Going Green

A Study of Public Procurement Regulation

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Preface

Having never realised the vast array of interesting facets that combined make up the phenomenon of public procurement, I took on my new task as a PhD candidate within the project of *Procurement for sustainability in construction: the development of local government practices* with some vacillation.

It was not long, however, before I realised that my European and international background would be of great use to me when studying this societal and legal phenomenon. I have an LLB (European) from Strathclyde University, Glasgow, Scotland in 2002, where my focus was on *environmental law*, as well as an LLM in international trade and environmental law from McGill University, Montréal, Canada in 2004. Adding to my national competence, I also have a Master of Environmental Strategy, from Lund University, 2004. This educational background has made my focus on environmental sustainability within this research project rather obvious. The setting of Sociology of Law has enabled me to more freely explore the regulatory context of green public procurement and to learn about the societal issues related to the legal framework for green public procurement.

The PhD process has been highly rewarding and interesting and not as lonely as it is sometimes portrayed. It has allowed me to put my organising skills to the test and provided me with the ability to be both creative and structured in my work. The physical workplace of the Sociology of Law unit at Lund University has provided an interesting and encouraging context for the development of this compilation thesis.

Lina Wedin
Beddingestrand, August, 2009

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This compilation thesis has been written under the auspices of a project entitled: *Procurement for sustainability in construction: the development of local government practices*, consequently my primary acknowledgements go to the Research Council for Environment, Agricultural Sciences and Spatial Planning (FORMAS). Second, I would like to express my sincerest gratitude to my supervisor Professor Karsten Åström for avid support throughout the last 5 years and for co-authorship, as well as to my other supervisor Matthias Baier who aided in finding the right direction. I would also like to thank Professor Jan Bröchner, Anna Kadefors and Fredrik Waara from Chalmers University of Technology who were part of the project from the outset, particularly Jan and Fredrik with whom I have co-authored two of the articles. I would also like to thank Mikael Rask Madsen who contributed by providing a thorough and most helpful critique of my work as discussant at the final seminar. Furthermore, I would like to thank my office roommate Susanna Johansson for moral support, as well as Katarina Pelin for support half-way through the PhD process, Anders Vedin for interesting conversations and Ingemar Svensson for a valuable private sector perspective.

Thank you also to everyone in my big family for support in my everyday life throughout this process, particularly my mother and my twin sister. Lastly, I owe my sincerest gratitude to Martin and my daughter Astrid for representing a source of warmth and happiness everyday, as well as my unborn baby (Harry/Siri) for providing motivation in the eleventh hour.

Lina Wedin
Beddingestrand, August 2009

Abstract

In Sociology of Law the discussions about regulation have been extensive and the issue of public procurement is gaining momentum as its true financial value and potential to impact markets are realised. This thesis aims to look at the regulation of green public procurement (GPP) by analysing findings from an in-depth case study in a Swedish context, using interviews with procurement officers as well as analyses of court cases. The thesis highlights relevant findings to discuss the regulatory context of GPP in terms of norms and to analyse it in terms of legal rationalities.

Empirical results are presented in the appended articles illustrating some of the elements of public procurement and GPP. A model for studying and analysing the findings is developed using norms and legal rationalities and is subsequently applied using empirical findings presented in the articles. The final chapter highlights the findings of what structure the regulation takes in order to cope with the infusion of green into public procurement – a mixed system of legal rationalities allowing for the generation of necessary knowledge to compensate for cognitive limitations.

Keywords: Sociology of Law, Regulation, Legal Rationality, Norms, Green Public Procurement.

Appended Papers

This thesis is based on a compilation of articles written between 2005 and 2008, and will be introduced in the following order:

I. Carlsson, L. and Åström, K., 2006. "Public Procurement as a Tool in the Attainment of Sustainable Development – Analysing Normative Structures Influencing a Municipal Public Procurement Official" In Frostell, B. (ed) 2006. *Science for Sustainable Development – Starting Points and Critical Reflections*, VHU, Uppsala, pp. 76-84.

II. Carlsson, L. and Waara, F., 2006. "Environmental Concerns in Swedish Local Government Procurement" In Piga, G. and Thai, K. V. (eds.) 2006. *Advancing Public Procurement: Practices, Innovation and Knowledge-Sharing*, Boca Raton, FL: PrAcademics Press, pp. 239-256.

III. Bröchner, J., Carlsson, L. and Waara, F., 2007. "Invoking Public Procurement Rules: Construction-Related Court Cases in Sweden, 2003-2006." Submitted manuscript

IV. Carlsson, L. and Åström, K., 2008. "Court Decisions in Public Procurement: Delineating the Grey Zone" *Scandinavian Studies in Law*, Vol. 53, pp. 407-420.

V. Carlsson, L. 2009. "Public Spending and Public Participation – How is Participation Effectuated in Public Procurement" In Baier, M. (ed) 2009. *Participative aspects of law – a socio-legal perspective*. Lund studies in sociology of law 31, pp. 45-58.

Abbreviations

CPV – Common Procurement Vocabulary
EC – European Community
ECJ – European Court of Justice
EEC – European Economic Community
EKU – Ekologisk hållbar Upphandling (Environmentally sustainable Procurement)
EMS – Environmental Management System
GDP – Gross Domestic Product
GPP – Green Public Procurement
IPP – Integrated Product Policy
LOU – Lag om Offentlig Upphandling (Swedish Public Procurements Act)
NOU – Nämnden för Offentlig Upphandling (Swedish National Board for Public Procurement)
OECD – Organisation for Economic Co-operation and Development
RFT – Request for Tender
TED – Tenders Electronic Daily
WSSD – World Summit on Sustainable Development
WTO – World Trade Organisation

Contents

1. Introduction

Pari passu with globalization, there has been a realisation that public procurement constitutes an important activity for governments today, evident not least within international and regional trade agreements.[1] Public procurement is an economic activity that ensures that society operates well in terms of the provision of public services. It entails acquiring the right item at the right time, and at the right price, to support government actions.[2] More generally, it concerns the relationship between government and other economic actors within the market.

An important reason why public procurement has become a focus area in terms of research and politics is the fact that public expenditure within the market is considerable, at both international, European and national levels. Internationally, expenditure amounts to between 8 and 25 per cent of GDP on goods and services,[3] whereas the figure is approximately 15 per cent of GDP in Europe[4] and between 15 and 18 per cent of GDP in Sweden.[5] Another important factor, which brings public procurement matters into the media headlines, is the fact that the money spent is public money, taxpayers' money. In other words, the investments made through this public expenditure are of great relevance to the general public.

Besides being an economic activity, public procurement is also of great regulatory interest. The regulation of public procurement has become increasingly significant globally and domestically, particularly in light of developments of using public procurement as a policy tool. One reason for this is the concern that this use of public procurement covertly is a way of hiding protectionist or corrupt

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[1] International guidelines and agreements include the Government Procurement Agreement of the World Trade Organisation was established in 1994, the World Bank Procurement and Consultancy guidelines, and the United Nations' 1996 UNCITRAL Model Law on Procurement of Goods, Construction and Services. Examples of regional agreements include procurement directives within the European Union, the Asia-Pacific Economic Co-operation Forum and the North American Free Trade Agreement. Form more information see e.g.: Thai and Grimm, 2000.

[2] OECD, (2005), *Good Governance for Public Procurement: Linking Islands of Integrity*, GOV/PGC/ETH(2005)2, at p.5

[3] Walker and Brammer, 2009, at p. 128.

[4] Arrowsmith, 1995, at p. 236.

[5] For a discussion on the public procurement expenditure level in Sweden see Bergman, 2008.

behaviour.[6] Although this use as a policy tool is not new (public procurement has e.g. been used to promote industrial development in the past),[7] recently, a new policy area has been targeted, stirring up a debate.

1.1. Practical and Theoretical Relevance

There is a call for new environmental policy instruments that integrate social, economic and environmental policy objectives and not merely instruments that tighten emissions standards each year.[8] It has been identified that green public procurement (GPP) – eco-procurement or green purchasing – is potentially a tool for driving innovation and in that way contribute toward sustainable development, as well as a tool compensating for (in economic terms) market failures in the form of negative *externalities*, including environmental pollution.[9]

In essence, green purchasing initially involves attempts to avoid unnecessary purchases, e.g. by reassessing the need for the product, but also to seek other solutions if the need still exists. In the latter instance, greener variants are sought to replace the conventional option, yet provide similar (or better) quality and function.[10] As GPP has become more and more accepted, discussions about both its efficiency and effectiveness have arisen.[11] How is GPP used in order to maintain efficient purchases and real environmental benefits? In order to identify such paths, the EU has called for national action plans that are to identify each country's approach to GPP. In Sweden, the national action plan for GPP has identified the construction sector as one of the key areas where it has been found that a GPP approach would be most efficient and effective. The construction sector is thus important in terms of GPP initiatives, which has been recognised prior to this.[12] The construction sector is important in that it constitutes a large share of the public budget, thus how that money is used is of great public interest, as well as the fact that there is a lot of potential for positive environmental effects e.g. in terms of

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[6] For more details on corruption, see Sohail and Cavill, 2008, particularly highlighting the construction sector as particularly prone to corruption.

[7] Daintith, 1979, Arrowsmith, 1995, at p. 235, Amodu, 2008, at p.189; see also McCrudden, 2007, for a recent account of the history of the use of procurement as a policy tool, or for "procurement linkages" in his own terms.

[8] Erdmenger, 2003, at p.10.

[9] Trepte, 2004, at pp. 9-10.

[10] Erdmenger, 2003, at p.11.

[11] McCrudden clarifies the distinction by stating that effectiveness "concerns the extent to which stated goals are achieved", whereas efficiency concerns "how cost-effectively" the goals are achieved". McCrudden, 1999, at p. 39.

[12] See e.g. Faith-Ell, 2005.

choices between energy sources for heating and lighting, use of materials and transport of materials.

Much of the research point toward rather large potential cost-savings and contributions toward environmental sustainability generally through GPP, e.g. through the reduction of waste, emissions and pollutants by undertaking environmental procurement,[13] as well as ensuring compliance with regulations, pleasing consumers and improving competitiveness.[14] However, to accomplish this, other research emphasizes the need for further development of procurement models through e.g. systematic information, training of clients and contractors, and follow-up of requirements.[15] The integration of environmental considerations into decision making processes and in particular the regulation of public procurement has become the topic of much debate over the past decade,[16] not least within the European Union.[17] The discussion concerns to some extent the use of public procurement as a complementary regulatory tool to existing legal mechanisms – to aid in their enforcement – or as a means of going beyond what is required by law.[18]

It is difficult to establish exactly what brought about the rise of GPP – whether it was the business sector that called for recognition by the public sector of their environmental initiatives or the public sector that decided to require environmental consideration by the business sector. Perhaps it was in reaction to the legal changes that public procurement authorities decided to integrate environmental considerations in the public procurement process, and conceivably the legislator reacted to the increased public awareness of environmental issues? Furthermore, did the change first take place at an international, European or national level? These questions may be impossible to answer, as change has occurred at various levels and it is beyond the scope of this thesis to attempt at an answer. What is identifiable, however, is the form GPP takes in terms of regulation and its effect in practice. Although, as stated above, the use of public procurement

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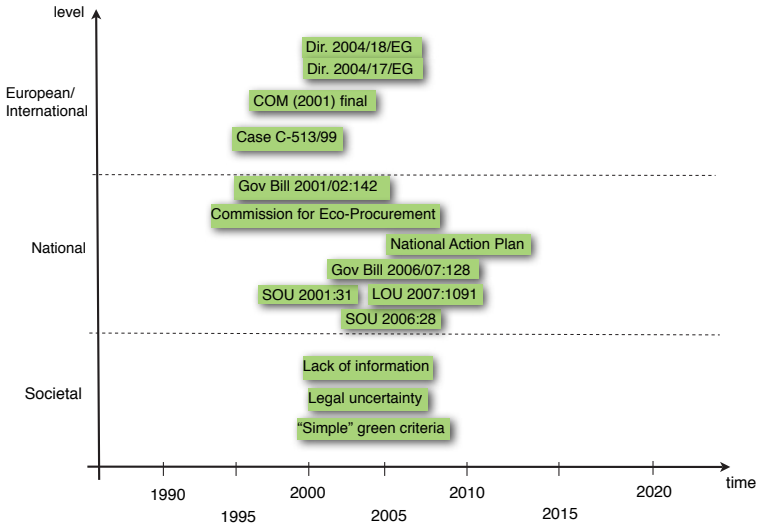
[13] Love, 2005, at p. 39.
[14] Mebratu, 2001, at p.12.
[15] Faith-Ell, 2005, at p.62.
[16] For a current and detailed discussion about e.g. GPP in an EC Law context, see Arrowsmith, S. and Kunzlik, P. (Eds), 2009. *Social and Environmental Policies in EC Procurement Law*, Cambridge University Press, 550pp.
[17] Article 6 of the EC Treaty (through an amendment by the Treaty of Amsterdam in 1997) obliges the community legislator to take environmental considerations into account in other areas of Community action, which was also referred to in the preparatory document to the new legislation pertaining to public procurement in Sweden (prop. 2006/07:128, at p. 157) regarding the possibility of a procuring authority to integrate environmental considerations in the public procurement process. See e.g. Lenschow, 2002.
[18] Arrowsmith, 1995, at p. 242.

as a tool to further socio-economic objectives is far from a new phenomenon,[19] bringing in particular environmental objectives into the regulatory mix has become the subject of much political and to some extent academic discussion throughout the last decades. In order to clarify the regulatory advances with regard to green public procurement, a timeline was constructed. The chart illustrates prominent legal documents and events that have taken place with regard to GPP throughout the past decade.



In sociology of law discourse the issue of law and social change has been a topical issue. What form does law take in order to cope with or manage the social changes? This issue becomes interesting within the regulation of public procurement, particularly in light of the societal change that has taken place through the environmental movement and the rise of the sustainable development project, which has brought about the introduction of environmental considerations in public procurement legal frameworks. In order to regulate the public procurement activity in Sweden, a vast array of paragraphs exist in the legislation.[20]

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[19] See McCrudden, 2007, for a historic overview with policies with socio-economic goals dating back to the nineteenth century.

[20] 177 no of paragraphs exist in the Swedish Public Procurements Act of 2008 on public procurement, SFS 2007:1091.

Different forms of regulation can be used to achieve different policy objectives. In terms of public procurement, it has been argued that the establishment of the internal market in terms of the EC context has come to be challenged through the integration of environmental considerations in the regulatory context. It is clear that green public procurement exists both in principle and in practice and proponents of the use of law as an instrument might argue that law should be used to encourage sustainability activities within public authorities, while opponents (or at least sceptics) might argue that such use is not within the judicial realm. Rather, some might argue, the purpose of regulation is to resist such changing winds and ensure the rule of law and traditional values. Irrespectively, the appropriate question for the purposes of this thesis is what structure the regulation takes in order to cope with the introduction of "secondary objectives",[21] "linkages"[22] or environmental considerations into a structure where the "primary objective" is economic and based on principles of economic efficiency.[23]

Public procurement has come to provide government authorities with purchasing power within the market (as participator in the market), while having the ability to regulate that market simultaneously (through its purchasing power). According to McCrudden, the implementation of policy has been distinguished by Daintith through the terms of "imperium", meaning the use of instruments involving the use, or threatened use, of force, (its regulatory function), and "dominium", meaning the use of instruments involving the use of wealth by the state, also referred to as "power of the purse",[24] "procurement powers",[25] or "regulation by contract".[26] By engaging in GPP, governments combine the three functions of government (previously distinguished) by "*participating* in the market but *regulating* it at the same time, by using its *purchasing* power to advance conceptions of social justice".[27] The government is participating in the market since public procurement involves purchases by a public body from the market (private economic entities) of goods, works and services.[28] Potentially, the government finds itself within a space that cannot be strictly identified as state or market. What does this mean in terms of public procurement regulation? What does the regulation of public procurement involve?

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[21] Trepte, 2004.
[22] McCrudden, 2007.
[23] Trepte, 2004, at p. 187.
[24] McCrudden, 2007, at p.2.
[25] Arrowsmith, 1995.
[26] Daintith, 1979, at p. 41.
[27] McCrudden, 2007, at p.3. Environmental values or policy goals can be included in the concept of socio-economic objectives of public procurement policy.
[28] Trepte, 2004, at p. 9.

It was stated above that the regulation of public procurement both involves imperium and dominium. GPP is essentially about dominium – using procurement powers to influence private actors towards the provision of environmentally preferable alternatives. The framework enabling this practice is manifested by acts of imperium – using instruments, in this case legislation, to regulate what procurement officers can and cannot use their procurement powers for. This thesis aims to investigate the regulation of the phenomenon of environmentally sustainable public procurement or GPP and identify its characteristics in terms of legal rationalities. In order to analyse the impacts of and for public procurement regulation, empirical material has been collected and presented to a large extent in the appended articles. These materials will thus be used throughout this compilation thesis in order to investigate the regulation of GPP.

The concept of regulation has been demonstrated within sociolegal research as being "part of the process of the social construction of fields of action", which "move beyond a state-market dichotomy by highlighting the importance of informational structures, levels of regulation, and national styles of regulation"[29]. Within sociolegal scholarship the concept of regulation has been discussed in terms of its hierarchical or command and control view of economic ordering, yet it has also been used in terms of being fragmented, dispersed and decentered and so as to include non-state forms of control.[30] The concept of *regulation* is used in various disciplines in more or less broad terms to study such issues as regulatory impact in terms of knowledge of regulations,[31] embeddedness of market participants,[32] or regulatory enforcement strategies.[33] Often it is used as a synonym to legislation or law, however, in sociology of law and sociolegal literature it has been recognised that the concept is more useful than that.

Regulation, for the purposes of this thesis is used within the parameters of this compilation thesis in a broad sense, not limited to a view of regulation as an emanation of the state and its "legal machinery", but can rather be represented by the idea of a "regulatory space" within which there is room for other regulatory mechanisms than command-and-control, such as e.g. "private legal orders" that "operate on the margins of formal institutions and formal legal frameworks".[34] Put another way, it is just as much about the working rules and practical criteria, as the

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[29] Larson, 2004, at p. 738.
[30] Williams, 2006, at pp. 210-211.
[31] Corneliussen, 2005.
[32] This entails studying how cognitive and cultural referents shape market participants' behaviour in pricing, etc. See Larson, 2004 and discussion on p. 739.
[33] Scholz, 1984.
[34] Williams, 2006. See also Eisner, 2004, at p.146, who recognises the shortcomings of an approach to regulation where the state and the market are dichotomised.

formal rules and formal evaluation criteria.[35] This opens up for a discussion throughout this thesis about not only the *law in books* but also about the *law in action*, where the law in action ministers to providing a more complete picture of what takes place within the entire *regulatory space* of green public procurement.

Within regulatory theory, vivid discussions about regulatory forms have taken place and particularly about the changes in regulatory forms over the past decades. Within the environmental regulatory arena different stages of regulation have been identified, where the first stage is represented by the "conventional government regulation" followed by the second stage of "substantial deregulation" in the 1970's and 1980's.[36] Although Gunningham and Grabosky argue that the deregulation stage was not that successful at that time due to mounting public opposition, the call for deregulation today comes from various directions.[37] This has lead to discussions within regulatory theory about modern regulatory forms, some elaborating further upon the regulation-deregulation divide, while others, more innovatively, explore new regulatory forms that go beyond that dichotomy. The regulation of public procurement has been the subject within this debate only to a limited extent, yet becomes particularly relevant and interesting in the wake of sustainable development and regulatory responses in terms of GPP, as this thesis highlights.

In order to analyse the regulation of sustainable public procurement and the response to this particular social change, a framework is needed. The framework is created within the parameters of this compilation thesis using the concept of *legal rationality* – used to define the form of legal procedure,[38] or as an analytical tool to examine how law organises itself in times of social change. Legal rationalities as ideal types are derived from Max Weber and two forms of legal rationality – formal and substantive – are introduced in relation to the two legal activities of lawmaking and lawfinding (once created).[39] In some of the sociolegal discourse, these forms of law or legal rationality have been argued to be insufficient in terms of describing modern day sociolegal phenomena. Some scholars have responded to this perceived shortcoming by attempting to elaborate on them. One of these is Teubner, who expands on these two legal rationalities and adds a third legal rationality: reflexive legal rationality.[40] However, it is important to remember that these theoretical constructions do not exist in their pure form in reality;[41] consequently they can

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[35] Montin, 1993, at p. 67.
[36] Gunningham and Grabosky, 1998, at pp.7-8.
[37] E.g. within environmental regulation (Gunningham and Grabosky, 1998) as well as more generally (Haines, 1997, at p.3)
[38] Sterling and Moore, 1987, at p. 73.
[39] Mann, 1980, at p.189.
[40] Teubner, 1983.
[41] Cotterrell, 1992, at pp. 150, 153.

exist in combined forms albeit with the dominance of one over another. These different forms of rationality will be elaborated on throughout this thesis. The legal rationalities have more or less explicitly been discussed in terms of different regulatory forms in the literature.[42] Cotterrell explicitly relates three different regulatory forms to the concept of legal rationality,[43] while others enumerate different regulatory forms without using the concept of legal rationality.

The analysis takes its origin in the concept of regulation and uses the concept of norms to study, and the legal rationality concept to explain, the findings of empirical studies from the public procurement sector and practice. The empirical findings have been presented in a number of articles on which this compilation thesis is based. The concept of norms and its relation to legal rules have come to the fore within sociology of law discourse, particularly at Lund University in Sweden. In the present thesis, the discussion about norms becomes useful in terms of how green has been infused into the public procurement context and how the legal norms pertaining to GPP relates to the empirical findings of GPP. In other words, I study the norms (legal and social) that operate in the regulation of public procurement. [44] This opens up for an analysis of the regulatory system by looking at the formalised legal norms (*law in books*), as well as other norms functioning within the relevant regulatory space (*law in action*). For example, different kinds of legal norms may be present in the context, both traditional legal norms (e.g. indicating the type of decision to expect in a given case) and other intervening legal norms that instead call for a reconciliation of contradictory interest.[45] Hydén refers to the former, traditional legal norms, as general guidance at the *primary level* of intervention, whereas the latter provides general guidance at a *secondary level* of intervention.[46] This division becomes relevant within the context of public procurement regulation, as it is the procurement officers (or civil service) that administer law; i.e. the legal problem is not resolved at the level of the legal system. Consequently, potential conflicts that arise as a result of the infusion of sustainability into the regulatory framework for public procurement are to be resolved by the procurement officers – at a secondary level of intervention. The implications of this, according to Hydén, is that the conflict is to be resolved based on factors other than "'pure' law"."[47] This issue will be returned to later on in this thesis.

