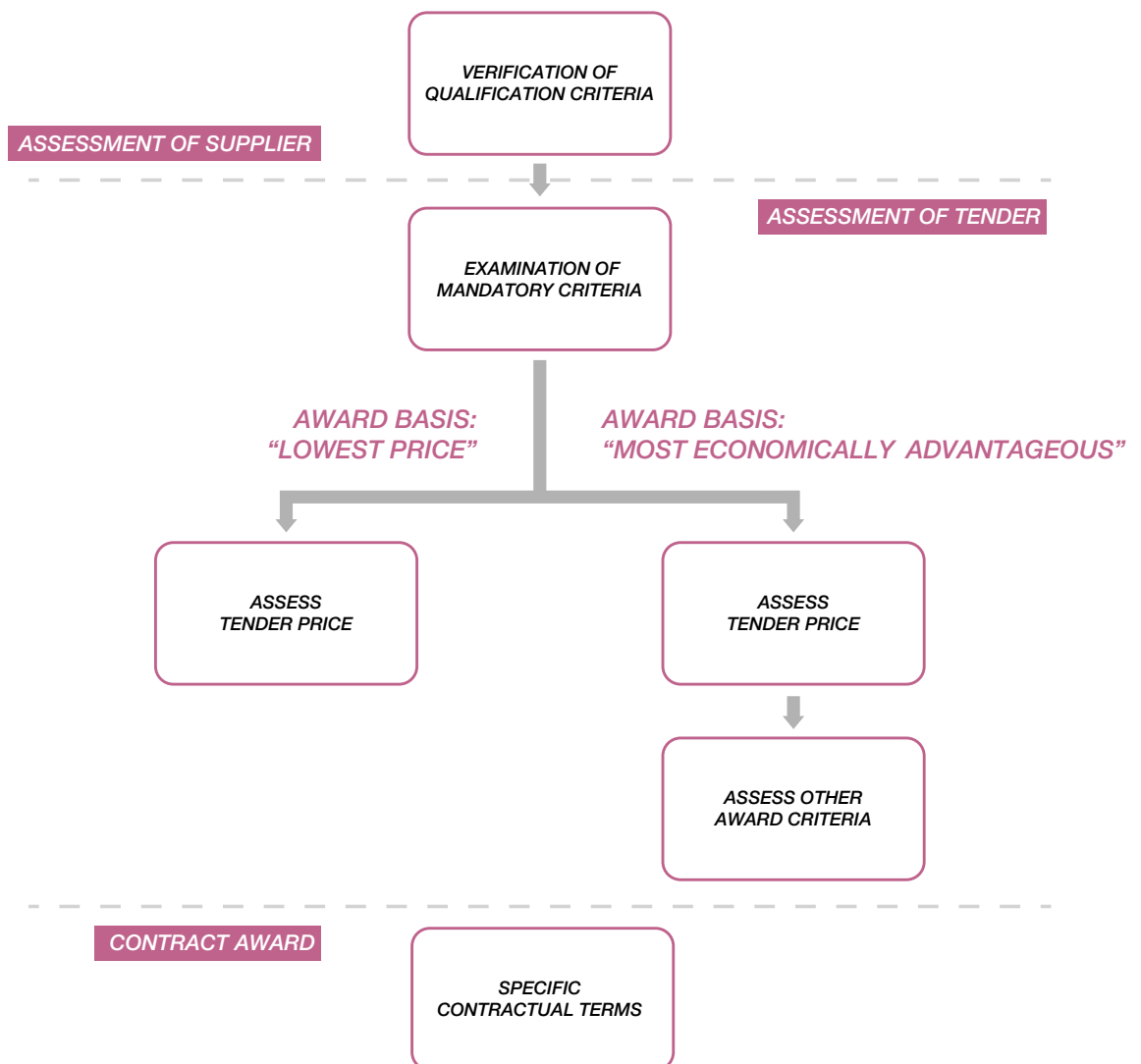
The question of whether procurement criteria can go further than the rules in EU law is complex but, following its analysis, the Swedish Chemicals Agency has concluded that it is possible for an authority to set criteria for the procurement of goods that go further than the harmonised EU criteria concerning the release of those goods onto the market.

4. Procurement procedures under current rules

In this chapter we take a more detailed look at the procurement procedure in Sweden and the EU based on current legislation. We also consider ongoing regulatory development and and implications.

