

GLOBAL INFORMATION SOCIETY WATCH 2010

Focus on ICTs and environmental sustainability



ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS (APC)
AND HUMANIST INSTITUTE FOR COOPERATION WITH DEVELOPING COUNTRIES (HIVOS)

Global Information Society Watch

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Introduction

Sweden is a country where public procurement legislation is strong – as in the rest of the European Union (EU) – and relatively well followed. Procurement procedures are regulated in detail in the Public Procurement Act.

Swedish authorities constitute a large part of the market for information and communications technology (ICT) goods and services,¹ which means that environmental requirements from these authorities could be a good way of getting momentum in making these goods and services more environmentally friendly.

However, the authorities face certain problems when trying to include environmental factors as criteria in their public tenders.² The Public Procurement Act regulates the procurement process in detail, and any breach against any of the sections may lead to the procurement being challenged in court, with the risk of having to redo a tender process. There have been many cases³ where procurement contracts have been successfully challenged because the public tender included environmental criteria which were in breach of the public procurement legislation.

Policy and legislative context

The main legislation affecting this issue is the Public Procurement Act, which derives from EC directives that effectively harmonise public procurement processes within the EU. National acts in the EU, including the Swedish act, strictly conform to the directives, and prejudicial cases from the European Court of Justice are applicable in Sweden, even if they derive from other member states.

The authorities must follow the procedures set out in the Act during the whole procurement process. As the proceedings must be clearly documented and these documents become publicly available immediately after the winner is chosen, it is relatively easy for a losing company to discover if there are any faults made by the public authority during the proceedings. If any faults are found, losing companies have a high chance of successfully challenging the procurement. The process would then have to be corrected or redone entirely, depending on the type of fault made, which usually is very costly for the public authority, both economically and in terms of time. If the fault or breach is severe the authority may also suffer from loss of goodwill.

Is there room for greener ICTs within the legal framework of public procurement?

A public authority's procurement process starts with a public announcement of the procurement, which opens the way for any company to submit a tender for the service or goods in question. Normally the authorities publish a public tender which specifies the service or goods that are procured through a large number of criteria, both referring to the company and referring to the procured service or goods. The criteria on the services or goods can roughly be divided into two categories: mandatory criteria (or qualifiers) and evaluation or award criteria. All criteria have to comply with the four general EC principles of non-discrimination, equal treatment, transparency and proportionality.

The competing companies' tenders normally follow the set criteria in the public tender very thoroughly and contain no items of expenditure that do not put the company or its tender in a better opportunity of winning the procurement. This means that environmentally friendly features generally are not included if there are no specific environmental criteria in the public tender, as environmentally friendly features often imply a higher initial cost. As a result, public authorities need to include specific environmental criteria to be able to procure environmentally friendly services and goods.

For example, an authority that would like to procure environmentally friendly computers could set up a mandatory criterion of power consumption less than a certain level of efficacy; tenders including computers with a higher energy consumption than the required level will then not be considered. The power consumption could also be included as an evaluation criterion; for example, the tender price will be multiplied by the efficacy in watts and the lowest result will win the procurement.

In theory it is relatively simple; however, it is not at all certain that these criteria meet the general principles of procurement. As there may be several ways of measuring the efficacy (including or excluding stand-by mode, wireless-off mode, etc.) these requirements may not be deemed transparent for the tendering companies – one company might tune its computer for the lowest overall energy efficiency and may lose the procurement because the authority only measures the energy consumption in working mode. The requirements could also be deemed as not fulfilling the principles of proportion and/or equal treatment since measuring work mode energy consumption will not necessarily lead to the most environmentally friendly computers being procured.

As many procurement contracts are very valuable for the winning company, only a small chance of winning would

1 Ewa Thorslund, Swedish IT and Telecom Industries, interview via e-mail.

2 DIGITALEUROPE (2010) *EU "Green" Public Procurement*. www.digitaleurope.org/fileadmin/user_upload/document/Position_on_green_pu_1268933193.pdf

3 For example, case 3627-06 of the Stockholm Administrative Court of Appeal and European Court of Justice C-448/01.

be enough for a losing company to challenge the procurement proceedings in court. So to include such criteria, there is a need for a level of standardisation that makes environmental criteria fulfil the general principles and become lawful according to the public procurement legislation. These standards are often represented by different “eco labels”, such as the EU Ecolabel (known in Sweden as the EU-Blomman) and the KRAV, Energy Star and TCO-95 labels, among others. There are a number of eco labels that all use their own way of measuring certain environmentally related factors, which to some extent solve the problem of transparency mentioned above by making the process of measuring as well as drafting the tender document easier.

However, these eco labels must be compliant with both public procurement legislation and the general principles. In 1999 a Swedish case ruled that the EC directives should be interpreted as not permitting the requirement of an eco label in tenders and thereby excluding all products without the eco label regardless of the product’s actual environmental features. To comply with the principle, a criterion has to be phrased as requiring eco-labelled products as *well as any product that could qualify for the eco label in question*. If this last addition to the criterion is not made, the criterion does not comply with the principle of equal treatment. Furthermore, the court ruled that to comply with the principle of proportion the environmental requirements of an eco label must be based entirely on scientific information proving that the environment benefits from the requirement.