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[42] See e.g. Orts, 1995, Mann, 1980, and Cotterrell, 1992.
[43] Cotterrell, 1992, at pp.161-166.
[44] For a detailed discussion on legal and social norms see: Hydén, H. and Svensson, M., 2008 "The Concept of Norms in Sociology of Law" *Scandinavian Studies in Law*, vol. 53, pp.15-32.
[45] Hydén, 1986, at p.135.
[46] Hydén, 1986, at p.135.
[47] Hydén, 1986, at p.135.

1.2. Purpose

The purpose of this summarising part of the compilation thesis is to describe the development of policy objectives within public procurement and analyse the legislation and regulatory framework in terms of both *law in books* (the written law) and *law in action* (its practical application and implications) using the appended articles to highlight the issues that are relevant in terms of the regulatory context. This, in turn, will be of essence in the analysis of what structure the regulation of green public procurement takes in terms of legal rationalities.

Given the complex context within which the regulation of public procurement takes place; what happens when new regulatory mechanisms are introduced in order to invite societal values traditionally not apposite and thus foreign to the system? What happens in terms of the regulatory framework in place – how is it adapted to the changing societal conditions – and its implications for practice – how is the regulatory framework effectuated and received?

The research question at the heart of this thesis is:
What form does law take in order to cope with or manage social *change?*

More concretely:

1. *How does the infusion of environmental considerations into the public procurement activity materialise in its regulation?*

2. *How can the regulation of green public procurement be explained using the concept of legal rationalities?*

In order to answer these questions, a wide-ranging case study of the regulation of public procurement in Sweden has been conducted based on various studies conducted throughout 2004-2008. This case study has lead to empirical findings discussed in a number of articles, which are part of this compilation thesis as appended papers.

1.3. Disposition of Thesis

The main body of text of the compilation thesis describes and analyses the findings presented in the different papers in order to explain the regulatory framework for green public procurement. The thesis starts out with an introduction (chapter 1) to the phenomenon and an account of the methodology involved including an initial overview of the contributions of appended articles (chapter 2). Subsequently, the theoretical framework for analysis is set up (chapter 3), followed by a discussion regarding the regulatory framework for green public procurement and its evolution

(chapter 4). Finally, chapter 5 analyses the findings from the perspective of legal rationalities and chapter 6 brings it all together and concludes the thesis with a discussion of the findings and highlights issues for future research.

2. Methodology

This chapter discusses the methods used throughout this study. It more specifically concerns the methods related to interviews and collection of material, as well as the analytical methods used in the evaluation of the gathered material. The chapter further considers my contribution to the larger research project on sustainable public procurement by way of this compilation thesis.

2.1. Background

Some of the methods set out in this paper relate to a research project that started in 2003 as a collaboration between Sociology of Law at Lund University and Service Management at Chalmers University of Technology in Gothenburg, where some research questions and methods were determined for the collection of some of the empirical data used in this thesis. The purpose of the project was to investigate how criteria related to environmental, social and economic sustainability are developed and used in models for awarding construction contracts. Some questions that were set out in terms of the project include: Which were the driving forces behind the development of the award criteria model? How is the model applied? How are 'soft' award criteria developed and interpreted? My contribution to the project is to provide a sociology of law approach to the issue of environmental sustainability in public procurement (i.e. more broadly than construction contracts only), an approach that will be described in this chapter.

2.2. Research Strategy

This doctoral thesis focuses on the infusion of environmental sustainability (green) values into the public procurement context, with the analysis being conducted from a sociology of law perspective. The research process has been explorative in that the studies carried out have been influenced by the empirical findings from interviews and subsequently from court cases. Likewise, the articles were inspired by the empirical findings and deal with issues that have arisen throughout the

research process. Other researchers have participated in the overarching project, albeit with an economic or management perspective on the issues at hand.[48] In light of my background in law and sociology of law, this thesis adds to their findings by providing a description of the regulatory framework for GPP, an investigation into the difference between the abstract legal norms (law in books) and practice (law in action), and an analysis of the regulatory framework for GPP in terms of legal rationalities. Furthermore, this adds to sociology of law research by providing an analysis of empirical material using a combination of norms and legal rationalities.

My research interest is the regulation of GPP and how the regulatory framework of public procurement deals with the infusion of environmental sustainability values into the traditionally economic reality of the public procurement context. Particularly how this infusion takes place with regard to the regulatory framework, legal regulation and implementation at the level of civil servants and domestic courts. This sociology of law study has required an approach additional to that of legal dogmatics, and has thus been complemented by the collection of empirical material relating to the experiences of the procurement officers regarding their professional context, particularly in terms of the integration of environmental considerations in their daily work. Consequently, legal dogmatics and the analysis of legal norms has not been sufficient in order to analyse the findings, rather, the concept of norms has been used to study the findings more broadly, to include both legal and social norms.

2.2.1. Analysing practice through interviews

It was decided at the outset of the project that semi-structured interviews were to be conducted to obtain a deeper knowledge of the empirical situation, not the least in light of the fact that the procurement process is a complex one. Firstly, it was decided that the interviews were to be conducted with procurement officers in Sweden, so as to get a Swedish perspective on these matters. Apart from practical reasons for this choice, Sweden was also chosen due to indications that interesting

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[48] See e.g. Waara, F and Bröchner, J., 2007. "Price and Nonprice Criteria for Contractor Selection", ASCE Journal of Construction Engineering and Management, vol. 138, no. 8, pp. 797-804; Kadefors, A., Björlingson, E. and Karlsson, A., 2007. "Procuring Service Innovations – Contracting Selection for Partnering Projects", International Journal for Project Management, vol. 25, no. 4, pp. 375-385; and Sporrong, J. and Bröchner, J. 2009. "Public Procurement Incentives for Sustainable Design Services: Swedish Experiences", *Architectural Engineering and Design Management*, vol. 5, forthcoming.

practices had been in development within this area since the early 1990's when the applicable procurement legislation was introduced.[49]

Eight Swedish municipalities, one county council and one region were selected based on 2000-2002 calls for tenders identified through the European database Tenders Electronic Daily (TED). Through this database, it was possible to identify which local authorities in Sweden had awarded construction contracts exceeding the EURO 5 million threshold throughout the 2000-2002 period.[50] It should be noted that in early 2003 Sweden had 290 municipalities, 18 county councils and two regions. Eight municipalities, one county council and one region where chosen due to the probability of finding interesting models – best practices – for awarding construction contracts. Our decision was also influences by experiences from prior research on municipalities.[51] The reason for incorporating one county council and one region into our study was an indication from the literature that they might act as role models for the municipalities. The final result of the selection is as follows:

Table 1 - The local governments in the research study

Municipality	*Population**
Stockholm	758 148
Göteborg	474 921
Malmö	265 481
Uppsala	179 673
Eskilstuna	90 089
Växjö	75 036
Varberg	53 346
Sandviken	36 765
County council/Region	
Region Västra Götaland	1 508 230
Västerbotten County Council	255 230

*31 December 2002, Source: Statistics Sweden

[49] (SFS 1992:1528) This legislation was in force at the time of the interviews although the new EC directives of 2004 were in the process of development but had not been implemented.

[50] See Waara, F., 2007. *Awarding Construction Contracts in Public Procurement: Using Multiple Criteria*, Chalmers University of Technology, *Department of Technology Management and Economics*, Göteborg, Sweden, appendix 1 for a detailed description of how this selection procedure was conducted.

[51] See Fog, H, Bröchner, J, Törnqvist, A, and Åström, K: *Det kontrollerande Byggandet*, 1989, Stockholm: Carlssons; and Fog, H, Bröchner, J, Törnqvist, A, and Åström, K: *Mark, Politik och Rätt – Om Plan- och Bygglagen i Praktiken*, 1992, Stockholm: Byggforskningsrådet.

The number of interviewed procurement officers was 29; out if which 10 were specifically from the construction sector. The others were procurement officers within the central municipal procurement function. The interview questions forming the basis of the semi-structured interviews are available as an appendix to paper II. The empirical findings from the interviews are discussed and presented to a great extent in the appended papers. However, a report was written subsequent to the completion of the interviews summarising the relevant findings from the interviews, which has also been used to some extent in this summarising chapter of the compilation thesis.[52]

2.2.2. Analysing court decisions

Another source of information for this thesis was the decisions that emanate from the courts in Sweden and at European level. Court decisions were analyzed to identify the reasoning behind different judgments, to find patterns of what issues are most frequently judged upon in the courts, as well as to find examples of complaints and cases regarding environmental criteria.

Two sets of analyses were conducted based on the same material. One in cooperation with research colleagues at Chalmers University of Technology, Department of Technology Management and Economics[53] looking at construction-related procurement cases that were brought before Swedish County Administrative Courts between 2003 and 2006, with an aim of identifying characteristics of the cases involved, the outcomes of the cases, as well as to discuss judicial review as a control mechanism in the public procurement process, and another analysis at Sociology of Law in Lund (presented in paper IV) looking at the same material yet with an aim of clarifying how the courts interpret the public procurement legislation.

To do this, 574 cases (representing a subset of all 4,742 public procurement cases in which County Administrative Courts had reached a decision during this period) from the Swedish County Administrative Courts throughout 2003-2006 were analysed (approximately 2,600 pages) by my PhD candidate colleague (now PhD) Fredrik Waara and myself, although Fredrik Waara screened the cases as described below. In order to make the number of cases manageable within the time frame of the study, the cases were selected through a screening process whereby only construction-related cases were subject to the analysis. This screening process was executed by using the Common Procurement Vocabulary (CPV) classification system used in the European Union to classify different goods and services. In 92 of the cases, it was not immediately identifiable what CPV code the case should

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[52] Carlsson and Waara, 2006.
[53] The study was conducted in cooperation with Professor Jan Bröchner and PhD Fredrik Waara.

receive. However, they were included as some aspects within the case documentation led us to believe that it was construction-related, e.g. the identity of the plaintiff. Furthermore, it should be added that construction contracts might entail several construction-related services, which is identifiable by the CPV code. To avoid such specification of the cases and to limit the selection to construction services more generally, only four digits of the CPV codes were used.

Upon further analysis, it became apparent that not all of the 574 cases were susceptible to detailed analysis. It turned out that 23 cases were interim decisions without details about the final decision, leading to the number of cases being 541. As specified in appended paper III and as will be discussed below in more detail, 50% of the remaining number of complaints were rejected by the courts (and the procuring entity got to follow through with the procurement contract), 26% were approved, whereas 24% were dismissed.

The case documentation was purchased from Allego, a firm that keeps records of court cases and decisions in Swedish public procurement. According to Allego, their database covers all court cases in the 23 County Administrative Courts from 2003 onwards.

2.3. Limitations

One limitation is that the empirical material has been collected within a strictly Swedish context. Additionally, much of the material is more specifically from a local public procurement construction context.[54] The number of interviews conducted in relation to the number of procuring officers throughout Sweden is another limitation. Nonetheless, throughout the research process, some of the broader issues with public procurement highlighted in this thesis have been found to be applicable within other sectors and levels of procurement also.

Other limitations include the analysis of court decisions and the need to reduce the number of decisions in some way. The reduction was done through the use of court decisions relating to construction procurement, as well as through looking only at decisions from County Administrative Courts. Ideally, cases in the Administrative Court of Appeal and the Supreme Administrative Court should have been included in the investigation, yet this is to some extent compensated by the fact that this is the level where the majority of complaints come to a halt. It should be noted that court decisions from the European Court of Justice (ECJ) have been analysed throughout the project and are discussed in this thesis when relevant.

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[54] For a discussion about the role of the municipal government re central government in Sweden, see: Montin, 1993.

2.4. Research Setting

The concept and phenomenon of environmentally sustainable procurement (GPP) has emerged over the past few decades and turned into a prioritized policy objective within governments globally. In Europe and Sweden in particular, legislative initiatives and court decisions have led to the infusion of the concept into policy- and legislative documents.

This thesis discusses the regulation of public procurement and its characteristics, particularly as regards GPP. Such a perspective permits an analysis of not only the legislative framework, but also its implementation and functioning in relation to other factors that influence legal decision-making, including political mechanisms (highlighting conflicting interests – e.g. environmental and economic), organisational mechanisms (budget allocations within the procurement organisation, access to resources) and societal mechanisms (receptiveness within social (including business) communities to various provisions or regulatory forms), as well as the public procurement process and procedures. It is thus important to recognise that a regulatory framework is not synonymous with legislative framework, as it is a broader concept that includes enforcement mechanisms that are not necessarily legally binding (e.g. guiding documents or tools available) as well as norms (other than formalised norms) pertaining to public procurement. In order to set the stage for discussions regarding the regulation of public procurement, this section briefly introduces public procurement and the public procurement process.

2.4.1. The public procurement context

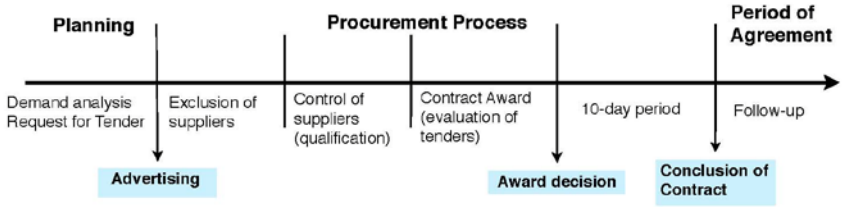
In the Swedish legal context a distinction is made between a procuring authority (*upphandlande myndighet*) and a procuring entity (*upphandlande enhet*), where procuring entity is broader than and includes procuring authority due to there being organisations other than authorities that are covered by the legislation on public procurement, e.g. publicly owned (or publicly controlled) companies.[55] For the purposes of this thesis, both terms will be used. Generally, a procuring entity can be stated to include all governmental and municipal authorities, as well as county councils and publicly controlled bodies. The latter includes companies, associations, cooperatives and foundations that supply in the public's interest. Although highly relevant in terms of public procurement legislation, the picture is broader in terms of public procurement management in that "procurement […] is,

[55] The Swedish Public Procurements Acts 2007 (SFS 2007:1091, *LOU* and SFS 2007:1092, *LUFS*) are applicable depending on whether it is a procuring authority (LOU) or procuring entity (LUFS) that performs the procurement.

in fact, a shared function in that all areas of management … are involved"[56]. Some actors that have been highlighted in the literature as relevant to GPP, which is applicable to a Swedish local authority setting also, are the procuring entity (be it centrally located or within the specific departments when procurement is decentralised), the finance department, the environmental department and the users in every department. In addition, external actors can be identified that are relevant to GPP also, including the legislator, the market (or market actors) and the citizens (in terms of using their influence through political processes).[57]

Before the public procurement process starts, a political decision must be made regarding the municipality, state, or otherwise and its needs. Does the municipality require a new school? Are there contracts regarding medical appliances that are coming to an end and need to be renewed? If so, a political decision must be made. Once this need is communicated to the procuring authority, their job is to identify the need and subsequently fulfil that need. Clearly, the budget for the municipality plays an important role in the procurement process. However, this thesis does not go into the details of the workings of the municipal budgeting system in Sweden. Suffice it to say that the allocated budget is perceived by some procurement officers as an important factor in the decision-making process that public procurement entails. The amount of money spent through public procurement makes it an easy target for the media and the power of scandals in terms of the expenditure of public money is significant.

The public procurement process is multifaceted and highly regulated, yet the following illustration demonstrates in a simplified manner the different stages of the process. It should be remembered that there are different procurement procedures available to the procurement officers. However, the process described below is the one most commonly used – the open competitive tendering or procurement procedure.[58]



[56] Corey, E.R. (1978) *Procurement Management: Strategy, Organization and Decision-making* (Boston, MI: CBI), at p. 116, in Erdmenger, 2003, at p.32.
[57] Erdmenger, 2003, at p.34.
[58] Waara, 2007.

For the purposes of this thesis it might be more helpful to describe this process in terms of a decision-making process.[59] The initial stage in the procurement process – conducting a demand analysis and creating the contract documents (also referred to as Request for Tender (RFT)) – entails identifying procurers' targets (financial, legal, environmental or general) and users' needs (fulfilment of a function, such as lighting) and their coordination.[60] Secondly, the contract documents are advertised, which is subject to rather specific rules. The legislation specifies certain conditions that, if not fulfilled, must or may (depending on whether it is included in chapter 10, sections 1 or 2) result in immediate exclusion of suppliers. Examples of conditions include that the supplier has been declared bankrupt, has been convicted of a crime or has not paid due taxes.[61]

The qualification of suppliers and evaluation of tenders tend to be the most contentious stages of the public procurement process, and research has shown that there has been a tendency in the past of combining or confusing the two stages. [62] A European Court of Justice case (C-31/87) *Beentjes*, clarified that they represent separate stages and what each entails. The first stage, qualification, involves an assessment of the tenderer/supplier and whether or not the tenderer can be said to fulfil the requirements as stipulated in the contract documents, whereas the latter, evaluation of tenders, entails an assessment of the tender in accordance with the requirements stipulated in the contract documents.[63] As a result of these assessments, an award decision is made, which must be publicly announced. One reason for this is that the review procedure is enabled by way of the award decision. In other words, from the moment of having informed the tenderers in writing of the award decision, there is a possibility of bringing a complaint against that decision (and other decisions taken throughout the procurement process) within 10 days.[64] Once the 10-day-period has passed, the procuring entity and the winning tenderer can conclude the contract and the period of agreement starts. Although it is not stipulated in the legislation, it is important in terms of efficiency and effectiveness to follow-up the procurement, not the least in terms of GPP to identify and visualise prospective benefits and cost-savings.[65]

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[59] Erdmenger, 2003, at p. 33.
[60] Erdmenger, 2003, at p. 33.
[61] See SFS 2007:1091, ch. 10.
[62] Paper III, at p. 11.
[63] Forsberg, 2004, at p. 134.
[64] See SFS 2007:1091, chapter 9 , section 9 and chapter 16, Forsberg, 2004, ch. 17. See also appended papers III, IV and V for more details on the review procedure.
[65] Erdmenger, 2003, at pp. 32-3.

2.5. Overview of appended papers

Five papers are appended to this compilation thesis, which to some extent tell the story of the research process undertaken prior to this summarising part of the thesis. The papers are briefly introduced here along with some thoughts on the *raison d'être* for each paper.

2.5.1. Paper I

Paper I was a joint effort between myself and Professor Karsten Åström and came about as a way of conducting a pilot analysis of the preliminary interview findings, as well as a way of testing the use of the norm model under development at the time at Sociology of Law at Lund University. The norm model was used experimentally at an early stage of the research process (2005) in order to sort and attempt to analyse some of the findings from the interviews. The model was helpful in categorising some of the findings in terms of identifying some driving forces and limitations to green public procurement, although there were other ways to arrive at the same conclusions. Thus, although it was a preliminary presentation of interview findings, paper I has proven to reflect a general position amongst procurement officers, which has been presented in a Swedish short report within the parameters of the research project. Thus, complete interview findings can be found in that report.[66]

Table 1
Considerations of the Public Procurement Officer.

Type of Consideration	Comment
Lack of information about environmental products.	Environmental information needed.
Contradictory values to consider in the public procurement process.	Free market and competition can be contradictory with sustainability values in the public procurement process.
Efficiency first.	Priority to avoid legal repercussions and to ensure best value for money in order to achieve efficiency.

[66] Carlsson, L. och Waara, F., 2005. *Offentlig upphandling ur en upphandlares perspektiv*. Minirapport, Sociology of Law, Lund University.

2.5.2. Paper II

As a result of the interview study, several limitations to the introduction of GPP were identified and some were highlighted in paper I additionally. Paper II aimed to illuminate these limitations, as well as to find out how green considerations are taken into account in the public procurement process when such activity takes place. The paper is based on the interview results and the findings are discussed further in chapter 5, below, and was written in collaboration with PhD candidate (now PhD) Fredrik Waara.

Table 2
Limitations to Integrating Environmental Concern

Type of Limitation	Comment
Lack of administrative resources	Due to a lack of administrative resources (including environmental know-how) in the local government agency, some procurement officers preferred criteria that are easy to evaluate.
Legal concerns	Some interviewees refrained from using environmentally related award criteria because it could result in bid protests from unsuccessful bidders. One interviewee also pointed out that the Environmental Code may result in risk-averse behaviour among procurement officers.
Lean budgets	Some interviewees perceived that environmentally friendly goods and services are too expensive.

2.5.3. Paper III

Another interesting aspect that came to the fore through the interview findings was that it appeared that the judicial review process was a source for concern and possibly a limitation to the integration of environmental considerations in the public procurement process. Consequently, paper III, written in collaboration with Professor Jan Bröchner and PhD candidate (now PhD) Fredrik Waara, attempted to examine the function of the review procedure in the public procurement context by looking at e.g. the content of complaints, outcomes and the role of the review procedure.

Table 3
Function of judicial review procedure in public procurement.

Function of judicial review	Comment
Improve compliance	Act as a deterrent to improve compliance with legal norms.
Clarify legislation	Court decisions aid in establishing what the content of the legal norms are in light of perceived uncertainty regarding legislation.
Control discretion	There is a flexibility and discretion granted procurement officers, which is controlled through judicial review.
Procedural safeguard	Grounds for complaints are related to failure to follow public procurement procedure (qualification and award evaluation stage requirements as stipulated by procurement unit in tender documents).

2.5.4. Paper IV

The interview material furthermore highlighted some concern (in addition to the concern regarding judicial review – discussed in paper III) regarding green public procurement and legality. There was a fear of taking risks with regard to the evaluation process, in terms of evaluating according to criteria not before used, e.g. certain environmental criteria. The information derived from the analysis of the judicial practice was intended to come to some conclusion as to whether or not the statements made by many of the procuring officers – the myths about public procurement appeals – were true. A research question within paper IV is thus whether the courts contribute to a more uniform application by clarifying the often vague prerequisites the legislation is built upon. In the interviews, some of the procurement officers highlighted a lack of consistency in terms of court decisions, making it difficult to validate risk-taking regarding the use of multiple criteria (including environmental).