4.1. Today's procurement process

According to the rules that have applied in recent years, environmental and social criteria may be set in different parts in, a procurement or related to different product categories. Criteria may be aimed at the supplier or the object of the procurement. Criteria may also be set as specific contractual terms and must then be met during the period of the contract, but they need not necessarily be met at the beginning of the contractual period. This process is depicted in the figure below.



Qualification criteria

Qualification criteria are directed at the supplier and not at the object of the procurement. Such criteria can be used to increase the likelihood that suppliers really can deliver what is being specified, and that they will do so in an acceptable way. A common qualification criterion is that the supplier must have an environmental management system and it is also possible to require that certificates linked to a certification system, or equivalent, can be presented for the entire life of the product. If one or more qualification criteria are not met, the supplier is disqualified from the procurement.

Criteria for chemicals

Some brominated flame retardants contain certain notorious environmental toxins whose use has been restricted, but other substances in the group are only weakly regulated, for example (HBCDD), which is not readily degradable and may have a harmful long-term impact on the aquatic environment. Plasticising phthalates also have certain substances that are partially restricted, but the regulations are generally weak. Mandatory chemical criteria in public procurement can have a significant impact on speeding up work on the chemical front.

Mandatory criteria

Mandatory criteria may be applied to the object of the procurement, for example concerning environmental performance. The supplier must meet these criteria in order to be awarded the contract. When a contracting authority specifies “lowest price” as the grounds for evaluation, the mandatory criteria are the only ones that the contracting authority may set for the object of the procurement, in addition to price. Mandatory criteria therefore allow no opportunity for weighting between criteria and price, which can be restrictive, since suppliers that are environmentally ahead of their competitors cannot be rewarded. For example, a mandatory energy efficiency criterion can lead to a product offering the lowest price, which lies right on the limit set in the criterion, being valued ahead of one that is much more efficient. This is problematic in view of the huge potential for energy efficiency improvements that is often available.

Another example is cleaning services, which are often procured at based on evaluation principle the lowest price. This means businesses that offer fair pay, good working conditions and ecolabelled cleaning chemicals can find it tough to compete. This affects not only the working environment, but also children’s everyday environment in many public facilities, such as schools, where harmful chemicals have been found to be present in many

cases. In a review of over 1,200 public cleaning contracts, 96 percent went to the businesses that offered the lowest price.

Other award criteria

Award criteria over and above the tender price may be used when the award basis for procurement is “most economically advantageous”. One reason to use such criteria can be a desire to reward a higher degree of compliance in relation to desirable properties, i.e. above what is mandatory and therefore formulated as a mandatory criterion. Here, the contracting authority has an opportunity to make use of a weighting or ranking of the award criteria to achieve the best combination of price and quality, where the concept of quality can include environmental and social criteria, for example.

When using environmental or social criteria as award criteria, it is important that the criteria:

- relate to the object of the procurement and not to the organisation or the capacity of the supplier; in the latter cases it is qualification criteria that must be set.
- are measurable, can be verified and comply with the fundamental trade principles, while also not giving contracting authorities unlimited choice.

Specific contractual terms

It can be advantageous to include certain criteria as specific contractual terms. The supplier must then meet the criteria over the course of the contractual period. They are, however, still mandatory, since they constitute an undertaking by the supplier as contained in the contract. An example of a specific contractual term may be that the supplier must work to a quality and environmental management system or develop a product with a particular quality. If specific contractual terms are set, the supplier need not necessarily meet these when submitting their tender, but may be given time to get everything into place, for example by an agreed date.

4.2. Third-party certifications in the new EU directive

Third-party certification means that compliance with the criteria set for goods or services is verified by an independent third party. The certification body draws up the criteria in consultation with stakeholders, and a certificate is issued after an approved testing and verification process. As a rule, a third party will also follow up compliance with the criteria.

It is common for third-party certifications that include environmental criteria also to meet the criteria in the standard ISO 14024 – Type 1 environmental labelling. ISO 14024 relates to criteria from a life cycle perspective that are reviewed by an independent third party, with the criteria development based on scientific principles and involving stakeholders in an open development process.