The outcome of the ruling was that public authorities could use eco labels as long as products with equal features as the eco-labelled products were accepted. As many eco labels stand for well-known and accepted environmental requirements, the use of eco labels was still a convenient mechanism on which to base procurement requirements. However, the ruling also made it clear that even if an eco label and its requirements are widely known and well accepted within the industry, it is not necessarily compliant with procurement law because there is a lack of scientific evidence proving that the environment benefits from the requirement. The authority must make its own assessment whether the requirement has enough scientific basis to serve as a procurement requirement, which creates uncertainty for the authorities.

This uncertainty, of whether an eco label should be used in public procurement, is a problem for the public authorities as well as for the industry and the organisations behind the eco labels. The public authorities at least have to specifically assess whether an eco label can be used without risking the success of the procurement.

Despite problems with internal public authority bureaucracy, it is, according to experts,⁴ far from impossible to include environmental criteria using eco labels. This

is also confirmed by the EC directive,⁵ where Article 23, subject to certain formulations of the requirements, allows for environmental criteria to be used. But it may be difficult to know how to include them in accordance with the Public Procurement Act. The risk of the procurement procedures being challenged seems to make officials working with public procurement reluctant to include these criteria, and environmental concerns are not assigned priority.

That the procurement of ICTs could be greener seems not to be questioned. However, the solution to the problem might not be that obvious. As outlined above, there seem to be a number of reasons for the problem which could prove to be hurdles to improving the situation. The procurement legislation is a problem, partly because it is not very flexible, but even more so because it is cumbersome for officials and the procurement authorities to deal with – there is a general lack of knowledge of how to design procurements within the existing legislation.

What is discussed less is the role of the ICT industry in this matter. The industry plays a very important role in developing new standards for products and services, as well as standards on environmentally friendly technical specifications, which could be used in public procurements.

New trends

In the last few years there has been a high focus on green public procurement generally in Europe: the concept has even been labelled with its own abbreviation, “GPP”. Many of the EU’s different departments have acted to make procurement greener and a GPP help desk was set up in January this year. The focus of most of these initiatives seems to be on the authorities – to make them focus more on environment when procuring goods and services. Toolkits as well as guidelines for officials working with public procurement are now available for free on both European and Swedish web pages. However, it seems as if almost all of the focus on GPP, both from European and Swedish authorities, is only on the authorities and not on the other actors involved. The ICT industry is often not highlighted as an important stakeholder, and there seems to be no comprehensive study with a multi-stakeholder approach.

What we currently see is that there are discussions on how to include new factors – but when should they be deemed as acceptable in public procurements? The ICT industry actors are discussing how they could develop their own standards. One question is then: Will these standards be set at a good level or just on a level that is suitable for the industry?

5 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0018:EN:HTML

4 DIGITALEUROPE (2010) op. cit.

Action steps

As has been described above, civil society plays a very minor role in the development of greener public procurement of ICTs. There certainly is momentum in making public procurement in general greener, including procurement of ICTs. In a process like this I believe it is very important that a multi-stakeholder approach be set up; it seems right now that this process lacks proper participation from civil society. Civil society needs to make its voice heard in the forums where discussions on green procurement are taking place. Currently a lot of work is being conducted at the EU level as well as in Swedish government agencies. It is possible to interact in these processes as a consultative body.

I believe civil society should focus on:

- Approaching Swedish government bodies as well as EU bodies and demanding consultative status.
- Highlighting areas which currently need more scientific research to be eligible as public procurement requirements.
- Highlighting that not only specific technical features should be included as requirements in tender documents, but that the public tender should have a full environmental focus, including life cycle analysis requirements and/or ecological footprint analyses. ■

GLOBAL INFORMATION SOCIETY WATCH 2010 investigates the impact that information and communications technologies (ICTs) have on the environment – both good and bad.

Written from a civil society perspective, **GISWatch 2010** covers some 50 countries and six regions, with the key issues of ICTs and environmental sustainability, including climate change response and electronic waste (e-waste), explored in seven expert thematic reports. It also contains an institutional overview and a consideration of green indicators, as well as a mapping section offering a comparative analysis of “green” media spheres on the web.

While supporting the positive role that technology can play in sustaining the environment, many of these reports challenge the perception that ICTs will automatically be a panacea for critical issues such as climate change – and argue that for technology to really benefit everyone, consumption and production patterns have to change. In order to build a sustainable future, it cannot be “business as usual”.

GISWatch 2010 is a rallying cry to electronics producers and consumers, policy makers and development organisations to pay urgent attention to the sustainability of the environment. It spells out the impact that the production, consumption and disposal of computers, mobile phones and other technology are having on the earth’s natural resources, on political conflict and social rights, and the massive global carbon footprint produced.

GISWatch 2010 is the fourth in a series of yearly reports critically covering the state of the information society from the perspectives of civil society organisations across the world.

GISWatch is a joint initiative of the Association for Progressive Communications (APC) and the Humanist Institute for Cooperation with Developing Countries (Hivos).

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