From the cases analysed for the purposes of paper III, a subset of 353 cases were deemed to contain enough details on the merits and decision of the case to allow for a more in-depth analysis. Out of the 353 cases, 23 related to an interim decision, thus containing insufficient information regarding the details of the cases, leaving 330 cases for my analysis. Consequently, I conducted an in-depth analysis of the subset of cases that went beyond a legal dogmatic analysis, in order to identify not only what the merits of the cases were, but also what the reasoning behind the final decision entailed in addition to the legal norm, in order to identify

whether coherence existed. The paper was subsequently written in collaboration with Professor Karsten Åström.

Table 4
Norms identified in the Application of Public Procurement Legislation

Norms in Public Procurement Legal Application	Comment
Principle of *affärsmässighet* (including safeguarding virtues of competition)	The principle of *affärsmässighet* (business-like behaviour) cannot be breached by the procuring entity (unit).
Procedural safeguard of principles	The principles of public procurement are ensured by the requirement that procedures as stipulated in legislation or by procuring entity (unit) (in contract (tender) documents) are followed.
Procuring entity (unit) in best position to know	The courts have referred to a principle (not derivable from the legislation) stating that the procuring entity (unit) is in the best position to know how the tenderers fulfil the requirements.
Imperfect tender documents allowed in light of changing market conditions	Provided that the principles stipulated in the Public Procurements Act are not breached, tender documents and evaluations models that are not optimally drawn up can be acceptable in light of the changing conditions that occur with regard to market conditions. (Another principle not derivable from the legislation.)

2.5.5. Paper V

During the process of papers III and IV, the issue of the role of the procuring authority in a broader perspective became an interesting aspect of green public procurement. Thus, paper V approaches previous findings as well as the function and characteristics of the review procedure with a more theoretical perspective. This is done in order to highlight the issue of enforcement and control of public procurement in the interest of the public and to discuss the role of the review procedure in public procurement in light of the concept of governance, particularly reflexive governance in terms of adopting a procedural orientation to induce actions by social actors.

Additionally, the rise of GPP as a public interest and the enablement of using of public procurement to achieve shared goals of sustainability are highlighted in terms of the governance concept.

Table 5
Judicial Review as a Participatory Mechanism

Characteristics of Judicial Review in Public Procurement	Comment
Access limited through conditions for standing rule	Access to judicial review in public procurement is limited through a narrowly defined standing rule, where only those being bidders in the procurement process and that has been or risks being harmed.
Access is limited to ensure efficiency	The limitation of who is part of the "public" in this context is validated by claims for efficiency.
Access was broadened through legislative amendment in 2002	The amendment ensured that access was obtained to the legal norm allowing for complaints to be brought, which had previously been disabled in practice.
All procurement decisions are subject to review	It is not only the decision being complained by the aggrieved bidder that is up for review; rather, the court may review any decision.
Legitimising function in terms of bottom-up accountability	The mechanism contributes to the consideration of the public interest in the procurement process and as such to some extent ensures accountability.

3. Operationalisation of Legal Rationalities

In order to describe the regulation of public procurement, a framework for doing so is needed. As stated earlier, for the purposes of this compilation thesis the concept of norms is used to study what legal and social norms exist within the context of public procurement regulation. For this reason, the concept of norms must be discussed prior to a discussion about the norms found in the study.

Additionally, in order to analyse these norms in relation to what legal rationality exists or is dominant within the regulatory framework, the relation between the norms and the legal rationalities must be clarified – i.e. the legal rationalities must be operationalised in order to allow for an analysis of the empirical findings. This operationalisation is done through the concept of norms and its relation to the internal structures of law.

3.1. Types of Norms

The concept of norms for the purposes of this thesis is used in a broad sense to include both social norms and legal norms.[67] In this regard the study of norms within the context of GPP does not risk excluding relevant social norms only to be found in the empirical material. Additionally, the subsequent description of the types of norms and their characteristics will not be limited to apply only to legal norms, as such a restriction risks shifting the focus from an operationalisation of the legal rationalities through norms to a discussion about the distinction between social and legal norms.[68] On the other hand, for the purposes of the analysis using legal rationalities, the character of the norms will uncover whether there is an affiliation with traditional legal norms or not. Although this will become apparent as the analysis progresses and is not given at the outset.

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[67] For a detailed description of the differentiation and for a sociology of law perspective on norms in general see Hydén, 2002 and Baier, M. and Svensson, M., 2009. *Om Normer*, Liber.

[68] Hydén has emphasised the advantages of not focusing on such a separation and that legal norms merely are social norms assigned a certain status with which specific qualities are accompanied. Hydén, 2002, at p.131.

3.1.1. Norms and the internal structures of law

In terms of the internal structures of law, different types of norms can be identified in relation to three internal dimensions: a) competence norms, b) procedural norms, and c) action norms.[69]

Competence norms can be described as those norms that describe *who* is to act in accordance with the norm – e.g. who has the competence to act.[70] Procedural norms are those norms that describe *how* this is to be done, while action norms include those norms specifying *what* is to be done. The latter is generally exemplified by duty norms, which is composed by various prerequisites that specify which legal facts (*rättsfakta*) are required for the specific situation. If the legal facts exist, the duty norm additionally stipulates the consequences that follow – e.g. if damages are awardable. Furthermore, the duty norms are concerned with past events, i.e. it is an ex post facto norm. Hydén adds to the array of action norms by the goal-oriented norms and the balancing norms. The former describe certain objectives that the decision maker is to strive towards, as well as the means available to achieve that objective. They thus consist of weaker normative content than the duty norms, are policy oriented and are based on standpoints that require specific knowledge other than legal. The latter, balancing norms, are even weaker in terms of normative content and point to which interests are to be balanced. How this balancing act is to be done is not identifiable, rather this is up to the actor applying the norm.

Consequently, it may be decisive for the application of the different norms who has the competence and what procedure the application is to take. From this Hydén identifies links between action norms and duty norms, competence norms and goal-oriented norms, as well as between procedural norms and balancing norms.[71] This becomes relevant for the purposes of this thesis and will be drawn upon later. Subsequently, the legal rationalities will be introduced.

3.2. Legal Rationalities

In order to understand the discussion about GPP and what regulatory form it takes in the subsequent chapter, three forms of law or legal rationalities will be clarified and discussed in this section.

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[69] Hydén, 2002, at p. 136.

[70] Public authorities' competency is stipulated by way of the instructions through which the organisation is constituted and partly through the special legislation through which the authority is conferred its specific tasks. (Author's translation.) Hydén, 2002, at p.137.

[71] Hydén, 2002, at p. 140.

3.2.1. Ideal types of legal rationality

The term *ideal type* appropriately brings our thoughts to Max Weber, who introduced the legal rationality concept and discusses two ideal types of legal rationalities: formal and substantive rationalities.[72] Teubner expands upon these legal rationalities to include a third – reflexive legal rationality. Important to remember is that ideal types are not meant to be treated as exact representations of reality in their undiluted forms, rather, in reality they exist in a complex combination where one can be in dominance over another.[73] Consequently, the analysis of legal rationalities throughout this book regarding the regulation of green public procurement potentially entails an overlapping and combinatory reference to these legal rationalities. Irrespectively, the different legal rationalities will be introduced separately for reasons of clarity.

The advances of alternatives to formal legal rationality within some of the literature correspond to the identification of an inadequacy within the antecedent legal rationality of coping with the changing society. The alternatives that are introduced (substantive and reflexive legal rationality) are by some seen as responses to that legal inadequacy. However, as mentioned above, in reality these forms of legal rationality are potentially more or less present and overlapping within the specific context. (Their existence within the public procurement context will be clarified in the subsequent chapter.)

Formal legal rationality

Originally Max Weber's description, formal legal rationality is exemplified by methodological rules (e.g. of legal interpretation) that work to ensure uniformity and continuity within the legal system.[74] This is also the justification of formal law. It is characterised by formalities that "facilitate private ordering" or the constitution of a framework for action within which the private actors make the "substantive value judgements" or decisions.[75]

The external function of formal legal rationality involves "establishing spheres" and ensuring boundaries within which private actors are free to act.[76] These functions of formal legal rationality have also been related to the market economy and its development, in that the autonomy created is conducive to the generation and distribution of natural resources.[77] Another external function of

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[72] Teubner, 1983, at p. 242; Cotterrell, 1992, at p.161.
[73] Cotterrell, 1992, at p. 162.
[74] Teubner, 1983, at p.242-243.
[75] Teubner, 1983, at p.252.
[76] Teubner, 1983, at p.253.
[77] This is also the essence of Max Weber's concept of formal rationality. Habermas, 1976, at p.264 and 1981, at p.352, in Teubner, 1983, at p.253 and note 5.

formal legal rationality is that of legitimising the political system.[78] Cotterrell has highlighted this function in terms of it being present due to a subordination of substantive legal rationality to formal legal rationality, where law is a "value neutral" basis of authority.[79] In other words, the dominance of formal rationality, free of political or moral values, ensures legal legitimacy. This is part of the discussion about the rule of law, whereby Cotterrell relates regulatory forms to the legal rationalities. Cotterrell refers to the traditional formal rationality, highlighting the view that its dominance is a prerequisite for the rule of law.

Lastly, the internal structure of formal law involves deductive and rule-oriented reasoning,[80] where the legal consequences of norms depend on precise definitions of factual situations. The norms are applied in the courts by legal professionals (judges, lawyers) in accordance with their specialised training and thus in a "universalistic way".[81]

Substantive legal rationality

Teubner draws on both Luhmann and Habermas in his discussions about the legal rationalities. He highlights that substantive legal rationality constitutes a reaction to the formal legal rationality in that it attempts to remoralize and repoliticizise law and thus generates "[a] renewed fusion of the law with the scientific, moral and political sphere".[82] This perspective to some extent introduces substantive legal rationality as if in opposition to formal legal rationality, which it needs not be.[83] Habermas highlights a substantive legal rationality within which the political system gradually accrues the responsibilities for correcting market failures as well as the responsibility for global economic policy and compensatory social policies,[84] which is also the justification of substantive law.[85] The legal system develops characteristics such as particularism, result-orientation and an instrumentalist social policy approach.[86] Substantive law constitutes the main tool by which the state modifies market-determined patterns and structures of behaviour,[87] and thus represents a form of political and legal intervention.

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[78] Trubek, 1977, at p. 540, in Teubner, 1983, at p.253.
[79] Weber, 1978, at pp.868-73 and 883-95, in Cotterrell, 1992, at p.162.
[80] Habermas, 1976, at p. 263 and 1981, at p.348, in Teubner, 1983, at p.253.
[81] Teubner, 1983, at p.253.
[82] Luhmann, Niklas 1974 Rechtssystem und Rechtsdogmatik. Stuttgart: Kohlhammer, at p. 31. In Teubner 1983, at p.271.
[83] See Montin, 1993, pp.18-19, for a discussion of how the *Rechtsstaat* (dominated by formal legal rationality) can be combined with the popular government (in my view dominated by substantive legal rationality) without necessarily leading to conflict.
[84] Habermas (1975) *Legitimation Crisis*, Boston: Beacon, at p.33. In Teubner, 1983, at p. 267.
[85] Teubner, 1983, at p.253.
[86] Teubner 1983, at p. 268.
[87] Teubner 1983, at p.254.

For substantive law, its external function consists of an instrumental modification of "market-determined patterns and structures of behaviour",[88] by giving substantive guidance to behaviour.[89] It entails state intervention in the market structure[90] and could thus be said to represent an interventionist regulatory approach. As mentioned in the introductory chapter, Hydén has highlighted a differentiation between *primary* and *secondary* levels of intervention. Although he does not get into the specifics of primary intervention, its correlation with intervenient systems can be granted, giving the type of intervention a character of direct regulation e.g. in order to prohibit certain activities that are hazardous to the environment. The secondary intervention is described as intervention in terms of "general guidance" where the norms "call for a balancing of contradictory interests",[91] which, in my opinion, could be said to represent a self-regulatory system subject to a regulatory phase; mentioned subsequently. One example of a self-regulating system, provided by Gudmund Hernes, is the market, whereby the principles of self-interest and competition provides the market with efficiency and a decentralised decision-making system.[92] Hydén points out that self-regulating systems can transcend into a regulatory phase whereby the function of (and the justification of) law involves providing the rules of the game to make the system more stable; or in the terms of Teubner, to *control* the self-regulation.[93]

Cotterrell describes an example of a regulatory form where substantive legal rationality is dominant as discretionary regulation. Here, substantive legal rationality is dominant over formal legal rationality due to a creation of flexibility through "open-ended standards and general clauses",[94] which could be likened to framework legislation or "frame-laws" (*ramlagar)*.[95] The internal structure of substantive law consists of purposive programs whereby the rule-oriented approach within formal legal rationality is supplemented by purpose-oriented norms, substantive prescriptions,[96] or political maxims[97].

Yet to some, the proliferation of substantive law is deemed futile since it potentially leads to a variety of negative consequences, including an exponential

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[88] Teubner, 1983, at p.254.
[89] Nonet and Selznick, 1987, at p.111, in Teubner, 1983, at p.251.
[90] Teubner, 1983, at p.253.
[91] Hydén, 1986. at p.135.
[92] Hernes, Gudmund, 1983. Marknaden som domstol. I *Land i olag*. Kristiandstad, at p.108, in Hydén, 2002, at p.140.
[93] Teubner, 1983, at p. 281.
[94] Cotterrell, 1992, at p. 162.
[95] Montin, 1993, at p. 22. For a presentation and discussion of framework legislation in a Swedish context see Hydén, 1984, particularly at pp. 1-3.
[96] Teubner, 1983, at pp.253-4.
[97] Mann, 1980, at p. 189.

growth of direct legal manipulation of society,[98] an inability of legislators to proficiently harmonise legal rules that may affect the same regulated behaviour (even if in different ways),[99] as well as "cognitive consequences"[100] for the legal system that require increasing legal competence to resolve conflicts in a greater variety of situations as well as increasing interdisciplinary competencies.[101] Cotterrell has highlighted that the increase in discretionary regulation (and thus a dominance of substantive legal rationality) also reduces the legitimacy in terms of a loss of the rule of law.[102]

Reflexive legal rationality

Although the concept of reflexive law has not been uncontroversial,[103] and other scholars have dealt with the same or similar concept,[104] and some have heavily influenced his work,[105] it is Teubner's construction of the concept that will be used in this thesis. Teubner presented the phenomenon of reflexive law in the 1980's as "an emerging but as yet unrealised possibility".[106] However, more recent writings demonstrate that this possibility has already been realised and that examples of reflexive law or reflexive elements within law exist.[107]

The reflexive[108] legal rationality is an addition to the formal and substantive legal rationalities, and is seen as part of a new evolutionary stage of law that constitutes a reaction to the changing society and the inability of the rationality of the existing regulatory forms (read formal and substantive law) to cope with that societal change.[109] Scholars have stated that the change has lead to a "crisis of

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[98] Cohn, 2001, at p. 487.
[99] Hess 1999, at p. 50.
[100] Teubner 1983, at p. 254.
[101] Hydén, 2002, at p. 192.
[102] Cotterrell, 1992, at pp. 162-3.ß
[103] Blankenburg, 1984.
[104] For example Nonet-Selznick and Dalberg-Larsen, in Hydén, 2002.
[105] Niklas Luhmann, Jürgen Habermas, Galanter (1980), and others. See e.g. Luhmann, N (1982) *The Differentiation of Society*. New York: Columbia University Press; Habermas, J (1979) *Communication and the Evolution of Society*, Boston: Beacon; and Galanter, M (1980) "Legality and Its Discontents: A Preliminary Assessment of Current Theories of Legalization and Delegalization," in E. Blankenburg, E. Klausa and H. Rottleuthner (eds.), *Alternative Rechtsformen und Alternativen zum Recht.* Opladen: Westdeutscher Verlag.
[106] Teubner, at p. 242.
[107] See e.g.: Hess, 1999; Aalders and Wilthagen, 1997; and Hydén, 2002.
[108] Giddens proclaimed reflexivity as a defining property of modernity and defined the "reflexivity" as: "the fact that social practices are constantly examined and reformed in the light of incoming information about those very practices, thus constitutively altering their character". Giddens, A., 1990. *The Consequences of Modernity.* Cambridge: Polity Press; Stanford: Stanford University Press, at p. 38, in Bourdieu, P. and Wacquant, L. J. D., 1992. *An Invitation to Reflexive Sociology*. The University of Chicago Press, at p. 38, note 66.
[109] Teubner, 1983, at pp.267-68.

regulation in the modern welfare state"[110] and a "juridification"[111] of the law or "cognitive limitation"[112] has crystallized, due to the complexities of modern social and economic processes.[113] In other words, society has become too complex for the formal and substantive legal rationalities to manage and Teubner (among others) argues that reflexive legal rationality is a means of resolving the resulting problems.

However, it should be emphasized here that, although the discussion to some extent is cast in evolutionary terms, it is an overstatement that this is part of an inevitable process,[114] from irrational to rational or from formal legal rationality to substantive or reflexive legal rationality. In fact, it has been stated that reflexive mechanisms (the example of informal negotiations and agreements is provided)[115] have always existed within legal practice and in combination with formal legal norms.

As with formal and substantive law, reflexive law will be analysed in terms of its justification, external function and internal structure. Reflexive law aims to construct self-regulatory systems through organisational and procedural norms and the justification of law is thus a means of controlling self-regulation.[116]

The external function of reflexive law involves the shaping of procedures for "internal discourse" as well as for external coordination of semi-autonomous social systems. The key word is *integrative* in that the external function involves creating "integrative processes" and supporting "integrative mechanisms", e.g. by integrating interests of those involved or affected by the decision making process,[117] or resolve conflicts in cases where "strict adherence to legal structures" would aggravate such conflicts.[118] This is enabled through the informational openness mentioned below. It is in reaction to the suggested "crisis of the interventionist state"[119] that reflexive law thus introduces a "'discursive' rationality"[120] into society and between social subsystems.[121] In other words, reflexive law involves a dialogue-prone or communicative context.

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[110] Cohn, 2001, at p. 487.
[111] Cohn, 2001, at p.488. Quoting Habermas.
[112] Hess, 1999, at p. 50.
[113] Teubner, 1983, at p.268.
[114] Mann, 1980, at p. 190.
[115] Aalders and Wilthagen, 1997, at p.426.
[116] Teubner, 1983, at p.254.
[117] Montin, 1993, at p.23.
[118] Aalders and Wilthagen, 1997, at p. 427.
[119] Hess, 1999, at p. 50.
[120] Teubner 1983, at p. 269.
[121] According to Luhmann, the crisis in law "results from the inadequacies of the received system of positive law, given the complexities of a functionally differentiated society".(Teubner, 1983, at p. 244) A functionally differentiated society entails a decentring of law from its place in society; it is no longer the central institution for integrating all of society's subsystems". (Hess, 1999, at p. 49) Teubner refers to the "principle of socially adequate complexity", also derived from

The internal structure of reflexive law is characterised by its "self-referential legal structures"; meaning structures that "reinterpret themselves (…) in the light of external needs and demands".[122] The reinterpretation is necessary in order for the legal system to manage the external changes, such as a change in political focus. This self-referential system (also called autopoietic system) is considered "operationally closed" to external intervention, while at the same time having an "informational openness" allowing the system to "create 'internal order' from 'external noise'".[123] The internal structure does not take the form of precise, formal rules or substantive standards, but entails procedural norms that regulate processes through indirect and abstract legal control.[124]

In an analysis Orts has applied a reflexive legal rationality to environmental law,[125] from which certain potential characteristics of environmental reflexive law can be extracted. Specific examples include: a) providing incentives for businesses to improve environmental performance such that they can reap the benefits of green marketing strategies, b) to develop strong internal procedures to monitor environmental performance, c) self-evaluative programs (such as environmental auditing programs), and d) self-reporting and to some extent self-regulating systems primarily based on public disclosure,[126] (although Orts adds that third–party certification is essential to ensure the information is accurate). In more succinct terms, "[v]oluntarism, public disclosure, third-party certification, participation by public interest groups, and procedures for institutional self-reflection and self-criticism are the key elements of the reflexive model."[127]

In addition, reflexive law can be said to entail intervention in social processes in that procedures that guide actors' behaviour are established, with an attempt to influence decision-making processes with required procedures.[128] Unlike substantive law, and as indicated earlier, reflexive law does not strive to achieve a certain purpose (or behaviour) of the regulation – input and output performance – but merely to provide the structural and procedural premises for future action.[129]

Luhmann, which states that "the legal order in post-modern societies must have mechanisms that allow it to operate in a complex environment of functionally differentiated, semi-autonomous subsystems", such as "politics, science, economy, morals, or law". In other words, it is an increased complexity in society that has brought about a change in the legal system and requires that the "legal order (…) be oriented toward self-reflective processes within different social subsystems". (Teubner, 1983, at p. 246 and 272)

[122] Teubner, 1983, at p. 249.
[123] Aalders and Wilthagen, at p.428.
[124] Teubner, 1983, at p.255.
[125] Orts, 1995.
[126] Orts, 1995, at p.784-7.
[127] Orts, 1995, at p.788.
[128] Hess, 1999, at p. 50-1.
[129] Teubner, 1983, at pp. 254-5.

3.3. Norms and Legal Rationalities

The different norms discussed earlier in this chapter, as well as their respective structural, functional and justificatory characters can be discussed in relation to the legal rationalities, which will be done subsequently. This conceptual framework will then be used in chapter V to discuss the norms pertaining to green public procurement and, consequently, the legal rationalities present within the context of green public procurement regulation.

3.3.1. Formal legal rationality and duty norms

Considering that action norms and duty norms stipulate prerequisites and the legal facts required for the norm to be invoked, the characteristics of a formal legal rationality could be identified within the description of these norms. In other words, norms that consist of these kinds of characteristics can be said to indicate a regulatory system dominated by formal legal rationality.