Where contracting authorities intend to purchase goods with specific environmental, social or other characteristics they may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label as means of proof that the works, services or supplies correspond to the required characteristics, provided that all of the following conditions are fulfilled:

a) the label requirements only concern criteria which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;

b) the label requirements are based on objectively verifiable and non-discriminatory criteria;

c) the labels are established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate;

d) the labels are accessible to all interested parties; and

e) the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.

These conditions differ to some extent from previous legislation. The former requirement that the criteria in the certification must be developed based on scientific knowledge has been removed, and replaced by point (b) above. Point (e) offers more clarification compared with the directive that has been replaced. For example, it is now possible to set direct criteria for specific certifications, as long as there is general compliance with the regulations.

Another change is the greater opportunities to procure innovative solutions under a new public procurement process called “innovation partnership”. In this case, authorities are given the opportunity to enter into long-term, structured partnerships for the development of goods and services that are not currently on the market.

In addition, the new directives specifically mention life cycle costs as an award criterion. It has, however, also been permissible to use life cycle costs as a criterion in procurements under the previous directives. Life cycle costs include internal costs, such as research, development, production, transport and waste management. They also include external and environmental costs, such as pollution from the extraction of raw material or emissions associated with the use of the product. It has to be possible for both the internal and external costs to be monetised and monitored. Life cycle costs may only be used when the award is based on the most economically advantageous tender, not when the assessment is based only on price. The new directives clearly state that once methods for calculating life cycle costs exist at EU level, these should be mandatory. According to the review by the Council on Legislation there is, however, some doubt about the degree to which Sweden will follow this latter point.

“Third-party certification is not an individual label, but an umbrella term for the control functions and independence of the labels concerned, which are what make third-party certification more credible. The new EU directive encourages the setting of criteria that refer to both environmental and social labels, and the use of third-party certification to verify that the requirements set for procurements are met.”

Mathias Sylvan, consultant in public procurement law

5. Myths and obstacles to sustainable public procurement

This chapter presents some of the common myths and perceived obstacles with regard to setting environmental and social criteria in public procurement.

5.1. Myths about sustainable public procurement

Myth: Environmental and social criteria in public procurement are not an effective instrument for furthering environment policy.

Fact: Wrong! Criteria that go beyond harmonised legislation help drive development, since only those suppliers that meet the criteria can win the contracts. This means vendors wanting to supply the huge public sector need to adapt accordingly. In theory, it could be claimed that other instruments, such as legislation or environmental taxes, ensure that all goods and services are sustainable, but a wide body of research shows that the objectives are far from being fulfilled, with chemicals being just one of many examples. For this reason, there has long been an almost total consensus internationally about the importance of more sustainable public procurement. One possible way to make sure that public procurement serves as an effective instrument is for the criteria to be continually followed up and tightened, which in turn is made easier if contracting authorities use third-party certifications.

Myth: It is expensive and difficult to set and monitor social criteria in manufacturing.

“One of the biggest difficulties of procurement is the follow-up work. This makes third-party certification an important tool for strengthening monitoring and quality control.”

Lennart Bondeson
Municipal Commissione , Örebro

Fact: Wrong! Using third-party certifications is a tried and tested way of making efficient and cost-effective use of taxpayers' money, with the contracting authority itself not needing to get involved in current and proactive criteria, or to conduct resource-heavy monitoring.

By requiring, for example, TCO Certified for IT purchases, the contracting authority gains access to a programme of current sustainability criteria in the form of codes of conduct, factory inspections and action plans for handling non-conformities. Criteria for social responsibility in manufacturing are verified and followed up by an independent third party. TCO Certified creates a framework that the IT industry can use to continuously and systematically improve working conditions in the manufacturing process.

Myth: Environmental and social criteria, particularly criteria for third-party certified goods and services, lead to higher costs.

Fact: Think again! There are a host of examples of demanding environmental criteria not causing increased costs. Many municipalities, for example, have a high proportion of organic and eco-certified food, and they keep well within budget. There are some schools that have 100% organic food, without incurring higher costs. In these cases, this is made possible by the municipality's public procurement framework and active work on other factors such as food waste, more vegetarian food and seasonal produce. In other cases, certain increased environmental costs for new technology are offset by a reduction in other societal costs, such as lower healthcare expenditures due to a cleaner environment. Taking a broader socioeconomic perspective, where people value a good environment and rich biodiversity, a higher price for particular goods or services can lead to lower costs for society overall. There are other cases where it can be worth paying more for a product, for example with a view to the maker of the product receiving a reasonable income, which has proven important not least in conjunction with textile production in developing countries.

Myth: Ecolabels cannot be used in public procurement.

Fact: Wrong! According to current legislation, under certain circumstances a contracting authority may require that the product or service being procured meets all or some of the criteria specified in a particular certification. One condition is that this must relate to a third-party certification, such as Nordic Ecolabelling, TCO Certified or KRAV. Ecolabelling can thus be accepted as verification, but it is not permitted to actually require that goods or services are certified. Another condition is that the contracting authority is prepared to accept goods and services without certification, as long as the supplier can provide proof that the criteria in the certification are met in an equivalent way. Under the coming legislation (2016) it will be possible to directly require a particular certification, given the same conditions generally. Ecolabels are therefore likely to play an even more important role in public procurement.

Myth: Contracting authorities can set criteria only at the time of procurement.

Fact: Wrong! Criteria can be set on an ongoing basis. A plan and budget for following up the set criteria should be in place from the beginning when a call for tender is drawn up. Using a third-party certified ecolabel as a criterion in procurement makes it easier to follow up and ensure that the products and services procured continue to meet the set criteria. Many certification organisations, including Nordic Ecolabelling, also tighten their criteria at least every 3-4 years.

The organisation already sets criteria in line with the Competition Authority's criteria wizard, so it is superfluous to add criteria relating to certified products.

Fact: A misconception. The criteria in the Competition Authority's criteria wizard for a product group are often a limited selection of the criteria that can be found in a label or certification. When individual criteria copied from a third-party certification are used, this does not take account of the benefits from a life cycle perspective that are inherent in the third-party certification in question.

These benefits include the fact that the criteria, which are developed after broad consultation, are set independently by the market players and reviewed by third parties in the form of testing and verification partners, in accordance with international standards, supplemented with random checks.

Myth: A municipality is not allowed to decide that at least 50 percent of all procured products must be certified or verified using a third-party's environmental and social sustainability certifications by 2020, for example.

Fact: Wrong! Of course a municipality can decide such a target. Naturally the municipality will have to comply with the legislation in striving to reach that target. It is also possible in various ways to actively use third-party certification as proof that the criteria in the tender specifications are met.

#ModUpp2020 is a free collaborative project between third-party certifications that, through support and guidelines, encourages the public sector to switch to Modern Public Procurement (Modern Upphandling, ModUpp) by setting environmental and social criteria in public procurement.

To participate in #ModUpp2020 the organisation must adopt a target that at least 50% of all procured goods and services will be labelled with a third-party certification by the year 2020.

Myth: Small contracting organisations cannot set sustainability criteria in their procurement, as they only procure small amounts from suppliers.

“Ecolabelling Denmark has conducted a survey of companies with certified goods and services on the Danish market. The survey showed that of the 204 companies in Denmark that hold a licence for the EU Ecolabel or the Nordic Ecolabel, 58% are small and medium-sized enterprises (fewer than 50 employees and turnover of less than EUR 10 million).”

*Rikke Dreyer, Chief Consultant,
Public Sector, Ecolabelling Denmark*

Fact: Not true! Several small organisations can collaborate in industry networks to increase the chance of advancing their sustainability work. A prime example is the network Banking and Insurance for Sustainable IT. Another positive example of how small contracting organisations can receive guidance and support is Region Västra Götaland’s “Green list” for furniture, textiles and lighting. This enables the contracting organisation to automatically make a sustainable choice without that choice being any more expensive.

Myth: Small and medium-sized enterprises are excluded from procurements if the authority sets environmental or social criteria.

Fact: Not true! On the contrary, more stringent environmental or social criteria can give a competitive advantage to many small and medium-sized enterprises, which often look positively on this type of criteria. Smaller actors are often active in fewer markets and can have a more niche offering, which means they can find it easier to meet environmental criteria in procurements.

Myth: There is a lack of goods and services with third-party certification.

Fact: A chicken and egg situation. Greater demand for third-party certifications increases the incentive for manufacturers and suppliers to improve environmental and social aspects of their business, and for them to obtain third-party certification for their goods and services in order to meet the market’s wishes. The result is more certified products to choose from.

A large selection of third-party certified goods and services are available within diverse categories of products and services: KRAV-certified organic food, MSC-certified fish, train travel and insurance policies certified as a Good Environmental Choice, IT products certified under TCO Certified, Nordic Ecolabelled hotels, paints carrying the EU Ecolabel and a host of other examples. Read more in the comparison of third-party certifications for environmental and social sustainability in this report.