3.3.2. Substantive legal rationality and goal-oriented norms

The norms pertaining to a substantive legal rationality is exemplified by competency norms and goal-oriented norms, in that the norms entail future objective and ex ante decisions on the basis of those objectives. The characteristics of these norms spur the connection to the substantive legal rationality through their futurist perspective and interventionist ambitions.

3.3.3. Reflexive legal rationality and balancing norms

The norms that can be related to reflexive legal rationality are procedural norms and balancing norms. The model of balancing interests can be related to these norms in that the legal interference is restricted to a control of a correct application of procedural norms and that decisions are made by those competent to make them.[130]

Balancing norms are even weaker in terms of normative content and point to which interests are to be balanced. How this balancing act is to be done is not identifiable, rather this is up to the actor applying the norm. Norms of a reflexive legal rationality thus entail limited state interference and then only to stabilise the system or control the self-regulation. Balancing norms involve balancing interests being identified – but not substantively determined – through the presence of procedural and organisational norms.

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[130] Hydén, 2002, at p. 140.

3.4. Development of Norms

Teubner explains the interplay between the logic and the dynamics of the development of norms, leaning on Habermas' *organisational principle* [131], in a sequential pattern. He starts out with (a) the "Initial State", where a given historical period has an organisational principle that is capable of solving the problems of social and system integration,[132] followed by (b) the "Evolutionary Challenge", where the capacity of society to learn and adapt to social change is insufficient within that organisational principle. Subsequently, at the stage of (c) "Experimentation", attempts to correct the insufficiency are experimented upon through the institutionalisation of normative concepts or 'cognitive potentialities'. At the final stage (d) "Stabilization" the new organisational principle, if successful, is incorporated in fundamental legal structures and is institutionalised throughout society generally.[133]

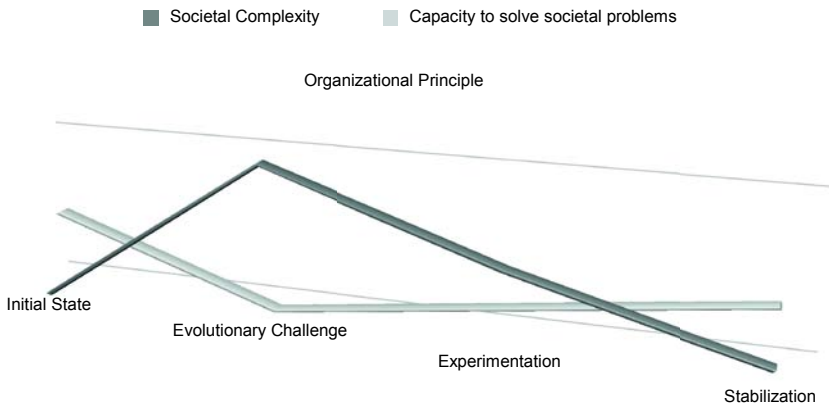

Figure 1 – The interplay between the logic and the dynamics of the development of norms.

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[131] Teubner, 1983, at pp. 260-1.
[132] Teubner, 1983, at pp. 260-1
[133] Teubner, 1983, at p. 261.

According to Teubner, evolutionary challenges have brought about the need for new regulatory forms, where a dominance of the traditional formal legal rationality no longer suffices to handle the current social problems. This evolutionary approach to norm development will become helpful when describing the phenomenon of green public procurement and its regulatory progression, how green issues have become relevant for the public procurement context, what the background to this development is. For reasons of clarity, the green public procurement phenomenon will thus be analysed and explained using phases of development.

4. Regulating Public Procurement

This chapter aims to discuss the regulation of public procurement and particularly GPP within a Swedish and European, as well as to some extent global, context. The chapter begins with a description of public procurement in terms of its purpose or policy objectives. The development of public procurement regulation will thus be clarified with a historical retrospect, followed by a discussion as well as in terms of its current regulatory context using relevant findings within the papers to highlight important events in terms of the regulation of green public procurement.

4.1. Phases of Public Procurement Regulation

Importantly, the purpose, or what is perceived to be the purpose, of public procurement influences the interpretation of the legislation in courts as well as its practical application.[134] In terms of public procurement, the objectives of its regulation were initially political, followed by an economic objective (or the establishment of the internal market in terms of the EC context), which has come to be challenged through the integration of environmental considerations in the regulatory context.

This section discusses the phases of public procurement regulation, partially in terms of policy objectives of public procurement, both from a European and Swedish context, although should not be seen as a comprehensive account of the regulatory background of public procurement.[135] Rather, the objective is to provide some historical context for the current regulatory framework of green public procurement by organising the development through different phases. It should be mentioned here that only three phases are accounted for initially. Although this

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[134] Slavicek, 2002, at p.16.

[135] For discussions on the historical development of public procurement in Europe, see e.g. Trepte, 2004, McCrudden, 2007 and Reich, Arie, 1999. *International Public Pocurement Law: The Evolution of International Regimes on Public Purchasing*. Kluwer Law International, or Arrowsmith, S., Linarelli, J., and Wallace, D. Jr., 2000. *Regulating Public Procurement: National and International Perspectives*, Kluwer Law International.

thesis is not about making prophesies, phase four – the future of public procurement regulation – will be touched upon towards the end of this chapter.

4.1.1. Phase One – Domestic Interventionism

That the issue of public procurement entails complex and controversial policy discussions is not only a recent reflection; rather, it was one of the reasons why procurement issues were not included in the original European treaties.[136] However, principles that today are of relevance for public procurement were included in the Treaty of Rome, including the four freedoms (movement of goods, movement of workers, to provide services and of establishment)[137] and non-discrimination on grounds of nationality.[138]

The first directive that in effect initiated the regulation of public procurement was Directive (EEC) 71/305 'concerning the co-ordination of procedures for the award of public works contracts' (also called the Works Directive).[139] The objective of this directive was to "*free the public procurement markets from discrimination* against tenderers from other Member States" (my emphasis) and this was to be done through various specific provisions concerning detailed public procurement procedures, the details of which we need not be concerned with for the moment.[140] During this period, both within the international WTO Government Procurement Agreement of 1979 and the EEC procurement directives of the 1970's, some protectionist behaviour by nation states was still permitted, including the use of procurement to secure national social policy goals.[141] At this point in time, the regulatory framework for public procurement in Sweden was made up of the Procurement Statute (*Upphandlingsförordningen*) and the municipal procurement regulations (*kommunala upphandlingsreglementen*).[142] These stipulations regulated how tax revenue was to be used for purchases within the public sector and concerned efficient administration of public funds.

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[136] The European Coal and Steel Community, the European Economic Community and the European Atomic Energy Commjnity. See McCrudden, 2007, at p.104-104 and Reich, Arie, 1999. *International Public Pocurement Law: The Evolution of International Regimes on Public Purchasing*. Kluwer Law International, for further elaboration.

[137] Article 30, 48 and 52-66.

[138] Article 7.

[139] McCrudden, 2007, at p. 105.

[140] See McCrudden, 2007, at pp. 105-105.

[141] McCrudden, 2007, at p.106.

[142] Upphandlingsförordningen, UF 1986:366.

4.1.2. Phase Two – Open Global Markets

However, subsequent to these legal developments positions changed with a realisation that "domestic interventionism" and "open global markets" were not easily reconcilable.[143] Indications of this are available in the developments within the European context during the 1980's and 1990's regarding the establishment of the internal market,[144] including the procurement directives of 1992 and 1993. Provisions broadening the public procurement markets were considered justifiable in order to contribute to the establishment of a single European market, more competitive tendering and thus a reduction of "the burden on the public purse"[145], as well as, indirectly, ensure savings and achieve efficiency in public procurement.[146] McCrudden highlights an acceptance (even referred to as a consensus)[147] of the *separation* of *economic forces* of globalisation from the *social and political realm*. This indicates a hierarchical differentiation between these values – a subordination of social and political interests to that of economic development. These developments culminated in the procurement directives of 1992 and 1993,[148] which is also the time when the EC and Swedish regulatory frameworks coincide.

Consolidated Swedish public procurement legislation was first suggested in 1992 in the Swedish Government Bill[149] (hereafter the 1992 Government Bill) preceding the Swedish Public Procurements Act of 1994.[150] The reason for its introduction was the commitment by Sweden to implement the EC public procurement rules within the internal market as a result of the EEA agreement. It is stated in the 1992 Government Bill that the change introduced by the legislation does not really alter the Swedish public procurement materially, since competition, non-discrimination and objectivity traditionally have been guiding principles; rather the change is introduced in terms of the procedural rules or the means through which these principles are endorsed.[151] In other words, it is primarily the public procurement procedure that becomes regulated. Also, the definition of

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[143] McCrudden, 2007, at p.106.
[144] For details see e.g.: McCrudden, 2007, at p.107.
[145] Fernández Martín, J.M., 1996. *The EC Public Procurement Rules: A Critical Analysis*. OUP, 42.
[146] See European Commission, 'The Cost of Non-Europé in Public Sector Procurementä in *The Cost of Non-Europé, Basic Findings* Vols 5A and 5B.
[147] Referred to as "the Washington Consensus", in McCrudden, 2007, at p. 107.
[148] Directives 93/36/EEC on supply contracts, 93/37/EEC on works contracts, 92/50/EEC on services contracts, and on contracts awarded in the utilities sectors 93/38/EEC, as well as the remedies directives 89/665/EEC and 92/13/EEC.
[149] Swedish Government Bill, proposition 1992/93:88.
[150] Swedish Public Procurements Act (1994:1528), SFS 1994:1528.
[151] Swedish Government Bill, proposition 1992/93:88, at p.1.

procuring entity widened the number of entities previously regulated in terms of public procurement. Furthermore, the proposed legislation was to introduce a control mechanism, to ensure that the procurement has been properly conducted, through a review procedure in the courts. Damages where also made available as a remedy through the new legislation. Consequently, in the 1992 Government Bill it seems clear that the main focus of the legislation on public procurement was to regulate the procedures and means through which public procurement is to be executed and its objectives are to be met, as well as to ensure accountability for procurement decisions.

The Swedish public procurement legislation has been viewed as a complement to the Swedish competition legislation. However, this has been criticised in that procuring authorities are not meant to create a well functioning competition, merely to seek out existing competition.[152] In the 1992 Government Bill it is stated that the purpose of the regulation and revision procedure is to "achieve an efficient use of resources at both state and municipal level."[153]

In a Swedish context, it has been stated that the rise of GPP in practice began in the early 1990's by local and regional authorities.[154] The 1992 Government Bill suggested that the new Swedish public procurement legislation (implementing the EC Directives on Public Procurement) contain wording to the effect that public procurement officers could consider environmental aspects in the public procurement process.[155] Simultaneously, at international level, the presentation of Agenda 21 stated that governments "should review the purchasing policies of their agencies and departments so that they may improve, where possible, the environmental content of government purchasing strategies, without prejudice to international trade principles".[156] Although there are clear reservations in favour of economic/trade interests, it shows an uprising international awareness of the potential of GPP.

4.1.3. Phase Three – Balancing EC Policy Objectives

At this time, discussions regarding what regulatory form was appropriate for public procurement regimes flared up, partly due to a perception that neither the promised cross-border trade boost nor the efficiency gains had been realised. It was

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[152] Slavicek, 2002, at p.18.

[153] Cf Swedish Government Bill, proposition 1992/93:88, p.48, in Slavicek, M. "Upphandlingens olika ansikten." *ERT* 2002 pp 15-34, at p.18, note 19.

[154] Eva Ahlner, Susanna Hurtig and Izumi Tanaka. Arbetsrapport R2006:005 Grön offentlig upphandling i Japan och USA – Lärdomar för Sverige. Institutet för Tillväxtpolitiska Studier (ITPS) (*The Swedish Institute for Growth Policy Studies,* now entitled *Growth Analysis*), at p.13.

[155] Swedish Government Bill, proposition 1992/93:88, pp.71-72.

[156] Agenda 21 (1992) paragraph 4.23 in Chapter 4.

both a regulation/deregulation debate and a debate about the function of EC law in terms of public procurement.[157] In essence, the question that arose was whether EC procurement law was 'fundamentally economic', with a primary function to achieve value for money and efficient allocation of resources,[158] or whether Community law even should be concerned with pursuing the economic objective or the balancing of different policy objectives and instead follow a deregulatory path.[159] There is some evidence that deregulation was contemplated at European level.[160] The Commisson's Green Paper[161] on public procurement, adopted in 1996, emphasised the need to "simplify the legal framework whilst maintaining the stability of the basic structure already in place".[162]

At a European level, indications of change in attitude within public procurement took place through the initiatives of the Commission and the European Court of Justice (ECJ) as we prepared to enter the new millennium. A Green Paper was adopted by the Commission in 1996 and stated that "[p]ublic procurement rules can contribute to a better achievement of (…) environment policy objectives."[163] In 1997, through the Amsterdam Treaty, the so-called integration principle (although it was originally introduced in the 1980's) was given a more prominent position in the EC Treaty (from article 130r to article 6), which consequently gives it more weight[164] and raises "environmental objectives to one of the Union's priorities"[165]. Around the same time, at international level, the OECD adopted a Recommendation urging that "member countries, and in particular their governments, (…) establish and implement policies for the procurement of environmentally friendly goods and services".[166]

In 1998, the Swedish Public Procurement Board (NOU) issued a Report[167] on ecologically sustainable public procurement by order of the Swedish Government to analyse how environmental criteria and other environmental considerations can be used in public procurement. The order was made as a result

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[157] McCrudden, 2007, at p.109.
[158] McCrudden, 2007, at p.109.
[159] Arrowsmith, Sue, 2002. "The EC Procurement Directives, National Procurement Policies and Better Governance: The Case for a New Approach." *ELR* Vol. 27, No. 3, at pp. 7-8, in McCrudden, 2007, at p. 110.
[160] McCrudden, 2007, at p.110.
[161] "Public Procurement in the European Union: Exploring the Way Forward", COM(96)583 final of 27 November 1996.
[162] McCrudden, 2007, at p.110.
[163] Green Paper, Public Procurement in the European Union: Exploring the Way Forward, COM 96/583 27 November 1996, at pp. III and 29. See also Section VI.
[164] Miljöstyrningsrådet (2004), *Miljöledning vid upphandling & inköp*, jure förlag, at p. 40.
[165] COM(1998) 143 final, at p. 26.
[166] COM 96/583, at p. 40.
[167] Nämnden för Offentlig Upphandling (NOU) (1998) *Rapport om ekologiskt hållbar offentlig upphandling*, dnr. 15/98-29.

of the changes emanating from the Amsterdam Treaty as well as the Green Paper mentioned previously. Simultaneously, a delegation on Ecologically Sustainable Procurement (EKU) was appointed by the Swedish Government to investigate what opportunities exist for public authorities to integrate environmental considerations in the procurement process.[168] The same year (1998), the ECJ ruled in favour of a possibility of integrating environmental considerations in the public procurement process. It was stated that: "[t]o develop the use of renewable energy sources for the production of electricity serves an environmental protection objective, since it contributes to reducing the emissions of greenhouse gases that are one of the main contributing factors to climate change, which the European Community and its Member States have committed to prevent".[169] Another ECJ ruling with regard to an environmental award evaluation criterion related to renewable energy sources confirmed that such a criterion was permissible, provided that the criterion is verifiable.[170]

Yet another ECJ ruling considered environmental considerations in the procurement process and stated, *inter alia*, that environmental criteria (in the present case the level of nitric oxide emissions from buses) were permitted so long as they are linked to the subject matter of the contract.[171] This changed the previous focus on what criteria were permitted in the procurement process (more specifically in the evaluation of awards based on the most economically advantageous tender) from a "strict fiscal" meaning of the term "economical" to an interpretation that leaves room for environmental criteria even if not directly of a fiscal nature.[172]

A Swedish Government Declaration stated in 2000 that environmental influence had to be considered in all public procurement[173] and in an official government report the possibility of integrating environmental considerations was further clarified.[174] Additionally, a supplementary directive from the Swedish Government enabled the development of an Internet-based tool in aid of public

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[168] Miljöstyrningsrådet, 2004, at p. 17.

[169] Case C-379/98 PreussenElektra AG vs. Schhleswag AG, REG 2001 I-02099. In Swedish Government Bill, prop. 2006/07:128, at p.196.

[170] *EVN AG and Weinstrom GmbH vs. Republik Österrich*, (Case C-448/01), *Official Journal* of the EU.

[171] *Stagecoach Finland* (Case C-513/99), *Official Journal* of the EU, 8.4.2000. (Also called *Concordia Buses.*) It should be noted that the case was finally decided on 17 September of 2002.

[172] Erdmenger, Christoph (ed.) (2003) *Buying into the Environment – Experiences, Opportunities and Potential for Eco-Procurement*, International Council on Local Environmental Initiatives, Greenleaf Publishing, at p.58.

[173] Government Declaration (Regeringsförklaring) September 19, 2000.

[174] Final report by the Procurement Committee, SOU 2001:31, chapter 6.

procurement officers when using environmental criteria in the evaluation process of the procurement.[175]

In 2002, at the World Summit on Sustainable Development (WSSD) public procurement was highlighted as an important factor in increasing the demand for better products from an ecological perspective,[176] whereas in Sweden in 2004, GPP was highlighted as a very important tool in the work towards environmentally sustainable development.[177] The legislation on public procurement in Sweden has been amended several times leading up to the new legislation that came in 2008, of which the most relevant for the purposes of this thesis is the 2002 amendment related to the review procedure, where the disablement of the review mechanism was removed.[178]

The EC Directives were adopted in 2004.[179] They clarified some legal quandaries as had been requested, including those pertaining to environmental (and social) considerations in the procurement process. Importantly, in 2004 at European level, the Commission issued a handbook – "Buying Green!" – on what environmental considerations are permissible and possible with regard to public procurement[180] as a result of the implementation of the integrated product policy (IPP). In the same process, Member States were urged to develop national action plans to encourage increased integration of environmental considerations in the public procurement process.[181] As a result, the Swedish Government handed over a written communication to the Swedish Parliament containing specific objectives and strategic areas with regard to GPP.[182]

These initiatives and changes at varying political and legal levels indicate an increasing awareness of and interest in the potential of GPP as a tool towards sustainable development. Additionally, the measures indicate that change is taking place with regard to the environmental awareness in society and that

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[175] Swedish Government Directive 2000:54. In Miljöstyrningsrådet (2004), at p. 17.

[176] WSSD, World Summit on Sustainable Development, Plan of Implementation, http://www.un.org.

[177] Swedish Government Bill on the Environment (Miljöpropositionen) 2004/05:150.

[178] See papers IV and V for more details on the content of this amendment.

[179] Directive 2007/66/EC and Member States have until 20 December, 2009, to implement it into national law. A memorandum has been published with suggestions on the implementation of the directive into Swedish national law, Ds 2009:30, and the amendment is intended to come into force on June 1, 2010.

[180] European Commission handbook *Buying Green!*, available at: ec.europa.eu/environment/gpp/pdf/buying_green_handbook_en.pdf. See also, COM(2004)38 final, Stimulating Technologies for Sustainable Development: An Environmental Technologies Action Plan for the European Union.

[181] http://europa.eu.int/comm/environment/ipp.

[182] Written communication, Skr. 2006/07:54.

environmental consideration is being integrated through the development of an existing regulatory structure and has thus become a legal norm.

As indicated, new Swedish Public Procurements Acts[183] were recently enacted in order to implement the 2004 EC Directives on public procurement.[184] The legislative elements discussed subsequently will be drawn from one of the new Acts –LOU (2007:1091). As a result of the changes that have taken place at political and legal levels demonstrated above, the regulation of GPP has slowly but surely developed. Not only has environmental issues in general received a more prominent position in the regulative framework of the European Union, but environmental considerations in public procurement has been enabled through ECJ rulings and legislative amendments at European and consequently at national (Swedish) levels. This is illustrated especially by the 2006 Government Bill where the removal of the prominent Swedish principle "*affärsmässighet*" (business-like behaviour) was discussed in relation to the possibility of integrating environmental (and social) consideration in the public procurement process.[185] Consequently, the legislation has come to consist of elements enabling public procurement decision-makers in terms of actively contributing to a more sustainable public procurement, elements that will be dealt with in more detail throughout this thesis.

4.2. Current Regulatory Framework

In essence, public procurement is about purchasing products and services. For this activity, 177 paragraphs are required in the 2007 Swedish Public Procurements Act,[186] out of which 9 specifically refer to environmental considerations. What makes the public procurement activity warrant such an array of legal stipulations? The answer to this question has the potential of becoming rather technical, with reference to the public procurement process, the different public procurement procedures and corresponding procedural requirements, the specific stipulations for different sectors, which documents can be requested as proof of eligibility, etc. The regulatory framework discussed here will take a more general approach in order to study the norms present in the regulatory framework and particularly in terms of GPP.

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[183] Swedish Public Procurements Acts (2007:1091), SFS 2007:1091 on public procurement (LOU) and (2007:1091), SFS 2007:1092 on public procurement for water, energy, transport and postal services (LUFS). The Acts came into force on January 1st 2008.

[184] EC Directives 2004/17/EC and 2004/18/EC.

[185] Government Bill Proposition 2006/07:128, at p.157. It should be noted that direct reference is also made to the integration principle, art. 6 of the EC Treaty.

[186] The Swedish Public Procurements Act, (2007:1091). This count excludes one of the Public Procurements Acts (SFS 2007:1092).

The new Swedish Public Procurements Act on public procurement (hereafter LOU) is considered a proceedings act (*förfarandelag)* that deals with various stages of the public procurement process,[187] and its main purpose is to contribute to the establishment of the internal market within the EU.[188] By facilitating trade between EU Member States, opportunities for competition and lower priced products and services increase,[189] which is the same kind of jargon used leading up to the 1992 Directives. Thus far it tallies with the previously existing Swedish legislation on public procurement.