In the area of textiles, CottoVer from Hefa AB offers workwear and promotional clothing that has both Nordic Ecolabel and GOTS certification.

#Cottover

CottoVer is a clothing brand that challenges the industry to raise the bar in applying sustainability criteria to clothing and textiles. In addition to selling garments made from organic and sustainable materials, CottoVer has tough environmental criteria for every stage of production. In order to verify the criteria and help customers make the right choices, CottoVer uses well-known third-party certifications such as the Nordic Ecolabel, Fairtrade and GOTS.

5.2. Obstacles to sustainable procurement

Lack of knowledge, leadership and desire to set sustainability criteria

The general problem in driving green public procurement is, as mentioned above, the frequent lack of knowledge about which environmental criteria are relevant, which requirements can be set and on what terms this can be done. This is due largely to a shortage of resources for investigation and of competence among contracting authorities, but also concern over the risk of legal challenges. If, in addition, the desire to prioritise sustainable public procurement is lacking among political decision-makers, as we see in so many cases, it becomes difficult for contracting authorities to overcome the problems. There is also currently a lack of opportunity to conduct a dialogue with suppliers, in order to establish which criteria would be most relevant and effective. Similarly, there is a poor statistical basis on which to operate, which means that contracting authorities have little opportunity to consult results from previous cases. Complex environmental issues are another area where knowledge is lacking, and this includes how to handle the existence of environmentally hazardous substances in various goods, particularly in globalised supply chains, where setting criteria across the globe can be complex.

However, some actors in the public procurement world are leading the way in setting sustainability criteria, and there is considerable interest in their work. One example that Lennart Bondeson at the Municipality of Örebro highlights is the municipality's procurement of investment services for over SEK 2 billion of pension funds. Alongside the procurement process, Örebro introduced a new policy requiring fossil-free investment funds, and then issued this as a criterion for the market, with very good results. Another positive example is that a number of municipalities have decided to tackle the problem of environmental hazards in preschools, and they have taken various effective measures, not least through public procurement.

Unclear regulations

Lack of clarity in current legislation is mentioned again and again as one of the greatest obstacles to setting criteria for environmental and social factors. Of the procurements governed by the directives, 12% received legal challenges in 2013, and when it comes to clothing, the figure was even higher at 17%. This clearly shows the uncertain climate that prevails, from the perspective of both the suppliers and the authorities. As mentioned, court practices are also contradictory, with rulings in many court cases varying, despite essentially tackling similar legal issues.

Weaknesses in the legislation

At the heart of the public procurement legislation lies a trading paradigm whereby the market is subject to competition with a view to procuring at as low a cost as possible, based on the principles of non-discrimination, equal treatment, transparency, proportionality and mutual recognition.

There are good reasons for these principles; they encourage efficient use of public funds, promote the EU as a single market and combat nepotism. In theory, it is perhaps also reasonable to assert that good environmental performance – based on the environmental policy cornerstones of the Treaties of the European Union – and strong social protection are by definition not incompatible with these underlying principles. However, things are not quite as simple in practice.

The first problem is having the option of using lowest price as the only grounds for assessing a tender. It is difficult, even in theory, to contrive a situation where environmental considerations are irrelevant, although naturally their importance varies from one situation to another. The main problem, however, is that a structure based on "lowest price" removes any compulsion to consider protection, even when there is major and obvious need for environmental or social criteria to be imposed. At least in the case of environmental protection, it is therefore difficult to see how this does not directly breach article 11 of the Treaty on the Functioning of the European Union, which requires that environmental protection requirements are always integrated into all areas of policy and into the implementation of legislation. The same is true with regard to the EU Treaty's call to maintain a high level of environmental protection requirements, in line with the principle of promoting sustainable development.

Against this background, “lowest price” needs to be entirely removed as an assessment criterion. Instead, a binding rule should be introduced that sustainable parameters must be taken into consideration. Criteria for this would then need to be described in the regulatory framework and be based on the environmental regulations in the Treaties of the European Union, which take a broad approach to sustainable development. Until such a system has been enshrined in secondary law in the EU, mandatory requirements should at least be introduced into Swedish legislation – in a weaker form, something similar can already be said to apply to national authorities.