The Swedish Government Bill (hereafter the 2006 Government Bill) to the new legislation adds the sustainability dimension to the regulation of public procurement through statements that: "[t]he suggested formulation of the provision provides the procuring authority or unit with an opportunity to integrate environmental and social considerations to the extent it is allowed in the directives;"[190] and the highlighting of the *integration principle* through the statement that "[i]n accordance with article 6 in the Treaty, the environmental protection requirements are to be integrated into the formulation of and execution of the Community's politics and activities referred to in article 3 of the Treaty, particularly with the purpose of contributing to a sustainable development."[191] Interestingly, it is stated in the 2006 Government Bill that there were discussions in the procurement committee regarding the formulation of the provisions pertaining to GPP and whether the consideration of environmental sustainability criteria were to be compulsory in certain situations where it was permitted within the directives. However, it was decided that a more in-depth analysis of potential effects would have been required, which they had not been able to do.[192]

The legislation is a framework legislation where procedural norms ensure that the procurement is performed by those authorised to do so and when required,[193] as well as according to the specific procedure.[194] However, the legislation does not explicitly stipulate what is to be procured or according to what criteria the products or services are to be chosen other than that the stipulated principles must be followed.[195] Rather, the legislation functions to enable the procuring authority by

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[187] Forsberg, Niclas (2007), *Offentlig upphandling i praktiken*, Norstedts Juridik, 3rd Ed., at p.13.
[188] Nilsson, Jan-Eric, Bergman, Mats and Pyddoke, Roger, (2005) *Den svåra beställarrollen – Om konkurrensutsättning och upphandling i offentlig sektor.* SNS Förlag, at p. 49.
[189] Nilsson, et al. (2005).
[190] Swedish Government Bill, proposition 2006/07:128, part 1, at p.157.
[191] Swedish Government Bill, proposition 2006/07:128, part 1, at p.157.
[192] Such an in-depth analysis is currently being undertaken.
[193] The Swedish Public Procurements Act, (2007:1091) chapter 1, sections 2-6, stipulate when the legislation is to be applied, i.e. for what types of procurements and contracts.
[194] The Swedish Public Procurements Act, (2007:1091) ch.4 stipulates the specific public procurement procedures and appurtenant conditions.
[195] See Forsberg, 2004, at p.105.

allowing for creativity and flexibility when drawing up the request for tender (contract documents) and when setting the criteria for selection of tenderers and evaluation of tenders. On the other hand, once these criteria are selected and put in writing in the contract documents, the procedure must subsequently be followed and consistent with what has been stipulated and advertised. This follows from clarifications of the public procurement principles through ECJ rulings.[196] In other words, the flexibility is limited in that the procuring authority must follow the general principles of public procurement as stipulated in LOU: equal treatment, non-discrimination, mutual recognition and proportionality.[197] Equal treatment entails ensuring that all tenderers receive the same information, that the contract documents are clear and distinct and contains sufficient information with regard to which requirements must be fulfilled in order for the tender to be accepted.[198] The principle of non-discrimination is to ensure that the contract documents do not contain requirements that only national tenderers can meet.[199] The principle of mutual recognition entails accepting goods and services produced in other Member States of the European Union on the same basis as national goods and services are accepted. Lastly, the principle of proportionality entails a restriction in that the procuring authority cannot set higher requirements with regard to the tenderers/subject of the contract than required for the particular procurement, as well as a prohibition against disqualifying a tenderer based on irrelevant grounds.[200]

The new legislation has clarified some of the question marks regarding environmental considerations,[201] e.g. by explicitly specifying the conditions for including eco-labels,[202] that contract clauses containing environmental conditions may be included as long as specified in the contract documents or the contract notice,[203] or the conditions for using environmental management systems (or EMS) as evidence of environmental management initiatives being undertaken.[204] Explicit reference to environmental considerations in the public procurement legislation consequently occurs in a number of places in the EC Directives and consequently in the recent Swedish legislation. The legal constituents enable the integration of environmental consideration in the public procurement process by allowing the procuring authority to exercise certain discretion with regard to the

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[196] See e.g. European Court of Justice Case no C-31/87, *Beentjes*, [1989] ECR 4365,
[197] The Swedish Public Procurements Act, (2007:1091), chapter 1, section 9.
[198] Forsberg, (2004), at p. 179.
[199] Forsberg, (2004), at p. 180.
[200] Forsberg, (2004), at p. 179-80.
[201] See paper II and the next chapter for more information on how environmental considerations are perceived in terms of public procurement.
[202] The Swedish Public Procurements Act, (2007:1091) chapter 6, section 7.
[203] The Swedish Public Procurements Act, (2007:1091) chapter 6, section 13.
[204] The Swedish Public Procurements Act, (2007:1091) chapter 11, section 15.

organizing of the procurement process, the formulation of the contract documents and the contractual terms of the final procurement agreement, as well as the evaluation of tenders. Granted that the public procurement legislation has evolved from and still revolves around economic interests and priorities – e.g. free movement of goods and services and ensuring the internal market of the EU, yet in light of changes external to the legislative framework, environmental awareness and interests have influenced its development and formulation towards a more "green" approach.

One stage in the procurement process where an integrative process is possible is when the procuring authority is able to exclude tenderers that have been convicted of a judgement of an offence concerning the professional conduct or that are considered guilty of grave professional misconduct.[205] According to Forsberg, this includes offences resulting from a breach of environmental legislation.[206] Although it could be argued that the threshold of "grave" is rather high.[207]

Another procedural premise enabling the procuring authority to integrate environmental considerations is during the formulation of the contract documents and in particular in the technical specifications,[208] where the procuring authority formulates the contract documents according to certain needs and may thus ensure that an environmental perspective is integrated in the specific procurement. In the contract documents, the procuring authority additionally determines what selection criteria the tenderers must fulfil and according to what award criteria the tenders will be evaluated. The legislation enables the procuring authority to stipulate selection criteria that require that the tenderers are able to fulfil the terms of the contract and, where applicable, require that the tenderers show proof of that ability.[209]

An example of such proof is, as indicated above, an environmental management system in the event that the contract requires such knowledge to be accessible within the organisation of the tenderer. As existed previously, the legislation specifically enables the procuring authority to formulate the contract documents such that the award criteria to be used in the evaluation of tenders can refer specifically to environmental considerations and requirements.[210] It should be noted that the procuring authority can decide whether to award the contract to the tenderer with the "lowest price" or the tenderer with the "economically most

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[205] DIR 2004/18/EC, Art.45(2)(c) & (d). The Swedish Public Procurements Act (2007:1091, chapter 10, section 1.
[206] Forsberg, (2004) at p.111.
[207] Case nr. 8647-1996, where an alleged emission of mercury did not amount to a grave professional misconduct. In Forsberg, (2004), at p.111.
[208] The Swedish Public Procurements Act, (2007:1091), chapter 1, sections 12-16.
[209] The Swedish Public Procurements Act, (2007:1091), chapter 1, section 18.
[210] The Swedish Public Procurements Act, (2007:1091), chapter 12, section 1.

advantageous" tender. Environmental evaluation criteria are only enabled when the procuring authority chooses the second alternative, given that "economical" is not limited only to fiscal variables, yet the criteria must be related to the subject matter of the procurement and must be specified in the contract documents.[211] Furthermore, and as indicated earlier, environmental considerations can be integrated through the conditions for performance of contracts (or contract clauses),[212] through which the procuring authority requires that the performance of the contract be executed in terms with certain environmental requirements.[213]

[211] Forsberg, (2004), at p.112.
[212] The Swedish Public Procurements Act, (2007:1091), chapter 6, section 13.
[213] Forsberg, (2004), at p.112.

5. Norms and Legal Rationalities in GPP

This chapter discusses the empirical findings and related analysis using the conceptual framework of norms and legal rationalities presented earlier. The conceptual framework is used here to study the norms present in public procurement regulation generally and GPP regulation specifically and to explain the regulation of public procurement and GPP in terms of legal rationalities.

5.1. Norms in Public Procurement Regulation

What norms can ergo be said to exist within the regulatory framework of green public procurement? Picking up on the objective of this compilation thesis, this section analyses the regulation of green public procurement in terms of what norms are present drawing on its legal regulation and practical application in both public authorities (by procurement officers) and in courts (by legal professionals). In other words, the answers are sought to the following questions: How does the law in books cope with the infusion of environmental sustainability values into the law in books? What are the consequences of the infusion of environmental sustainability values into the legislation for the law in action?

5.1.1. Internal structure of public procurement regulation

In light of the operationalisation, the internal structure of public procurement regulation can be described in terms of which of the three internal dimensions – competence norms, procedural norms and action norms – are present in the context.

Law in books

Identifiable in the context of public procurement regulation generally is the presence of all categories of norms: action norms, competence norms and procedural norms. From the legislation (both the current and the previous legislation) it is apparent that competence norms stipulate who is to act in the public procurement setting. The legislation stipulates the competent actor as the "procuring entity". However, the legislation does not stipulate who is to act on

behalf of the procuring entity; rather, who is authorised to act and make decisions on behalf of the procuring entity is generally formalised in a document stipulating the devolution of authority on the basis of the Swedish Local Governments Act (SFS 1991:900). For the purposes of this thesis, the actor subject to this competence norm is considered the procuring officer. This is also the actor in the public procurement process that was interviewed in the empirical investigation of this thesis, as evidenced primarily in appended papers I and II.

The legislation furthermore stipulates action norms in terms of duty norms, albeit to a limited extent. Where existent, the duty norms are typically present at the start of a chapter in the first section of the legislation (or at the start of a section)[214], with a wording indicating *what* the procuring entity "shall" do, followed by a series of procedural norms in the following sections of that chapter stating *how* this is to be done.[215] The duty norm is generally formulated in combination with a competence norm stating that it is the procuring entity that is the actor. An example is the section stipulating the public procurement principles, where it is stated "[p]rocuring authorities *shall* treat suppliers in an equal and non-discriminating manner, as well as conduct procurements in a open way." The initial part of the section is thus a duty norm (shall) in combination with a competence norm (procuring authorities), followed by a procedural norm (conduct procurements) and a goal-oriented norm (in an open way) referring to the objective represented by the principle of transparency.

The consequences – or sanctions – related to a breach of the duty norm is however not stipulated in combination with the duty norm itself, but in a general mode in a specific chapter of the legislation dealing with the review procedure and damages.[216] The chapter stipulates the procedure for bringing a complaint and section two contains a duty norm stipulating the consequences of conducting an erroneous procurement (*felaktig upphandling*) – whereby the procuring authority is in breach of one of the principles or any other stipulation in the legislation.[217] Accordingly, the sanctions are relevant for being in breach of any of the norms in the legislation, not limited to the duty norms. In relation to the review procedure some competence norms are present in terms of the standing rule; i.e. who has the right to bring a complaint against the procurement decision or bring a claim for

[214] E.g. the Swedish Public Procurements Act, (2007:1091), chapter 1, section 9.
[215] See the Swedish Public Procurements Act, (2007:1091), chapters 6, 7, 9, 10, 11, and 12, for some specific examples.
[216] The Swedish Public Procurements Act, (2007:1091), chapter 16.
[217] The Swedish Public Procurements Act, (2007:1091), chapter 16, section 2.

damages.[218] Here the competence falls upon the bidder. Overall, however, the presence of procedural norms is profuse.[219]

More specifically, in a GPP regulatory context, the legislation stipulates primarily action norms in the terms of balancing norms. One exception exists in terms of environmental management systems (EMS), where the legal norm stipulates specific conditions for requesting EMS as evidence of tenderers' environmental management capacity.[220] The other sections in the legislation that refer specifically to GPP in some way, do so by way of formulations that indicate environmental considerations as a possibility – "may" (*får*) or "can" (*kan*), typically in combination with procedural and competence norms.[221] LOU, chapter 6, section 3 represents one example in that "[a] *procuring authority may* state the technical specifications in the form of performance or functional criteria. *Environmental properties may* be included in these criteria." The balancing norm is accompanied by a duty norm in combination with a procedural norm, stating how this balancing norm is to be executed if used: "The criteria *shall* be formulated such that the subject matter of the contract is clearly identifiable." LOU, chapter 6, section 13 illustrates another example whereby "[a] *procuring authority may* prescribe specific social, environmental and other conditions for the fulfilment of a contract." As previously, this norm is followed by a duty norm in combination with a procedural norm: "These conditions *shall* be stated in the contract notice or in the contract documents."[222]

Consequently, the norms introducing GPP are primarily balancing norms, directly accompanied by competence norms, but also indirectly by duty norms and procedural norms. The formulations as balancing norms require specific information and knowledge other than legal to be implemented. Yet they do not expressly indicate what other interests (other than environmental) are to be balanced (with the exception perhaps of chapter 12, section 1) or how the balancing act is to be done.

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[218] The Swedish Public Procurements Act, (2007:1091), chapter 16, sections 1 and 6 .

[219] With the exceptions mentioned in light of GPP and the review procedure, and the first sections of chapters 6, 7, 9, 10, 11 and 12, the 16 chapters contain almost exclusively procedural norms. (I.e. approximately 130 out of 177 sections if we exclude chapter 2 on definitions (consisting of 25 sections.)

[220] The Swedish Public Procurements Act, (2007:1091), chapter 11, section 15.

[221] See the Swedish Public Procurements Act, (2007:1091), chapter 6, sections 3, 7, 12 and 13; chapter 10, section 2; chapter 12, section 1; and chapter 16, section 1.

[222] The Swedish Public Procurements Act, (2007:1091), chapter 6, section 13.

Law in action

The nature of the norms within the public procurement regulation in action (the norms identifiable in the application and implementation of the legislation in practice) will be discussed in this section.

Paper I highlights the presence of both action norms in terms of duty-norms and goal-oriented norms. These are "not to include irrelevant considerations, ensure competition, ensure proportionality; and stay within the procedural requirements to avoid legal repercussions.[223] It is stated in the paper that these norms are expressed as goals that are thought to be achieved within the procurement officer's profession, such as ensuring competition. To some extent procedural norms from the legislation are mentioned or referred to (the proportionality principle and procedural requirements), but in the shape of goal-oriented norms (ensure proportionality) or duty-norms (stay within procedural requirements to avoid legal repercussions). Another existing goal-oriented norm that is highlighted within paper I in terms of law in action is to "make the most of the tax payers' money"[224] or ensure best value for money in order to achieve economic efficiency.[225] The balancing-norms pertaining to GPP present in the law in books[226] is expressed by the procurement officer as a norm often in conflict with another EC-derived norm of free market competition.[227]

In paper II it is apparent that the Public Procurements Act to some extent is seen by the procurement officers as a "procedural document".[228] The norms pertaining to GPP are identified as balancing norms, where a balance is struck between environmental interests and cost, as well as between environmental interests and certainty (available knowledge about products and services). Additionally, there seems to be limited capacity to tip the scales in favour of environmental interests due to lack of knowledge regarding environmental considerations and the lack of knowledge regarding the legislative framework and its stance regarding environmental considerations.[229] Rather, there seems to be a call for a goal-oriented norm –political guidance and clear policy objectives – pertaining to GPP in order to motivate action that is in favour of the environmental interests.[230]

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[223] Paper I, at p. 7.
[224] Paper I, p. 7.
[225] Paper I, at p. 10.
[226] This is particularly with reference to the ability to integrate environmental considerations in the evaluation stage of the procurement process, seeing that it is a balancing-norm that existed also prior to the 2008 legislative change.
[227] Paper I, at p.9.
[228] Paper II at p. 250.
[229] Paper II, at pp. 249-50.
[230] Paper II, at p.250

The procedural nature of norms is articulated in both papers III and IV. Paper III points towards one of the stages of the procurement process – the evaluation process – when, on the basis of cases and procurement literature, highlighting the fact that the procuring entity is "free to choose an appropriate method for the evaluation of price and non-price criteria", as well as to stipulate its own procurement process to some extent (i.e. the *how* – or procedural norms).[231] From papers III and IV I furthermore detect that a procedural norm (emanating from the cases) stipulates that the procuring entity acts in correspondence with what it has stipulated in the contract documents, which in turn is to warrant the fulfilment of the duty norms present in the legislation, such as transparency.[232] However, in paper IV I identify another procedural norm from the cases mitigating the before mentioned procedural norm in that it is stated that the procedure for drawing up the contract documents or the model used need not be optimally drawn up to be accepted, with the proviso that the principles of public procurement are fulfilled. This norm is warranted with reference to the context of public procurement that involves changing market conditions.[233]

Another norm that can be identified in paper III is a goal-oriented norm to minimize the cost of procurement, rather than to maximize the value, present in light of the threat of appeals by aggrieved tenderers.[234] Lastly, a competency norm derived from the analysis of cases in paper IV, not identifiable from the law in books, is the statement in several cases that "the procuring authority itself holds the best prerequisites for determining how the tenderers fulfil the requirements".[235] In essence, this is also to some extent a limitation on the application of the duty norm in the law in books stating what an erroneous procurement entails (a procuring authority in breach of one of the stipulations in the legislation).

So, how about action norms for GPP; are they absent? In paper III, we argue that action norms in essence are absent. However, based on empirical findings and government bills, the answer is not as clear-cut. Paper II highlights the statement by one of the interviewees that "there are no special rules for environmental criteria", indicating that environmental criteria in public procurement are not subject to specific legal rules.[236] This means that the statement that action norms

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[231] Provided that basic principles of the legislation are met, see paper III, p. 8.
[232] Paper III, at p. 22, paper IV, at pp. 2 and 7.
[233] Paper IV, at p. 9.
[234] Paper III, at p.6.
[235] Paper IV, at p. 9.
[236] It should be remembered, though, that the interviews are based on experiences regarding the previous (SFS 1992:1528) legislation. It is possible that the answer would be different subsequent to the new legislation, where e.g. environmental management systems and environmental brands are subject to specific legal rules. See Swedish Public Procurements Act

are absent in terms of GPP is true in terms of duty-norms. On the other hand, looking at one of the action norms as introduced through the operationalisation – the balancing norms – their presence can be identified.

The review procedure and the standing rule is explained and discussed in papers IV and V. In paper V it is clear that the standing rule is generally rather narrow in the law in books and in terms of public participation, yet a broadened (and more inclusive) competence norm (or standing rule) can be identified to exist in practice (or the law in action).[237] Additionally, the duty norm – stipulating what an erroneous procurement and its consequences entails – is also broadened in the law in action since all decisions taken can be called in question and not only the specific decision (or duty/procedural norm) referred to in the complaint.[238]

GPP regulation in books – GPP regulation in action

Paper I indicates the existence, as identified by the procuring officer, of conflicting interests in terms of sustainability (or GPP) versus free market competition. This has also been highlighted by other procurement officers in the study and can additionally be identified in the historical description of policy objectives within public procurement, discussed earlier. Consequently, although there is neither an action norm in terms of a duty norm directly stipulating that these potentially conflicting interests are to be balanced or how, nor that the procuring entity must integrate environmental considerations in the public procurement process,[239] there is a balancing norm that potentially influences the actions of those administering the law by leaving it to the procurement officers to balance political policy objectives. Additionally, although published subsequent to the interviews, the Swedish Government Bill 2006 fortifies the presence of the balancing norm, with references to Article 6 of the EC Treaty,[240] as well as by linking the discussion regarding the removal of the principle of business-like behaviour (*affärsmässighet*) to the presence of sustainability values or green public procurement.[241]

Interestingly, the Government Bill 2006 highlights the debate regarding the controversial issue of potentially introducing an action norm directly stipulating that procuring entities *should* integrate environmental considerations in the procurement process, declaring however that further thorough analysis is

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(2007:1091), chapter 6, section 7, for environmental brands and chapter 11, section 15 for environmental management systems.

[237] Paper V, at pp 4-5 and 7-8.

[238] Paper V, at p. 5.

[239] See, however,the discussion below.

[240] Swedish Government Bill 2006, Proposition 2006/07:128, at p.157.

[241] Swedish Government Bill 2006, Proposition 2006/07:128, at p.157.

required.[242] Such an approach would have entailed a goal-oriented norm rather than a balancing norm, which might not have been feasible taking into account the apparent cognitive limitation of lacking environmental information in relation to the introduction of GPP, as highlighted in papers I and II. The debate resulted in a formulation in line with the EC directives, i.e. no action norm in the form of a duty norm (shall) or goal-oriented norm (should), but rather an enablement (may) that in essence introduces a weaker, balancing norm into the law in books.[243]

It is clear from the analysis above that the public procurement regulation (generally) or law in books – the norms identifiable in the legal documents – primarily consists of procedural norms, whereas the GPP regulation or law in books largely consists of balancing norms. The public procurement regulation or law in action, in accordance with the discussion derived from the papers, also primarily consist of procedural norms, whereas the GPP regulation or law in action is dominated by goal-oriented norms – albeit goals represented by traditional business values (competition) and remnants from earlier legal documents (efficiency).

5.1.2. External function of public procurement regulation

In terms of the external function of public procurement regulation, the predicament raised at the outset of this thesis complicates the analysis. Who is the regulator and who is being regulated? In the straightforward analysis the state regulates the procurement activity and thus the activities of the procuring entity, which makes the procuring entities (or procurement officers) the regulated actors. On the other hand, the use of public procurement as a tool to further socio-political objectives entails the combination of its different functions within public procurement where the state uses its purchasing power to regulate the market, while being a participator in the market at the same time.[244] The state is thus the regulator of the public actors, but also the regulator of the private actors on the

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[242] Swedish Government Bill 2006, Proposition 2006/07:128, at p.199. In fact, the Swedish Government, in an additional directive, commissioned the procurement committee to investigate the possibility of introducing a stipulation to that effect, which was also the committee's recommendation (SOU 2006:28, at pp.227-33). The recommendation was however rejected in the procurement legislation, subsequent to objections from various directions arguing that it would be impossible to verify and follow-up environmental criteria in all procurements. See e.g. comments on a proposal circulated for consideration by the Swedish Agency for Public Management, registration number 2006/92-4. Other potential problems are highlighted by the comments made by the former Swedish National Board for Public Procurement, registration nr. 2006/0091-22, at p. 17.

[243] For a detailed description of the debate see. SOU 2006:28, ch. 6, particularly pp. 227-32.

[244] McCrudden, 2007, at p.2. See ch.1, above.

market. The analysis will take place on the basis of both of these regulatory activities.