Another problem is that “most economically advantageous tender” is also a flawed concept. The focus, at least in practice, lies on the cost for the contracting authority, rather than for the whole of society, which doesn’t support the objective of sustainable development. The term “economically” also gives the wrong signal, since it brings to mind thoughts of monetary value, which is also the basis for the analysis of life cycle costs in the new directives. It is true that certain environmental and social aspects can be monetised, but this is rarely done and in practice it is hard to achieve. And in a case such as biodiversity, it may be practically impossible to conduct such valuations. Although the Court of Justice of the European Union has been clear that it is possible to take a broader view, there is a distinct problem with the legislation having such a narrow focus.

It would therefore be better to have a system whereby “highest value” or simply “most advantageous tender” is used in legislation. Requirements that costs must be monetised in order to count also need removing. This does not, of course, mean that cost is an unimportant parameter, but that this indicator could be more easily related to others.

6. Ways forward

Based on the new EU Directives, in this chapter we propose some possible solutions and new opportunities for social and environmental responsibility in public procurement.

Environmental and social considerations in public procurement have grown from generally non-existent to middling. Despite good intentions on many fronts – Sweden has a number of authorities with high ambitions that have shown leadership, created best practice and pushed the implementation of the legislation in a sustainable direction – ambitions have generally been modest. There is also great uncertainty about what is and is not permitted.

Initially, the legislation in the field provided for almost no environmental protection whatsoever. In the next phase it was considered possible, under particular circumstances, to formulate certain environmental criteria, but the risk of an adverse ruling in the courts meant that many contracting authorities shied away from that option. A few years ago, the options were somewhat improved and the aforementioned “should” rule was instituted in Sweden, but even in that case there are clarity issues and this rule is generally seen as something of a legal oddity.

Now a new EU Directive is being introduced. This will lead to certain improvements in the situation that might be seen as progress, but far from exceptional, despite sustainable public procurement having been discussed for many years. As yet, there are still no criteria requiring that environmental or social protection must be taken into account, even where it is clearly justified. A great deal therefore remains to be done before public funds are used for the public good, in terms of sustainable development.

6.1. Better application and clarification of legislation

Clearer legislation that is interpreted in a more consistent way than is currently the case would give contracting authorities greater freedom to set the criteria they should be setting. Getting to this point requires a broad set of measures. The legislative proposals put forward in Sweden are a step in the right direction, since they allow greater opportunities for dialogue and negotiation with suppliers, and a greater focus on applying a holistic and life cycle perspective when considering costs. However, the legislation still needs clarification on several points, especially with regard to the balance between the trade principles and the environmental provisions included in the regulatory framework. Good practice also depends on more consistent interpretation of the legislation.

The fundamentals of the legislation need to be reviewed. It is important to entirely remove the option of procurement at the “lowest price”, while the concept of “most economically advantageous tender” needs to be replaced with “highest value” or “most advantageous tender”. The requirement that costs must be monetised in order to be counted must also be removed.

Finally, it is important to legislate so that all contracting authorities “must” take account of environmental and social factors in public procurement. In the same spirit, there should also be a move towards public procurement taking place within the top quartile, i.e. the quarter of goods and services that have the best environmental and social performance. Such top quartile procurement could really help to turn sustainable public procurement from rhetoric into practice.

Leadership and greater legal and commercial competence

The criticism levelled at the public procurement legislation – that it is difficult, time-consuming and unclear – come partially from contracting authorities that feel uncertain about how the rules should be applied. This generally leads the contracting authorities to choose the safe option over the uncertain option, to the detriment of both sustainability and commercial sense. Greater legal and commercial competence on the part of the contracting authorities would contribute to more advantageous contractual terms, more stringent environmental criteria and fewer legal challenges. This also requires steady leadership. If more contracting authorities were to step forward and set tougher criteria, this would lead to a higher base level and bring about pressure to harmonise the criteria being set, the way they are set, and when and how they are followed up. Where some contracting authorities lead, others will follow. There are already good examples to be found – the first

Swedish municipalities to grasp the concept were Eskilstuna, Örebro, Malmö, Uppsala, Alvesta and Lund, who signed up to #ModUpp2020, an initiative aimed at modern public procurement that has been developed by a number of environmental and social certification bodies. But we need to see more authorities to act boldly, and lead the way. Sweden urgently needs a national public procurement strategy that clearly shows what societal objectives such procurement should contribute towards. This would provide the impetus to get everyone pulling in the same direction.