According to paper I, there is an objective of ensuring competition and finding best value for money in practice,[245] which was also emphasized in paper III.[246] In one sense, the external function can be said to involve the establishment of the structural premises for the mobilization and allocation of resources, since the purpose of procurement is to acquire goods and services in an efficient manner. In another sense, the external function can be said to entail the instrumental modification of market-determined patterns of behaviour, since both the public actors and the private market actors possess the executive function in terms of making their own decisions regarding when and what to procure (in the case of the former) and when and what to produce or provide (in terms of the latter), whereas the regulating function or the purchasing power of the state, can be likened to an intervention by enabling additional policy objectives as well as limiting the scope for action, e.g. to compensate for environmental externalities by enabling environmental considerations or require environmental investments by tenderers through the use of environmental criteria in the tender documents. However, the intervention can be said to be both primary in terms of legal rules stipulating the intervention substantively in the form of balancing norms (in the case of the public actors), and secondary as it is effectuated through the activities of civil servants (in the case of the private actors).[247]

As indicated in the discussion about norms in GPP regulation, the law in action shows how this intervention is effectuated in practice. It tends to take on a form of very limited intervention in both the activities of the public and private actors, since the balancing norms are invoked in terms of traditional business objectives or goal-oriented norms, alternatively in terms of environmental considerations that do not entail much disturbance of the business-as-usual by requiring very limited effort on the part of both the public and private actors. Naturally there are exceptions to this, where the balancing norms truly are invoked and the scales are tipped in favour of the environmental interests in the formulation of the contract documents. One is the use of energy efficiency criteria in the procurement process.

Paper III highlights the trend towards increasing collaborative practices between public and private actors, possibly as a reaction to the increase in number of complaints brought in terms of judicial review.[248] Irrespective of the reason for this trend, Edward Weber has identified a trend within environmental regulation

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[245] Paper I, at p.9.
[246] Paper III, at pp. 29-30.
[247] See discussion regarding primary and secondary intervention under heading 3.2.1, above.
[248] Paper III, at p.22.

where public and private sectors collaborate within regulatory frameworks that move away from command-and-control mechanisms and towards discretionary and flexible mechanisms to achieve win-win situations.[249] However, and in accordance with the findings in paper II, the public procurement process takes place through a dialogue with the users of the goods and services, which is also considered a necessity in order to use the government's purchasing power to achieve policy objectives,[250] or to effectuate secondary intervention as stated above. In other words, internal dialogue takes place within the organisation, but also with the external actors. The latter dialogue is strictly regulated through the procedural requirements of the law in books,[251] yet it is apparent in the law in action that dialogue between the procuring authority and the private actors takes place to a great extent.[252]

5.1.3. *Justification of public procurement regulation*

The introduction of legal regulation within public procurement was warranted by the establishment of the Single European Market and to ensure free competition within that market, in accordance with the international policy objective of creating open global markets. Thus, the justification for the introduction of the procurement regulations within the European Union and subsequently Sweden could be described as a means of ensuring the establishment of spheres of activity for private actors, in the terms of Teubner.

On the other hand, paper II highlights the use of public procurement to integrate environmental considerations, and thus indirectly regulate the economic activity within the market to, in a way, compensate for market inadequacies, including e.g. the inability to internalise the external costs of environmental pollution. As paper II indicates, this development has taken place as a result of developments within the European Court of Justice, which has come to change the policy objective within public procurement from ensuring open global markets – and a strictly economic objective of public procurement, towards the balancing of different policy objectives in the decision making process.

The availability of judicial review in terms of regulatory enforcement in the public procurement process is interesting in terms of its use as a means of controlling procurement officers' discretionary powers. This brings us back to the issue mentioned earlier regarding discretionary regulation. One reaction to the

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[249] Weber, P. Edward, 1998, *Pluralism by the Rules – Conflict and Cooperation in Environmental Regulation*. Georgetown University Press/Washington, D.C., at p.2.
[250] Paper II, at p. 250.
[251] See e.g. paper III, at p. 20, for an example of when dialogue is restricted.
[252] See reference to dialogue with private actors in paper I, at p. 8.

discretionary regulatory approach, or regulatory approach dominated by substantive rationality, and its dissociation from the rule of law is thus, according to Cotterrell, the introduction of a means of controlling that discretion through e.g. judicial review.[253] As discussed in paper V, the reason why a revision procedure is available, besides enabling an aggrieved tenderer to obtain redress, is to create a foundation for a uniform application of the law and thereby serve as guidance for tenderers, increase predictability and thus uphold the rule of law. Paper IV indicates that the predictability sought by invocation of the revision procedure is compromised by the presence of the grey zone in the law in action. There is thus an element of legal uncertainty in terms of implementing the law in books into law in action.

Furthermore, as discussed in papers IV and V, aspects of the regulatory framework – relating to the revision procedure available to aggrieved bidders – exist in order to safeguard the procedural norms,[254] which in turn exist in order to safeguard the virtues of the free market: competition and non-discrimination,[255] as well as the virtue of the rule of law as discussed above.[256] In paper V, I highlight the view that the ECJ has identified the public procurement legislation as an instrument authenticating established EC principles.[257] Consequently, the revision procedure available can be seen as a way of ensuring the free market and thus potentially as a way of controlling the self-regulation that exists in terms of the state regulating public actors, as well as the self-regulation that takes place in terms of the public procurement process, whereby (as highlighted in papers III and IV) the procuring entity stipulates its own formal requirements in the tender documents.[258]

Paper V furthermore discusses the public procurement specific review procedure in terms of it being a reduced form of judicial review primarily about ensuring efficacy and discourse and not broad participation by the public in the name of democracy.[259] The procedure is a means of controlling that the procedural norms are followed, while allowing for participation albeit limited in reference to efficiency and the purpose of public procurement. The existence of the review procedure were clearly deemed important by way of the *Alcatel* judgement in 1998 and the amendment to the public procurement legislation in 2002, whereby its

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[253] Cotterrell, 1992, at p.163.
[254] Paper V, at p. 2.
[255] Paper IV, at p.7.
[256] Cotterrell, 1992, at p. 162.
[257] Paper V, at p. 5.
[258] Paper III, at pp. 22, 24.
[259] This is in line with what Mathiesen has suggested as a solution to the problem of inefficiency due to participation. See paper V, at pp. 6-7.

existence in the law in books was broadened so as to enable its existence in the law in action.

In the law in action it thus seems that the desired predictability to some is extent limited and the drastic increase in number of complaints in the years following the legal amendment making complaints feasible bear witness to a desire to make use of the ability to control discretion.

5.2. Legal Rationalities in Public Procurement Regulation

Making further use of the operationalisation presented earlier in this compilation thesis, this section will develop and discuss the analysis of norms in public procurement regulation in terms of legal rationalities.

In the analysis above it is clear that the law in books entails primarily procedural norms – the Act is even called a procedural document. In terms of GPP, primary norms present in the law in books are balancing norms. According to the empirical material and the findings identified from the appended papers, the law in action indicates the presence of procedural norms as well, whereas the procedural norms as well as the balancing norms pertaining to GPP law in books are expressed in terms of goal-oriented or duty norms in GPP law in action. What does this mean in terms of legal rationalities?

5.2.1. Internal structure of public procurement regulation

In order to answer the question, this section will make use of the previous analysis to discuss the legal rationalities in public procurement regulation. It was argued through the operationalisation of the norms and legal rationalities that certain links between different norms and legal rationalities can be identified. Consequently, this section will discuss the relation between the findings in terms of norms and the legal rationalities introduced in chapter three.

According to the analysis of the law in books, the regulatory framework primarily consists of procedural norms, supported by some duty norms to certify the enforcement of the norms through the invocation of the duty norms through the review mechanism, as well as by some competency norms indicating who is to act in relation to the existing procedural and duty norms. The norms present in the law in books in terms of GPP are specifically and primarily represented by balancing norms. This is in accordance with the connection made in the operationalisation between procedural norms and balancing norms, indicating a dominance of reflexive legal rationality. However, there are elements of both formal and substantive legal rationality in the regulatory framework.

Through the analysis of the law in action, on the other hand, a different picture is painted. The legislation is seen as a procedural document to some extent and the presence of procedural norms is recognised by procurement officers. Overall, however, when discussing the norms present in practice, they refer to the norms in the form of duty norms or goal-oriented norms. The procurement process is about making the most of tax payers' money, achieving economic efficiency, ensuring competition, looking to what is best for the municipality inhabitants, etc. In terms of GPP, the existence of a balancing norm is recognised, however the balancing norm is identified as balancing environmental against free market or competition interests, or environmental against efficiency interests. It is identified as a conflict between interests, where the environmental interests are not prioritised in the procurement process. Rather, the procuring officers refer to traditional values of public procurement – such as looking to what is best for the municipality's inhabitants or ensuring competition – as goal-oriented norms within procurement practice. Interestingly, the old Procurement Statute (*Upphandlingsförordningen*) contains objectives similar to that referred to by the procurement officers of looking to what is best for the inhabitants. Furthermore, the objective of ensuring competition has been stated as an objective not within the tasks of procuring authorities. The task is not to create a well-functioning competition, but merely to seek out existing competition.[260]

In most cases, were the scales tipped in favour of environmental interests, this would take the form of straightforward environmental criteria (as in requiring little effort and were easy to assess) where the knowledge limitations were not as great. This is apparent from paper II, where examples of environmental considerations used in the procurement process is represented primarily by criteria pertaining to Environmental Management Systems (where a copy of an environmental policy or certificate often would suffice as evidence) or energy efficiency (financially identifiable).[261] In terms of balancing environmental interests against others there were sometimes calls by the procurement officers for a goal-oriented norm (in the form of a specific policy directive or earmarked resources) for environmental considerations in order for them to implement it in practice and e.g. invest resources to develop environmental criteria to a greater extent.

Consequently, the balancing norm was concretised in terms of goal-oriented norms emanating from traditional business or economic efficiency values, alternatively in terms of simple environmental considerations and/or a call for goal-oriented norms pertaining to environmental considerations. In papers I and II limitations to the integration of environmental considerations are highlighted

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[260] Slavicek, M., 2001, at p. 18.
[261] Paper II, table 1 at p. 252.

partly as a lack of environmental information and knowledge. This is a potential reason for the insufficiency of the model for balancing interests – there is not enough knowledge regarding how to give priority to the environmental interest. Consequently, the norms pertaining to GPP take on a goal-oriented form and thus the law in action is dominated by a substantive legal rationality instead.

Turning to papers III, IV and V and the norms identified in terms of the revision procedure available in the public procurement process, it is clear that the procedural norms prominent in the law in books prevail into the law in action as applied in the courts. What becomes interesting for my purposes here is the following: i) the discretion ("free to choose an appropriate method") present with regard to the procedural norms, provided that the principles of public procurement are fulfilled; ii) the broadening of the procedural norms ("procedure need not be optimal"); iii) the limitation on the application of the duty norm of what an erroneous procurement entails ("procuring authority holds the best prerequisites"); iv) the extension of the application of the before mentioned duty norm (all decisions are subject to review); and, lastly, v) the broadened competence norm (or standing rule). The legal rationality dominating here becomes less identifiable through an analysis in terms of which norms are present; rather, what is identifiable is the application of the law in books in the courts. The courts tend to remain true to the norms present in the law in books and merely construe how the norm is to be interpreted, where some are broadened or narrowed. However, the discretion identified under point i) brings my thoughts to the "open-ended standards and general clauses" identified in terms of discretionary regulation and a substantive legal rationality.

Another interesting finding in terms of legal rationality is the goal-oriented norm identified in the law in action (as applied by the procuring officers) that does not exist in the law in books – minimise the cost of procurement instead of maximising value – which additionally directly affects GPP implementation. This, too, indicates that the balancing norm in the law in books is dealt with through a concretisation of the norm into a goal-oriented norm – or coping with an element of the reflexive legal rationality through an element of substantive legal rationality.

A continued discussion in terms of which legal rationality is dominant regarding the external function of the public procurement revision procedure will follow in the next section.

5.2.2. External function of public procurement regulation

The external function of public procurement regulation was discussed above, providing a rather disparate rendering. In light of European integration, it is no longer primarily about ensuring economic efficiency with taxpayers' money, but rather to secure the objectives pertaining to the Single European Market. As stated in the operationalisation, this has been identified by Habermas as elements of the

formal legal rationality in that it is about the generation and distribution of natural resources – of which public procurement is part.

Additionally, in light of environmental awareness at both European and national level, the use of public procurement as a policy tool to further environmental (and social) interests, the external function also becomes one of contributing towards sustainable development. The external function of public procurement regulation in terms of GPP has thus become represented by an interventionist approach or the instrumental modification of market-determined patterns of behaviour. According to the empirical findings, however, this interventionist approach seems present primarily in the law in books, whereas the law in action portrays a different image. The approach instead seems to be to adhere to the norms present in the market – traditional business norms, competition – or to limit the intervention to a minimum. The latter is achieved by using criteria that do not require much neither on the part of the public nor private actors, as well as by weighting the environmental considerations (in terms of procurement of goods) at approximately 5% and price at 70%, which in essence means that the price will generally be decisive for the outcome.[262]

The market has been used as an example of a self-regulating system.[263] Seeing that public procurement is a limited form of procurement that is played out within the market, the *private* procurement can be seen as a typical example of a self-regulating system. The regulatory framework for public procurement compromises this idea, as stated earlier. This can be explained by the fact that the regulatory functions of the state in terms of public procurement can be seen as twofold. The public actors are regulated in terms of public procurement regulation – or *imperium* – (in terms of incorporating GPP into the legislation through balancing norms), while the private actors are potentially indirectly regulated through the invocation of these balancing norms – or *dominium*, which could be described both as a means of secondary intervention or as a regulatory phase of the self-regulating system of the market.

Consequently, the formal and substantive legal rationalities seem dominant through the regulation of procuring authorities and through the enablement of invoking additional policy objectives, while reflexive legal rationality elements are present through the existence of goal-oriented norms originating in the self-regulating system of the market.

The external function of public procurement regulation in terms of both law in books and law in action thus seems to be adherent to a dominance of formal legal rationality with elements of substantive legal rationality. In the law in action

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[262] See paper II and Carlsson and Waara, 2006.
[263] Hydén, 1984, at p. 45.

elements of both a formal and substantive legal rationality are present in light of the endeavour by public actors to minimise the intervention in the market structure of additional policy objectives by focusing on traditional business objectives. Although the law in action involves minimising the intervention, there are exceptions to this in that some procurement officers make use of the enablement available through their discretion by integrating environmental considerations, but also to be nationally or locally protectionist. This leads to issues about the role of the revision procedure in terms of public procurement regulation.

In public procurement, a judicial dialogue is created through the revision procedure, which in effect leads to a decentralised integration of society, albeit to a limited extent in light of the limited standing rule in terms of who is part of the *public*. The revision procedure will be dealt with further in terms of the justification of public procurement regulation.

Additionally, as highlighted in paper III, the public procurement process is moving towards more cooperative methods with partnerships between private and public actors.[264] These factors indicate an element of a reflexive legal rationality within public procurement regulation as well.

5.2.3. Justification of public procurement regulation

The origin of the regulation of public procurement within the EC is the maintenance of the values of a free market. Prior to the adjustment of Swedish legislation on public procurement to the EC directives, the Swedish market had contained elements of national protectionism from a European perspective, which was not in line with a truly European market. In the operationalisation this was discussed in terms of the justification of public procurement regulation, albeit primarily in terms of public procurement regulation prior to the infusion of environmental sustainability values. Teubner refers to the establishment of spheres of activity for private actors as the justification of formal law or as an element of a formal legal rationality.

In essence, *private* procurement – the purchase of goods and services – is about making the most of competition and obtain high quality goods and services at the lowest possible price. Public procurement, on the other hand, is limited procurement in that it is a public authority that becomes one of the market actors and procures within a strict, procedural, regulatory framework, where other considerations are necessary. However, the justification of a European inspired regulatory framework in Sweden is the inclusion of Swedish public procurement in the European market. Consequently, the justification of the current public

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[264] Paper III, at p. 4 and Kadefors, A . et al. 2007.

procurement regulation is in line with the formal legal rationality of establishing spheres of activity for private actors. Although the actors with regard to the regulation of public procurement are public actors, this to some extent also applies to the public actors in that they are participators in the market in their procurement function.

On the other hand, in light of environmentally related developments at a European level discussed above, there are also elements of a substantive rationality in that the integration of GPP balancing norm bear witness to an ambition to compensate for market inadequacies.

The justification for the revision procedure in public procurement regulation is, as discussed above, manifold. It is both a means of ensuring the rule of law in terms of predictability, a means of controlling the discretion available and a means of introducing dialogue into the process. Consequently, in light of the justification of public procurement regulation, the law in books gives evidence of the presence of all three legal rationalities, where the elements of formal legal rationality are present in terms of the provision of a revision procedure contributing to predictability in the legal application. Elements of substantive legal rationality are present in terms of discretion available to the procurement officers in terms of balancing norms. Whereas elements of the reflexive legal rationality are present in terms of the processes of discourse existing within the organisation (public authority) and between the public authority and the external private market actors.

The law in action, on the other hand, bears witness to a limited effect of the predictability as a legitimising function, where it is rather the revision procedure that contributes to maintain the rule of law as a control mechanism of public procurement regulation (hence limiting the discretion available to the procurement officers through balancing norms) and thus by controlling elements of substantive legal rationality. Furthermore, there are reflexive legal rationality elements present in terms of the revision procedure constituting a control mechanism of self-regulation, as well as in terms of the dialogue between public and private actors in the law in action, and the revision procedure serves as a control mechanism in order to uphold the rule of law in light of regulatory discretion. Consequently, the formal legal rationality system is deemed necessary to cope with the introduction of substantive legal rationality elements and the existence of reflexive legal rationality elements in the law in action.

6. Discussion and Concluding Remarks

Public procurement expenditure amounts to nearly one fifth of GDP in Europe and Sweden, making it an important area in terms of both research and regulation. Public Procurement activity has been tainted with concerns regarding both protectionist and corrupt behaviour, which have been intensified by the use of public procurement as a policy tool furthering sustainability values. On the other hand, green public procurement is also considered a justifiable addition to the regulatory mix that is called for in terms of managing social change and responding to environmentally damaging activities or compensating for market externalities, as witnessed by phase three of public procurement regulation discussed in chapter four. The aim of his compilation thesis has been to study and explain what form law takes in order to cope with social change, by analysing the norms present within the regulatory space of public procurement, in particular GPP, and discussing these norms in reference to legal rationalities.

Overall, the analysis presented in the previous chapter indicates a mixed system of legal rationalities without clear dominance of either, based on a combined analysis of the internal structure of law, external function of law and justification of law. Perhaps this is due to the experimentation of combining different regulatory approaches in the era post regulation/deregulation debates, or to limitations in the construction of the theoretical framework. Either way, in light of the purpose of this compilation thesis, several findings are interesting and relevant in terms of how law manages or copes with social change. In this chapter these findings will be discussed and the chapter will conclude with some final remarks and issues for future research.

6.1. Coping with the Infusion of Environmental Values

As stated above, there seems to be a co-existence of the legal rationalities in the regulation of GPP. On the other hand, dominance by legal rationalities can be identified in terms of a comparison between the law in books and the law in action in light of the different structures and functions of law. This section will discuss

the findings pertaining to the legal rationalities and the presence of their elements throughout the previous analysis.

6.1.1. Encouraging the generation of knowledge

In terms of the internal structure of law, the law in books indicates a dominance of reflexive legal rationality, although formal and substantive elements exist, whereas the law in action indicates no dominance of reflexive legal rationality, but rather a co-existence of the three legal rationalities, potentially with a dominance of substantive legal rationality.

Some of the reasons identifiable for this are the limitations to the integration of environmental considerations, including lack of environmental knowledge and information or legal uncertainty regarding the application of the law in books. It seems that the procedural norms in combination with the balancing norms requires information not yet within the reach of many procurement officers. The discussions regarding the introduction of a goal-oriented norm in terms of GPP highlighted the necessity for such information and knowledge prior to the introduction of the norm. By introducing GPP in terms of a balancing norm, legitimacy problems in terms of substantive legal rationality and adherent cognitive consequences or limitations are potentially avoided (or at least reduced)[265] allowing for a communicative context where knowledge is generated and future action is enabled. In this way, which is in line with a reflexive legal rationality, the intervention in social processes (or procedures that guide actors' behaviour) is enabled through structural and procedural premises for future action. Consequently, GPP and the integration of environmental considerations are enabled without the substantive legal rationality element of striving to achieve a certain purpose of the regulation or input and output performance. This is in alignment with what Aalders and Wilthagen have highlighted in terms of the gradual replacement of cognitive requirements (or certainties about substantive values) by certainties about procedure and methods.[266]

Based on the interviews conducted in light of this study, the law in action indicates that the procurement officers either interpret the balancing norms pertaining to GPP as goal-oriented norms emanating from the business environment, as a conflict between political interests (sustainable development and free competition), or they apply the balancing norm by introducing simple

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[265] Some problems were identified in the interviews regarding the use of emvironmental management systems as evaluation criteria in the procurement process, leading to it being perceived as a paper tiger without real benefits for the environment, at least not as an element of the public procurement process. See Carlsson and Waara, 2006 at p.23.

[266] Aalders and Wilthagen, 1997, at p. 426.

environmental criteria without real consideration of what they want to accomplish or the procurement process as a whole. This indicates an immaturity with regard to the prospects of GPP contributing to sustainable development. On the other hand, there could also be said to exist a feeling of abandonment on the part of the procurement officers in that the political conflict of interests has been transferred to the civil servants without guidance on how to handle it, but also without the competence or resources to do so.

In terms of the external function of law, the analysis indicates that formal and substantive legal rationalities are present both in the law in books and in the law in action, albeit with a dominance of formal legal rationality. Elements of a reflexive legal rationality are also present in terms of the law in books (revision procedure) and the law in action (revision procedure and collaborative practices), whereby a communicative context has been created. Consequently, no legal rationality seems to be clearly dominant in terms of the external function of law. Potentially, the concern regarding the use of imperium and the imposition of additional policy values, have lead to alternative ways of collaboration between public and private actors, indicating a move towards a dominance of reflexive legal elements. Yet at the same time, a move towards the strengthening of the control mechanism to counterbalance discretion has occurred, indicating a move towards formal legal rationality in terms of requiring predictability or a move away from substantive legal rationality.[267]

The justification of law analysis highlights a dominance of formal legal rationality (in terms of the current regulation being warranted with reference to the establishment of the internal market), albeit with elements of substantive legal rationality (with attempts to compensate for market inadequacies through GPP) and reflexive legal rationality (controlling public procurement self-regulation through the revision procedure and through *dominium* or the ability of the procuring authority regulating the self-regulation that takes place within the market among private actors).