Opportunities for dialogue and negotiation

Many authorities procure a broad spectrum of goods and services for many different purposes. This places high demands on those responsible for developing procurement specifications and conducting the monitoring; they need to make sure they are setting the right criteria and expressing them in a comprehensible way. If the specification contains relevant or unclear criteria, this can lead to increased costs, challenges to the procurement or to the authority not receiving goods or services that meet their needs. Guidance and advice are crucial. In addition, a greater opportunity for negotiation in public procurement would make it easier for authorities to set the right criteria, including those of an environmental and social nature. The above-mentioned review by the Council on Legislation contains proposed changes to the negotiation procedure, with greater scope for negotiations under certain conditions. This is an option that needs to be put at the heart of any future work, and that demands active leadership in the drive for more sustainable public procurement.

“The lack of research into socially and environmentally responsible public procurement is, in terms of objective fulfilment and cost-effectiveness, problematic from a policy perspective.”

Public Procurement Inquiry

Harmonised criteria can lead to greater effects and lower costs

Suppliers currently have to deal with authorities that set varying environmental criteria, essentially with the same objectives but differing on the detail. If Swedish and Nordic contracting authorities could apply more harmonised criteria, this would be likely to reduce the costs for suppliers, as all they would have to do would be to meet the harmonised criteria, rather than each authority's separate criteria. This would also bring down costs for

contracting authorities that are able to make use of the harmonised criteria, instead of having to formulate their own. In this context, it is important for the authorities to ensure that experiences and examples of best practice are shared.

Holistic and life cycle perspective

The lack of a holistic and life cycle perspective within public procurement manifests itself in various ways, but tends to result in poor quality and higher prices. Examples of this include when authorities split procurements into investment and operations, or when goods and services are only procured when the need arises. By procuring package solutions and viewing purchases from a broader and more long-term perspective, the contracting authorities could achieve significantly better quality at a lower overall cost. Quality also encompasses environmental and social factors for example. Adopting a quantitative and qualitative life cycle perspective as regards goods and services, can provide a better picture of their impact on the environment and social conditions. There is also a great deal to be gained if this perspective guides the actual procurement process.

Improved statistical basis

Currently, many national contracting authorities lack the IT support to be able to conduct and follow up their purchasing activities. Considerable manual input is therefore required. The same is true for many municipalities, for whom producing underlying statistics on procurement would be a challenge. The lack of a good overview can cause problems – purchasing costs can end up higher than necessary, and the outcomes of environmental and social criteria can be difficult to monitor and improve. There is a need for better statistics and knowledge, particularly when it comes to environmental issues.

Importance of good monitoring

Follow-up of contracts is currently an area of weakness in the public sector, as made apparent by the quality issues in areas such as welfare. This underlines how important it is for the contracting authorities to develop monitoring strategies, for example through carefully considered incentives, different forms of remuneration and different options for extending contracts. To establish systematic and effective monitoring, it is crucial to clarify

how it will work in the initial specifications.

6.2. Third-party certifications – part of the solution

Third-party certifications with an environmental and social focus have a significant potential to improve and clarify criteria in public procurement. Using third-party certifications such as Nordic Ecolabelling, TCO Certified and Fairtrade, to name a few, can make things easier for both the contracting authorities and suppliers alike. Examples of their potential benefits are outlined below.

Useful throughout the entire procurement process

Some of our criteria are suitable for use as qualification criteria, since they require that the tendering organisations meet certain national or multinational environmental criteria, for example, or that they follow certain rules regarding labour law.

Other certification criteria are based on the properties of the product and are thus more suitable as mandatory criteria, specific contractual terms or award criteria. Examples of this may be energy efficiency or limiting the use of substances that are harmful to health and the environment.

In addition to forming the basis for the criteria set in the procurement, certifications can also be used as proof that the object of the procurement meets the criteria. A single third-party certification can thus show compliance with qualification, mandatory and award criteria. Any equivalent proof must, however, also be accepted by the authority.