In public procurement the input (what to procure) and the output (what the procurement is to accomplish, be it primarily a social, economic or environmental value) of the procurement process is not regulated, i.e. GPP is not imposed through *imperium* other than in the form of balancing norms. Yet there are means available to the procurement officers to require private sector actors to respond to environmental requirements, by invoking the balancing norms in favour of environmental interests, i.e. through *dominium* – or the power of the purse. The purpose of such a requirement would be, in the terms of Teubner, to ensure that

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[267] The issue of predictability is considered an issue of conflict or tension between the formal and substantive legal rationalities. For a discussion see e.g. Sterling and Moore, 1987, at pp. 75-6 and Trubek, 1972, at p. 28.

businesses introduce 'reflexion structures' within their organisations to ensure continuous improvement in terms of their effect on the environment.

Environmental codes and traditional 'command-and-control' legislation have been criticized for not bringing about sufficient change to mitigate the current environmental problems in our society. There is an indication of a change towards experimental regulatory forms where a holistic societal perspective is solicited, of which the integration principle and GPP are symptoms. Through GPP, environmental awareness is becoming incorporated in legal structures, possibly indicating a stabilization of a new organizational principle in our society. Potentially, in the current societal situation where economic priorities increasingly are complemented by environmental (and social) ones, the organisational principle of economic rationality is no longer sufficiently managed by a dominance of the formal legal rationality or the substantive legal rationality. Potentially the externalities caused by the economic rationality structure have increased to such an extent that the system problems have surpassed the adaptive and learning capacities of society. It seems that the normative concept of sustainable development is becoming institutionalised as a model for strategic action and to some extent – as evidenced by the balancing norms of GPP – is becoming incorporated in fundamental legal structures. This incorporation is not being done haphazardly (as evidenced by the discussion pertaining to the choice of formulating the norms regarding green and social values discussed earlier), but rather in a way that makes sense to the regulatory framework or – in the words of Teubner – selectively filtered into the legal structure and in accordance with the logic of normative development of the legal framework for public procurement. In other words, the lacking environmental information and knowledge currently claimed to be absent in the procuring authorities can be generated and thus enable GPP with true environmental benefits in the future.

6.2. Concluding Remarks

The cognitive limitations apparently existent in terms of implementing GPP are currently being attended to. There have been investments made to generate knowledge in terms of integrating environmental considerations in the public procurement process, largely through the Swedish Environmental Management Council that is in the process of developing environmental qualification and evaluation criteria for the procurement process, as well as undertaking the task of

educating procurement officers throughout Sweden in GPP.[268] This indicates a move towards generating the knowledge required to abate the cognitive limitations.

As stated at the start of this chapter, three phases for public procurement regulation was to be accounted for. Yet this division begs the question: What happens after phase three? Although it is not within the objectives of this thesis to make prophesies, the matter should be touched upon. According to Teubner, the movement within regulatory strategies has shown a tendency of heading towards a dominance of reflexive legal rationality. However, within public procurement and particularly green public procurement, two tendencies can be identified. One is a movement towards discretion and proceduralisation, as discussed earlier, whereas the other, as represented by some of the interview findings where procurement officers are considering lowest price evaluations, indicates a desire to reduce the complexity, or the statements in a report commissioned by the Swedish Competition Authority, emphasising the need to primarily use direct (or primary intervenient) regulatory strategies where existent, as opposed to indirect (or secondary intervenient) regulation strategies.[269]

Tendencies in two directions – one towards more collaborative practices and a generation of information regarding environmentally friendly alternatives and thus environmental knowledge – and one towards the use of primary intervenient regulation forms as well as lowest price evaluations only. Is such a finding possible? Yes, particularly in light of what I stated at the outset of this thesis (and here I disagree with Teubner) the legal rationalities should not be seen in evolutionary terms, but rather as being able to co-exist where the elements of one might be more dominant than another. Consequently, the framework for GPP regulation in terms of law in books consists primarily of balancing norms, which the practitioners have difficulty implementing and instead call for goal-oriented norms. They thus resort to means of reducing the complexity in the implementation of the regulatory framework e.g. by moving towards more collaborative practices or towards lowest price evaluations only (or primarily), or simple environmental evaluation criteria.

It thus seems that the consequences for the legal system is a move away from substantive legal rationality, but not necessarily towards reflexive legal rationality. Rather, there seems to be a movement along the continuum of legal rationalities towards both formal legal rationality and reflexive legal rationality – perhaps even simultaneously. To some extent this is in line with what Gunningham and Grabosky call for in terms of environmental regulation, in order for the regulation to be "smart": the use of multiple rather than single policy instruments.[270] There is

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[268] See the website for the Swedish Environmental Management Council, www.msr.se for more information.
[269] Lundberg et al. 2009.
[270] Gunningham and Grabosky, 1998, at p. 4.

however a reservation regarding this similarity in that the regulatory framework for GPP is not tailored to address a specific environmental issue or problem.

Whether phase four entails a goal-oriented GPP norm, where the required knowledge is deemed to exist and thus the political conflict of interest is resolved directly in the legislation, a call by the private sector that their environmental investments are awarded by winning public procurement contracts (in essence requiring the environmental evaluation criteria are weighted higher than 5%), or a development involving a move away from environmental considerations in the procurement process towards price only contract awards or resorting to additional direct regulation targeting the construction sector specifically, I cannot forecast. However, I believe that the private sector will continue to make investments towards a more sustainable development and that governments will want to constitute good examples in terms of contributing to a sustainable development.

6.3. Future Research

One issue for further research is related to the effects of GPP. A problem with the integration of environmental concerns in public procurement is whether or not it will lead to any actual change. If it does not lead to any actual change, the relevance of such initiatives can easily be questioned. One aspect of this has been identified as whether the initiative addresses environmentally intensive sectors. In other words, does the environmental aspect focus on an area that is already satisfactorily covered by legislation, thus being superfluous? In that case, as mentioned elsewhere, the initiative may be less useful than if it targeted an area that existing regulatory structures have overlooked.[271] A national Swedish Action Plan for the period 2007-2013, which highlights certain sectors as particularly important in terms of environmental intensiveness and where the greatest impact is thought to result from GPP action. Future research should examine if and how work within these sectors is taking place and what the effects are. Given that the objective of GPP is to contribute to a more sustainable development and a more holistic perspective in decision making, are these resulting effects? Alternatively, is it sufficient that the result is an increased awareness and reflection within the legal structure of environmental issues?

Another issue relevant to GPP is that of measurability. A topical matter at present is how to achieve measurability of various sustainable requirements (both for qualification and award, as well as for technical specifications and contract conditions) in order to ensure monitoring and follow-up of the procurement process in general and GPP practices in particular. Not only do the courts require

[271] Marron, 2003.

that such requirements be verifiable in some way (through the provision of proof (e.g. EMS) or through monitoring and follow-up), but also sustainability requirements necessitate follow-up in order to verify their significance as requirements contributing towards sustainable development. (E.g. x amount of CO2 reductions, etc.) Consequently, future research into the measurability of environmental criteria, as well as the effects of GPP initiatives on the natural environment would be important contributions.

Furthermore, in light of what has been discussed in terms of the private sector and environmental investments not being rewarded, another quest for further research is to examine to what extent tenderers are awarded for their investments in e.g. environmental technology by the outcome of contract awards.

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Paper I

Paper I

Carlsson, L. and Åström, K., 2006. "Public Procurement as a Tool in the Attainment of Sustainable Development – Analysing Normative Structures Influencing a Municipal Public Procurement Official", in Frostell, B. (ed) 2006. *Science for Sustainable Development – Starting Points and Critical Reflections*, VHU, Uppsala, pp. 76-84.

Public Procurement as a Tool in the Attainment of Sustainable Development – Analyzing Normative Structures Influencing a Municipal Public Procurement Official

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Abstract

Regulative developments in Sweden and in the European Union as a whole have come to allow for the use of environmental considerations in the public procurement process. This corresponds to the increased environmental awareness shown by European citizens and the realization by the private sector that "green" is a marketable value. In light of the difficulties involved in enforcing environmental regulations, the use of other, already existing, tools is a welcome development. It is also in line with the proclamations made at European level to integrate the three dimensions of sustainable development in all decision-making. The integration of environmental and social considerations in the already economically focused procurement sector, would thereby be a welcome development.

The attempts of this paper are two-fold; one is to test a developing theory of norms and a norm model by applying it to empirical data; another is to identify what factors affect a public procurement official's decision-making in the procurement process. The norm model is a tool with the help of which one can identify three main components to the norm, which in turn influences the decision-making. Namely, the will-component that consists of the underlying motives and values; the knowledge-component that establishes the cognitive perspective of the decision-maker; and, lastly, the system-component, which consists of the possibilities and limitations that systematic factors may convey.

The paper shows that the norm model is a helpful tool when identifying factors that affect the decision-making process. The paper further gives an indication of what prerequisites are needed to integrate environmental considerations.

Introduction

Recent policy documents issued at European level encourage environmental and social considerations in the exercise of public procurement. (COM (2001) 247 final; SEC(2004)1050) It is said to be a step toward sustainable development through the use of public procurement, which is an existing system and organizational setup within the Swedish society. Integration of environmental and social aspects in the procurement process is seen as a complement to the economic focus tainting the public procurement official's outlook.

In light of preliminary findings from a study on the public procurement practice in Sweden, the success of the integration of environmental and social aspects in public procurement practice seems dependent upon several factors. One such factor is the formulation of the policy documents and to what extent such documents can be realistically translated into practice. Another is the information transfer of such documents and their content. Is the information communicated to the state representatives, municipal representatives and other relevant people involved in procurement? Furthermore, the actual public procurement official

responsible for executing the procurement and the will, interest or ability that person holds to integrate the new initiatives and considerations in the process, are other relevant factors. Lastly, the surroundings, in terms of political climate, organizational setup, colleagues with legal and/or other expertise in these matters, as well as the state and municipal budgets allocated to allow for potential investments needed, are very important in terms of setting the stage for available possibilities or options.

The interview used as the basis for the analysis in this paper, was one of several conducted in an empirical study of eight municipalities, one region and one Country Council in Sweden from 2003 through 2005. The empirical study in question is part of a larger research project, investigating the public procurement practice primarily among construction procurement officials in their selection of tenders. The interview in question was selected on the basis of being the most conclusive with regard to the exercise at hand, as well as being very representative in terms of the overall findings obtained from the interviews conducted with public procurement officials to date.

This paper takes its origin in a theory of norms and the discourse of norms as imperatives of action. Furthermore, the following discussion integrates a norm model as a method of research that is under development within sociology of law. The objective is to explore public procurement as a municipal instrument for ecological sustainability. In the first place the aim is to test a theoretical model and operational concepts in the case of an interview made with a procurement official in one of the major cities in Sweden.

A Norm Model

Håkan Hydén, professor in sociology of law, has developed a norm model that illustrates three components of a norm: knowledge and cognition (K); will and values (V); and, thirdly, system and possibilities (SM; cf. Figure 1.). (Hydén, 2002:284) The norm in question is defined as an imperative of action. (Hydén, 2002:114; Gillberg, 1999:202)

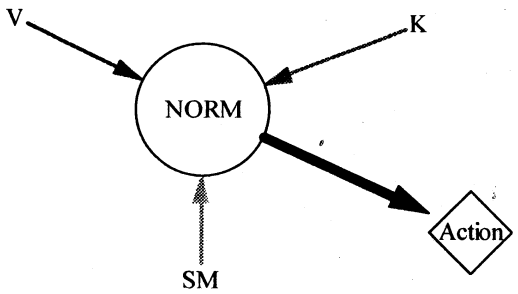

Figure 1. Norm model, based on Hydén, (2002:284).

The three components contain different suppositions. V entails the individual's creation of motive through the values, morals and forces that guide the individual. These forces can in turn be attributed to various motivational systems, which will not be discussed further in this paper. (See Hydén, 2002:285)

K encompasses the individual's interpretative or cognitive scheme, through which he sees the world and ascertains knowledge, potentially influenced by both cultural and professional aspects. The cognition may thus be tainted by the V-component (in terms of the socialization

process and cultural perception) and by the SM-component (in terms of the systematically bound, professionally elaborated knowledge). (Hydén, 2002:285-6)

Lastly, SM represents the prerequisites and structures that have the potential to limit or enable the individual in his exercise of the action in question. Hydén discusses the existence of systems of action that have been created in our society to satisfy societal, material needs, and goes on to say that the actions taken within the system are driven by interests tied to the goals or objectives that the system brings about. (Hydén, 2002:69) There are different types of systems, including the economic system, where money functions as a control unit, the political and bureaucratic system, where possession of power functions as a control unit, or the natural system, with natural laws. (Hydén, 2002:69,114)

The latter is important in relation to the application of the norm model to the public procurement official's situation and position in society. Not the least in light of the proclamation that the driving force behind the application of the norm is the interest derived from the logic of the system.(Hydén 2002:70) In other words, it is likely that the public procurement official will effectuate the norm, given that the interest or objectives that derive from the system he is affected by can be achieved. According to Hydén, different professions will establish those norms necessary to fulfill the requirements that the system in question institutes. To this Hydén relates the concept of a "role", where the acquirement of a role within the system in turn creates the identity and self-perception the affected person attains. It is thus the public interest that is related to the public role and not the individual interest that originates in the private personality.(Hydén, 2002:71) These components do notably not function in isolation, but are overlapping and generate the imperative content of the norm. (Hydén, 2002:60,287)

As an analytical instrument, a norm is a tool through which the substance of an action or driving forces behind the action – what I would call the imperative content – can be subtracted and identified. (Hydén, 2002:60) The imperative content can be studied from a *causal* or a *finite perspective*. A causal perspective involves identifying the driving forces behind the norm – the causes or reasons for the norm's establishment. A finite perspective involves finding and observing the expected consequences of the norm's establishment. (Hydén, 2002:60)

Interesting from a procurers perspective is that his role encompasses both a causal and a finite perspective. In terms of a causal perspective, a public procurement official is exposed to pressure from numerous directions' in terms of driving forces. These include various documents (laws and regulations from various levels, policy documents, municipal steering documents, etc.), budget aspects, the interest of the municipality or state as a whole, and the organizational structure within the municipality (political climate, senior officials and colleagues, etc.). The finite perspective is present in terms of short or long term forecasts and planning within the municipality, where the procuring official takes budget allocation, effects on the municipality and its citizens into consideration. It is a results-oriented aspect where the objectives determined by the relevant system (or systems), as well as by the profession in question, contribute to the imperative content of the norm.

The norm model will subsequently be used in an attempt at identifying which driving forces and expected consequences contribute to a public procurement official's imperative content. The empirical material resulting from an interview conducted with a public procurement official (at municipal level) forms the basis for the application of the norm model. By using the norm model we aim to unveil those norms that have developed through municipal practice, expressed by a procurement officer.

Assumptions with regard to Sustainable Development

Sustainable development is generally defined in accordance with the Brundtland Report of 1987, in that it is about "meeting the needs of the present generation while not compromising the ability of future generations to meet their needs". (WCED, 1987:40) This definition has been criticized for being too vague and that there is an "implementation deficit" with regard to the operationalization of the concept. (Owen, 2003:1,7) Attempts to bring structure to the concept have been made by adding the economic and social dimensions to the initially most strongly emphasized environmental dimension. (Owen, 2003:6,8) It should be noted that this paper primarily discusses the environmental dimension of sustainability. The social aspects of sustainability in public procurement have been analyzed elsewhere by e.g. Niklas Bruun (SOU 2001:31) and Christopher McCrudden (2004). In this paper, therefore, the term *environmental sustainability* is used to keep it separate from the other dimensions of sustainability. The Brundtland Report attempted to operationalize the concept to a certain extent by listing specific ways of achieving sustainable development, although it has been argued that the statements do not really add substance to the understanding of how this can be done. (Chin Sum and Hills, 1998:138)

One major assumption underlying the research this paper is based upon, is that a contribution toward sustainable development can be made through the integration of environmental considerations in practical decision-making. According to the Cardiff-process (1999), a decision regarding the integration of environmental consideration in all decision-making within the European Union (EU) was made. In this regard, public procurement is mentioned as a strategically important tool. (Miljöstyrningsrådet, 2005:18) Throughout Europe, there is now an attempt to contribute toward the operationalization of the concept of sustainable development by integrating sustainability-aspects into the procurement process, as will be seen in the next section. This can be done by integrating environmental considerations in the practical decision-making exercised in the public procurement process within public bodies, e.g. Swedish municipalities. The public procurement official has a possibility to integrate environmental sustainability considerations in his exercise of public procurement through the use of different mechanisms. This is also called "eco-procurement" and is said to involve an attempt to avoid unnecessary purchases by reviewing the actual need for the product and seeking other solutions. If this is not possible, the objective is to purchase a greener variant that supplies the same (or better) quality and functionality as the conventional choice. (Erdmenger, 2003:11) The law ,on public procurement "Lagen om offentlig upphandling" (LOU) makes this a possibility by allowing for the use of the procurement model of "the most advantageous tender", where environmental consideration constitutes a suggested evaluation criterion. In terms of what constitutes sustainable development, assumptions have been made within the parameter of the research project in question to the effect that social and environmental considerations are added to the already existing economic consideration. In public procurement the financial aspect is heavily present due to the business-focus of public procurement and procurement in general. Sustainable development is partly about integrating social and environmental considerations in all decision-making, including public procurement. Bearing in mind that public procurement today is used by policy makers to ensure open competition and free movement of goods and services, there is no good reason not to ensure social and environmental policy objectives through public procurement. At European level, the European Commission has suggested ways of integrating environmental considerations in public procurement.

Sustainable Development in Policy Documents

Theoretically it is both possible and encouraged at European level to integrate environmental considerations in the public procurement process, as this section will show. The question remains as to what relevance this has in practice, which will be discussed in the subsequent section.

An interpretative communication and a handbook on environmental public procurement have been issued by the European Commission suggesting ways of integrating environmental considerations in public procurement practice. (COM (2001) 247 final) The interpretative communication has been further discussed in some literature. (Anonymous, 2001) One aspect considered is the information that exists and is available in terms of which product, what services or works are the most suitable on the basis of their environmental impact, availability and cost. (SEC(2004)1050, p.4, Ch.1) The quality and quantity of environmental information is related to the successful integration of environmental considerations in public procurement. The official must have access to relevant and accurate information upon which to make important decisions on behalf of the municipality.

Another aspect brought to light in the handbook is the importance to identify the needs of the department/municipality/state and communicate it to the outside world in policy documents. (SEC(2004)1050, p.4, Ch.2) This can be likened to a declaration of will on the part of the issuer of the policy. In terms of public procurement, such a document may be issued to demonstrate the will and intents of the municipality. One example is an environmental policy. These, however, are not necessarily in cohesion with the will and interest of the public procurement official, which becomes important in terms of the imperative content of the norm. Nonetheless, such documents should be communicated to those acting on behalf of the municipality, including those executing procurement, which means the public procurement official should be somewhat influenced by, or at least aware of, such documents. The handbook further suggests some more detailed ways of integrating environmental considerations in the procurement process, including the drawing up of technical specifications using environmental factors, such as eco-labels. Other examples are to take a "life cycle costing approach", or using performance-based or functional specifications to ensure innovative green offers. (SEC(2004)1050, p.4, Ch.3) Furthermore, selection criteria may contain environmental criteria to prove technical capacity to perform the contract, whilst award criteria (provided the "economically most advantageous tender" selection method is used) can be used to introduce environmental elements and give it certain weighting. (SEC(2004)1050, p.4, Ch.4-5) As mentioned earlier, the latter is specifically stated in LOU and has been approved by the European Court of Justice (ECJ). (C-513/99) It is important, however, which the handbook emphasizes, to ensure that all criteria and requirements relate to "the subject matter of the contract".(SEC(2004)1050, p.5) Environmental sustainability in public procurement is operationalized partly through these policies issued at European, national and municipal levels, stating what initiatives are encouraged.

In addition to the handbook, the interpretative note from the European Commission gives examples of how environmental consideration can be integrated into public procurement practice. These include buying goods with eco-labels, such as the European Flower, the Nordic Swan, or the German Blaue Engel, as well as using energy efficient goods, and encouraging Environmental Management Systems (EMS) by requiring that the entrepreneurs have such a system in place. More specifically, an EMS is a method of incorporating environmental care throughout the corporate structure. It is a useful tool to implement to comply with legislation, address stakeholder pressure and improve corporate image and raise awareness of environmental issues. (UNEP website, 2001)

In light of these policies, there are several ways for a public procurement official to integrate environmental considerations in the procurement practice. For the concept of environmental sustainability to be integrated into the public procurement process, it is not sufficient that the European Union institutions produce documents on the matter. Rather, it is fundamental that the public procurement official receives and internalizes the information, such that it can become a driving force behind future decision-making and that the possibility exists in practice. Therefore, we shall in the next section turn to the question of normative processes on a municipal level, more precisely to the question of how norms are developed locally.

Application of the Norm Model

In terms of integrating sustainable development considerations into public procurement practice, it is of the essence that the public procurement official has knowledge of guiding policy documents and of how to effectuate such integration, but also that he has an interest to do it and that the surrounding structures support such an action. Using the results from an interview with a public procurement official at municipal level, the norm model will subsequently be used to determine the imperative content of the norm – i.e. the driving forces behind and the possible consequences of the action of integrating environmental considerations into public procurement practice.

The public procurement official in question seems rather typical for a Swedish municipal procurement official, in that he, according to the interview findings, has an engineer background, complemented by some legal and economic education. Furthermore, he is responsible for the procurement within the municipality and has some people, mainly with a practical background in procurement, assisting him in the procurement processes.

The norm model and its components, mentioned earlier, will be applied to the information gained from and about the public procurement official in question from the interview.