An important factor to bear in mind when designing criteria based on third-party certifications is that most third-party certifications have a set of criteria that evaluates the products most preferable environmental and social properties from a life cycle perspective, and that they are used in its entirety. An important factor to bear in mind when setting criteria is that most third-party certifications have been developed so that the criteria and complement each other from a life cycle perspective. There is thus a great deal to be gained from using the whole set of criteria from the certification, rather than selecting individual criteria, for example from the Competition Authority's criteria wizard.

Easier monitoring

The responsibility for ensuring that the delivered goods or services meet the requirements of the certification, and thus those of the procurement, lies with the supplier. If problems arise during the contractual period, in the worst case the supplying company risks committing a breach of contract and losing its licence for the certification in question. The Environmental Management Council considered it unreasonable to demand more controls and monitoring than that from the contracting authority. Specifying in the procurement that supplied products or goods must meet the certification criteria or equivalent throughout the period of the contract thus makes monitoring considerably easier for the contracting authority.

Ensures that criteria meet requirements for transparency, scientific rigour and objectivity

The criteria for qualifying for certification are developed by the organisations that issue the certification licences. This means the principle of transparency, i.e. that the criteria in the document must be clearly defined, can be considered achieved from the outset when the criteria from a particular certification are used in a procurement process. Swedish legislation also requires that the set criteria must be based on scientific evidence which the environmental and social certification schemes that meet certification standards such as ISO 14024 or similar are considered to do. Under the new directives for public procurement, the requirement for scientific rigour is replaced with objectivity, which is also considered to be met by the certification schemes.

Many goods and services already meet the criteria

During procurement, it is important to ensure that the criteria set by an authority do not restrict the potential number of eligible products or services. This can easily be ensured by using a third-party certification. The issuing organisations usually publish which products and services and which suppliers currently meet their criteria. It is important that a contracting authority checks in advance that there is a sufficiently large range of the product or service in question that carries the desired certifications, or their equivalent. If not, there is a risk that the authority will not receive any tenders, or too few tenders, which will lead to insufficient competition.

7. Conclusions

- In Sweden, the award criterion “lowest price” dominates in public procurement, which does not always favour what the general public values most highly. Repeated opinion polls have shown that environmental problems concern the public more than public finances.
- Swedish private and public consumption of goods and services is having an unsustainable effect on people and the environment, both nationally and globally. The Swedish market for public procurement is worth around SEK 600 billion a year, but unfortunately the potential to set procurement criteria that promote sustainable development is unexploited.
- In global terms, the EU’s regulation on chemicals, REACH, is an ambitious means of dealing with harmful industrial chemicals. Nevertheless, surveys repeatedly show that REACH has its shortcomings and takes too long to apply. In order to limit harmful chemicals in products, public procurement should therefore be used to set criteria that go further than the legislation.
- There are currently major opportunities to set criteria concerning environmental and social responsibility. To encourage more contracting authorities to set sustainability criteria in practice, there needs to be clearer political leadership that takes a stance and lobbies for mandatory sustainability criteria, where a possibility is switched to an obligation.
- It is important that leading elected officials take responsibility for establishing cross-party alliances, in order to ensure the long-term success of public procurement work.
- There are four types of problems that make sustainable procurement more difficult: lack of knowledge, communication barriers, concern over legal disputes and perceived restrictions on the scope to set criteria.
- The lack of knowledge often concerns which criteria are relevant, which requirements are allowed to be set and on what terms this can be done. Environmental criteria, for example, are often complex, particularly from a life cycle perspective, not least on the issue of how to handle the occurrence of environmental toxins in certain products, particularly in globalised supply chains.
- Third-party certifications are resource-efficient verification tools for the contracting authorities to ensure that the set sustainability criteria are relevant and that the criteria are followed up.
- By using the latest version of a sustainability certification, it is now possible to set social and environmental demands that tackle challenges from a sustainability perspective throughout the product’s entire life cycle. Increased demand for goods and services that meet sustainability criteria also provides an incentive for tenderers to continuously improve their products and the manufacturing process.
- The new EU directive on public procurement sends a clear signal to municipalities, county councils and national authorities that they should use environmental and social criteria as an important tool in achieving social objectives such as reducing environmental impact and combating poverty.
- The Swedish Public Procurement Act should therefore promote third-party certifications, exactly as set out in the new EU directive on public procurement.
- Contracting authorities can choose third-party certified goods and services as a means of ensuring efficient and sustainable use of taxpayers’ money. Third-party certification is based on an established process for developing sustainability criteria and for following up those criteria.