Firstly, the will or value aspect – V – encompasses the morale, values and motive that drives the individual to a certain decision or action. This analysis is made in light of the earlier discussion on the identity and self-perception that is created when assuming a role. In terms of the procurement official in question, this component is not straight forward to discern. However, some of his answers in the interview can point to a certain morale and motive behind his procurement decisions. It was apparent from the interview that the procurer was careful not to express personal opinions, but rather to state matters as they were in relation to his profession as a public procurement official. Although some personal opinions may taint the procurer's decision-making, it is thus as a professional procurer that he makes his decisions. These decisions are in turn made with the intention of achieving the goals that are set within his profession, of which examples are, as expressed by the procurer: not to include irrelevant considerations; ensure competition; ensure proportionality; and stay within the procedural requirements to avoid legal repercussions. He furthermore stated that complaints may lead to outdrawn legal consequences where the municipality as a whole suffers due to the amount of money and time required in such a process. The public procurement official additionally expressed the importance of looking to what is best for the municipality's inhabitants, who are the ones paying for the services he provides.

There is thus a motive for the procurer to make the most of the tax payers' money through his decision-making and a desire to be cost-efficient and avoid legal consequences shapes his V-component, which in turn is an influencing factor in his decision-making. There were indications in the interview of attempts in the procurement official's decision-making to integrate environmental considerations. For example, environmental selection criteria were being used in the evaluation-stage of the public procurement process. However, sustainability

was regarded as an interest in conflict with other objectives like keeping costs down to give as much economic value as possible for the tax payer. On the question: "What do you believe sustainable development represents with regard to public procurement?", the procurement official replied: "Basically, [public procurement] is about creating the most economically viable deals. It is very much related to money. Sustainable development is related to political goals."

Consequently, the interest and objectives within the relevant system and the profession of public procurement are not primarily related to environmental sustainability, rather, it is the economic aspect that is of primary interest in practice.

The K-component consists of, as mentioned earlier, the procurement official's interpretative scheme. Such a scheme is likely to be outlined by the procurement official's educational background and professional locale, i.e. his knowledge. In the case of this procurement official, he is likely to have a pragmatic view on these matters in that, based on the interview findings, he is an engineer. Yet, he has additional training in law and economics, which would have given him a theoretical perspective as well.

Considering the fact that public procurement officials exist in a public setting with public sector aspects, but that is tainted by private sector aspects, such as competition and profitable purchases, a broad knowledgebase is of the essence. The theoretical knowledgebase opens up the possibilities to exercise procurement within the parameters of legal and economic aptness, while a pragmatic background is likely to contribute to the decisions being within what is realistic to carry out. Other relevant aspects here are the training received and the expertise and support available within the organization.

According to the interview findings, the procurement official in question attends regular seminars about changes in the law relating to public procurement, and has access to a legal division that assists him when necessary. He also has colleagues within the department that assist him in the procurement process, most of whom have a pragmatic background with some additional legal education. Furthermore, he has contacts among the suppliers who inform him of what the market looks like and what companies exist on the market.

It was apparent from the interview findings that the procurement official had knowledge of the policy documents that exist within the municipality as well as documents that have come from the European Commission, adding to his interpretative scheme. These documents have thus been communicated to him and subsequently internalized by the public procurement official.

Furthermore, the procurement official made the point during the interview that there is insufficient environmental information about what materials have adverse effects upon the environment, and that "a methodology for proceeding with the integration of environmental considerations must exist". Consequently, the procurer felt that there had to be a systematic way of dealing with environmental considerations and that more knowledge was required. This lack of knowledge probably limits the interpretative scheme.

It should be remembered that, given that the public procurement official assumes a role accompanied by certain premises, his cognitive scheme will be tainted by this in light of his professional locale. Accordingly, the knowledge the procurer ascertains, will be interpreted in light of his profession as public procurement official, which is another aspect of the interpretative scheme. It becomes relevant what perspective – or professional locale – the procurement official has. From this it follows that the K-component of the norm model will convey such information to the imperative content of the norm that is in line with the interest of the profession of public procurement. The knowledge obtained from seminars and

colleagues, as well as political initiatives, such as increased environmental consideration, will be interpreted in light of pragmatic economic efficiency and relevance to the procurement.

The third component of the norm model – SM – is clearly of importance in terms of what decisions the public procurement official makes. The relevant systems with regard to the procurer seem to be the economic, the legal, the political and bureaucratic systems. Consequently, they contribute to setting the parameters for the role as procurer, which explains the focus within public procurement on the economic aspect. The latter statement was also confirmed by the procurement official during the interview. The legal system puts constrains upon the public procurement official due to the legal complexity and uncertainty expressed by the procurement official with regard to LOU.

According to the interview findings, there are delegations within the political and bureaucratic system that confer to the public procurement official his professional authority to make procurement decisions. The interview also revealed that politicians have an interest in integrating sustainable development within public procurement to achieve a political goal.

Currently, the municipality in question is marketing itself as an environmentally friendly municipality. Consequently, the political will within the municipality does not seem to be a limitation to the procurer in terms of making decisions in support of sustainable development, quite the opposite. Yet, other limitations, including the lack of knowledge and system constraints, outweigh this political interest.

Concluding remarks

This paper, based only on one exploratory interview, indicates that the norm model is useful in analyzing the normative structure of public procurement. In a preliminary conclusion it is found that, when identifying the normative structure in the everyday life of a procurement official, there are many, often contradictory, sources of normative influence directed towards the procurer.

On a European level there is a clearly outspoken norm saying that environmental considerations should be integrated into the public procurement process. On the other hand according to the Rome treaty, free trade of goods and services under free competition is a basic norm in the European Union. Looking at the national legal system (LOU), there is one strong normative value, going back to previous legislations, namely the concept of "affärsmässighet" The underlying word *affärsmässig* can be translated as commerce-wise or businesslike. So, there are EU norms dictating sustainability as a politically defined value, parallel with another value, namely free market competition. Two values often in conflict with each other, as experienced by the interviewed procurer.

We have seen that our procurement official has his professional background in engineering, supplemented with courses in law. However, it seems as if knowledge and professional skills, experienced and learnt from practical procurement work, is perhaps his most important form of knowledge. He has also expressed that there is a shortage of knowledge on evaluating environmental consequences in relation to various materials or proceedings. This does make it difficult to evaluate sustainability in relation to lowest price. He expressed a need for more elaborate methods, making it possible to calculate environmental influences.

In terms of the SM-component of norms, the most important factor are the system-limitations that exist and that establish the professional role of the public procurement official, as well as the basis upon which the V- and K-components are actualized. There are economic, bureaucratic and legal aspects that limit the possibilities of the public procurement official, and thus taint the imperative content of the norm, which in turn affects the decision-making.

The primary interests and objective within the public procurement profession at present seem to be to ensure competition and economic efficiency, which for the public procurer involve avoiding legal repercussions and finding the best value for money. Not to ensure that public procurement is used as a tool toward sustainable development by integrating environmental or social considerations.

In light of the statement that the driving force behind the application of a norm is that the interests are tied to the logic of the system, mentioned initially, the following can be said: To change the current situation it is not only necessary to add sustainability to the interest of the profession of public procurement in theory (e.g. by setting the integration of environmental considerations as an objective in a procurement policy), but also to ensure that the interest is tied to the logic of the system, i.e. to ensure that the system allows for and encourages environmental consideration in practice.

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Paper II

Paper II

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Chapter 11

Environmental Concerns in Swedish Local Government Procurement

Lina Carlsson and Fredrik Waara

INTRODUCTION

Do procurement officers in the public sector have a more difficult job today than they had half a century ago? Wilson (2000) has observed that in the 1950s there was a need for well constructed and inexpensive highways. In the 1990s, however, we not only wanted well constructed and inexpensive highways, we wanted to build them in ways that would aid mass transit, reduce air pollution, preserve historic sites, etc. Thus, if we by difficult mean an increasing number of criteria that procurement officers take into consideration, we can say that their job is more difficult today.

Among the range of criteria that has to be dealt with, those reflecting environmental concern have received much attention. Research reports indicating continuous degradation of our natural environment, with increasing greenhouse gas emissions and climate change, have led policy makers to focus on public procurement as a way of encouraging the development of more environmentally friendly goods and services. Several authors have discussed the role of using public procurement as a policy instrument (Arrowsmith, 1995; Geroski, 1990; Marron, 2003; McCrudden, 2004; Trepte, 2004), but this policy perspective is not the main scope of this chapter. Instead, the aim of this chapter is twofold: (1) to describe how procurement officers integrate environmental concern in their procurement process; and (2) to identify limitations to integrating environmental concern, both as perceived by the procurement officers and as indicated in the literature.

The remaining part of this chapter is outlined as follows. First, a discussion of what is meant by environmental concern is presented, followed by an overview of how environmental concerns are

integrated in public procurement, as well as possible limitations to such a development, as presented in the literature. A short presentation of recent surveys conducted at Swedish and European levels is also made. Second, the research setting and the empirical study is described. Third, the findings from the empirical data collection are presented, stating how environmental concern is integrated in local government procurement in Sweden and public procurement officers' perceptions about limitations to the integration of environmental concerns. Lastly, some concluding remarks are made.

ENVIRONMENTAL CONCERN IN PUBLIC PROCUREMENT

Environmental concern in public procurement is a growing global phenomenon, not merely encountered in Sweden and Europe, but in other parts of the world as well. With the purpose of examining possible ways of integrating environmental concern in public procurement, as well as potential limitations, this section reviews previous literature.

What is Environmental Concern in Public Procurement?

In the literature, the integration of environmental concern in the public procurement process goes under several different names, including *eco-procurement* (Erdmenger, 2003), *environmentally preferable purchasing* (Coggburn & Rahm, 2005), *environmental public procurement* (European Commission, 2004), *greener public purchasing* (Marron, 2003), *green procurement* (Anonymous, 2001), and *sustainable procurement*, addressing both environmental and social issues (McCrudden, 2004).

Although our intuitive sense of these concepts is quite clear, it is worthwhile to analyze environmental concern in public procurement in more detail. Eco-procurement, for example, has been described to encompass "all activities that aim to integrate environmental considerations into the purchasing process, from the identification of the need, through the selection of an alternative, to the provision to the user" (Erdmenger, 2003, p. 11). Ideally, integrating environmental concern in the procurement process involves avoiding "unnecessary purchases by reviewing the actual need for the product and seeking other solutions. If this is not possible, it seeks to purchase a greener variant that supplies the same (or better) quality

and functionality as the conventional choice" (Erdmenger, 2003, p. 11).

Our own interpretation of environmental concern in public procurement is a similar one. By environmental concern we mean that if decision makers are faced with a choice between two alternatives, they will, ceteris paribus, choose the alternative that is least harmful to the environment. However, we do not necessarily mean that the decision maker always will come to choose the alternative that is least harmful to the environment. This is because we treat environmental concern as only one among many criteria of choice that a decision maker may want to take into consideration. Such other criteria can be cost, performance, etc. As long as there is no conflict between these criteria, the choice will be fairly easy. When these criteria are in conflict, however, the choice will be more difficult because the decision maker will have to make trade-offs between different values.

We can illustrate this with a local government agency that wants to hire a contractor for the construction of a new school building. Let us assume that the local government is concerned about the environment, but also about the production cost. The procurement officer responsible for the contract is offered two design alternatives, but can only choose one of these designs. One design is more expensive than the other design, but on the other hand it is less harmful to the environment. Neither of the two designs is best on all criteria and hence the procurement officer has to make a trade off. Subsequently, he or she must make an evaluation as to how much more the less environmentally harmful design is worth compared to the other design, and make a decision based on that. Even if the procurement officer chooses the least expensive design, he or she can still be concerned about the environment, but the extra cost was not outweighed by the value of the design being more environmentally friendly.

The above example is a simple one, but it illustrates how environmental concern was integrated in the procurement process, but another criterion, in this case the price, outweighed the environmental value of the product. The use of environmental criteria in the contract award process, is thus one example where environmental concern can be integrated, although the final result is not the most environmentally friendly.

In this paper, consequently, environmental concern can be identified through the use of environmental criteria in the selection and contract award processes, as well as in the preparatory and finishing stages of the procurement process—e.g. avoiding unnecessary purchases or including environmental requirements in a contract performance clause.

Integrating Environmental Concern in Public Procurement

How, more specifically, can the integration of environmental concern be done? Environmental concern can be integrated at every step of the procurement process. According to Marron (2003), governments attempt to do so by using various policies that increase the recycled content of government purchases, increase the efficiency of energy-using devices or that promote the use of one or several of the following: organic products, alternative fuels, clean electricity, less-polluting manufacturing technologies. Examples of policies that are used in this context are improved budgeting systems (e.g. using life-cycle costing), price preferences for greener products (e.g. by putting an estimated price tag on an environmental factor, such as one ton emitted carbon dioxide), set-asides for greener products (e.g. 10% of power from renewable sources) and information provision and training (Marron, 2003).

At the European level, there are now guidelines on how to take environmental concern in public procurement. In 2004, the *Buying Green* handbook was published (European Commission, 2004). This handbook takes a process view on public procurement by emphasizing that environmental issues can be taken into consideration in technical specifications, in selection criteria, in the award of contracts, and in contract performance clauses.

Limitations Identified in the Literature

Some limitations to the integration of environmental concern in the public procurement process have been identified in the literature. One such limitation is the budgeting process, when it treats capital and operating costs separately. This, according to Marron (2003), may result in uneconomic decisions, which additionally can be the result of a lack of information about more economic alternatives.

Other limitations can be identified on the basis of a "hurdle analysis" as performed by Günther (2003). These included a prejudice that efforts would not be useful, that there was a lack of target and information about targets, as well as a lack of support by guidelines. Additionally, hurdles identified by Günther included a lack of possibilities and information in terms of products, price and functionality of products, the additional work required, a lack of information about the relevance of green procurement, and uncertainty of legislation.

A problem with the integration of environmental concerns in public procurement is whether or not it will lead to any actual change. If it does not lead to any actual change, the relevance of such initiatives can easily be questioned. One aspect of this has been identified as whether the initiative addresses environmentally intensive sectors. In other words, does the environmental aspect focus on an area that is already satisfactorily covered by legislation, thus being superfluous? In that case, as mentioned elsewhere, the initiative may be less useful than if it targeted an area that existing regulatory structures have overlooked (Marron, 2003).

Recent Surveys

There are several recent surveys of environmental concern in public procurement. Here, we concentrate on surveys that have dealt with public procurement practices in Sweden or in the European Union at large.

In 2003, the International Council for Local Environment Initiatives (ICLEI) published the results from a questionnaire survey of green public procurement in the European Union (Ochoa & Erdmenger, 2003). ICLEI is an association of local governments and national and regional local government organizations that have made a commitment to sustainable development. This survey indicated that Denmark and Sweden showed the highest level of commitment to green procurement. Among the authorities that showed a high level of commitment (among all EU countries), lack of money was perceived to be the most significant obstacle to green public procurement. Among the authorities that showed a low level of commitment, however, lack of environmental know-how was perceived to be the most significant obstacle. Two other potential obstacles—legal

concerns and lack of interest—were perceived to be less significant by both groups.

Another 2003 survey (Kippo-Edlund, Hauta-Heikkilä, Miettinen & Nissinen, 2005) concerned practices in four North European countries—Denmark, Finland, Norway, and Sweden. This survey included a sample of 199 bidding documents and 101 contract award decisions. The survey indicated that Denmark and Sweden, once again, showed the highest level of commitment to green procurement.

In 2004, a questionnaire survey of green procurement among all public authorities in Sweden was conducted (Swedish Environmental Protection Agency, 2005). Among the 400 (out of 558) authorities responding to the questionnaire, 15% always used environmental requirements, 46% usually did, 27% sometimes did, and 10% seldom or never did it. Moreover, the survey shows that almost half of the respondents think that a lack of knowledge about how to formulate environmental requirements is an obstacle to green procurement. Slightly less than 30% of the respondents perceived higher costs, lack of interest, and legal concerns to be obstacles.

In 2005, a survey intended to measure the current status of green public procurement among all 25 member states in the European Union was conducted (Bouwer et al., 2005). This survey included both an analysis of tender documents and a web questionnaire. Here, perceptions of higher costs were identified as the most significant obstacle. Lack of knowledge, lack of management support,, lack of practical tools and information, and lack of training were all perceived as slightly less significant obstacles. If we look at the different product groups we find that for construction work, the following criteria were most frequently used: (*a*) energy usage and energy saving options, (*b*) water efficiency measures, (*c*) chemical contents of the materials, (*d*) building material from renewable resources, (e) environmental management measures/system, (*f*) building material from recycled material, and (*g*) environmental product declaration or life cycle assessment.

To sum up, we note that some of the surveys suffer from low response rates. The absence of detailed nonresponse analysis in these surveys makes the results uncertain because it is possible that results are biased towards respondents that show a higher degree of

environmental concern. Moreover, the questionnaire responses may be biased towards answers that are considered to be politically or socially correct.

RESEARCH SETTING AND METHOD

The empirical data in this chapter were collected as part of a three-year research project in Sweden. The regulatory setting is that of the Public Procurement Act of 1992, which came into force in 1994 occasioned by the European integration and membership. The Public Procurement Act regulates procurement undertaken by public sector agencies at national, regional and local levels. At the regional and local level, Sweden has 2 regions (former counties), 18 counties, and 290 municipalities—responsible for a large part of the procurement budget in Sweden. As a consequence of the EC Directives (2004/17/EC and 2004/18/EC) on public procurement, a new Swedish legislation that implements these directives is under development.

From an environmental point of view, we note that in terms of environmentally related initiatives within public procurement, the Swedish government initiated the development of the Swedish Instrument for Ecologically Sustainable Procurement (the EKU-instrument) in 1998. The EKU-instrument has now become a web-based tool intended to aid in the development of environmental procurement criteria and to assist procurement organizations with guidance and information in their attempts at greening their operations (Swedish Environmental Management Council, 2006). In addition to the EKU-instrument, a central government agency, the National Board for Public Procurement, occasionally gives guidance on environmental issues associated with public procurement in its newsletters. There are, however, no other official guidelines on how to apply the Act and on how to integrate environmental concern in public procurement. Thus, a variety of practices could be expected to develop, especially at the local government level.

To explore how environmental concerns are integrated in the procurement process and procurement officers' perceptions of limitations, we interviewed 29 procurement officers in eight municipalities, one county, and one region in Sweden. Interviews with eight of the procurement officers were part of a pre-study between May and October 2003, whereas the other interviews were conducted

as part of a second study that took place between November 2004 and December 2005. Interviewing was chosen because we were interested in procurement officers' reasoning about environmental concern and limitations.

Before turning to each municipality, county, and region we reviewed their web sites to learn more about their organizational structures and their environmental profiles. Then we contacted potential interviewees and presented ourselves as doctoral students interested in public procurement. We asked to speak with officers responsible for procurement of construction work and officers responsible for procurement of goods and services in general. Most often the first person we contacted agreed to participate, but in a few cases it was suggested that we talked to another person instead. Among our 29 informants, fifteen worked with procurement of construction work, eleven worked with procurement of goods and services, and three were legal advisers.

One interview was conducted at the Chalmers university campus in Göteborg, whereas the other interviews took place at each procurement officer's workplace. About one week before our visit an interview guide (including 60 questions) was sent to the interviewees by e-mail. Interviews followed roughly the same structure, where the interviewee was asked to describe his or her background and role in the organization. Then there were questions about the organizational unit, followed by questions about the public procurement process. A summary of the questions regarding environmental issues is presented in the Appendix. The duration of the interviews ranged from one hour to three hours, one and a half hour being the average.

The interviews were tape recorded and detailed notes from each interview were written. In analyzing the interview data we reviewed all interviews and extracted statements that were related to the use of environmental criteria. During the analysis we sometimes went back to the recordings to double-check particular answers. The results from the interview analysis and alternative interpretations were discussed.

FINDINGS: ENVIRONMENTAL CONCERNS AND PERCEIVED LIMITATIONS

In this section we present findings from our interviews with procurement officers. The section is divided into procurement of

construction work and procurement of goods and services, respectively. For each of the two groups we present (*a*) how environmental concerns are integrated in the procurement process, and (*b*) the issues procurement officers perceive as limitations to environmental concerns in local government procurement. The presentation of findings corresponds to the structure in the *Buying Green* handbook (European Commission, 2004).

Procurement of Construction Work

Buildings and structures are examples of customized goods that are tailored to fit the specific needs of the local government. The traditional way of procuring construction work is that the local government first designs the building or structure, either by using in-house design engineers or by procuring external consultancy firms. The local government thereafter procures one or several contractors who are responsible for the actual construction.

Specifications. Interviewees responsible for procurement of construction work said that environmental concerns are usually dealt with during the design stage and thus integrated in contract specifications instead of as selection criteria, award criteria, or contract performance clauses. Although the type of environmental concern varies depending on the particular building or structure, two typical examples can be described. Energy efficiency was an important criterion for buildings. Interviewees said that they strived to reduce energy usage by choosing energy-efficient systems for heating and cooling, energy-efficient electric lighting, etc. Given that lower energy usage is associated with lower operation costs, no tradeoff has to be made. Building materials with low environmental impact was another important criterion for buildings. Here, some interviewees relied on systems and documentation that prescribed whether a particular building material was prohibited, acceptable, or preferred because of its chemical contents. Environmental concern was not as straightforward as for energy usage. One interviewee said that previous building materials that had been resistant to mould had been prohibited due to its chemical contents, but new building materials that replaced the old ones were less resistant. Thus maintenance costs were expected to be higher for the new, less harmful building material. Furthermore, it was mentioned that the Environmental Code of 1998 regulates many of these issues and that

there are several permits that have to be applied for, making such requirements superfluous.

Selection Criteria. Although the Public Procurement Act makes it possible to exclude a firm that has infringed environmental legislation or regulations, none of the interviewees recalled that they had excluded a construction firm because of any environmentally-related crime. The overall pattern was that procurement officers are reluctant to reduce the number of competing construction firms, although some interviewees said that they had excluded construction firms due to poor financial stability. When it comes to technical capacity, on the other hand, interviewees sometimes required that the contractors should have an environmental management system or a corporate environmental policy.

Awarding the Contract. Examples of award criteria included environmental management systems and environmental schemes that concerned the particular construction project. Some interviewees evaluate how advanced the environmental management system is, whereas others simply required that contractors should have an environmental management system. We found that there is interplay between award criteria and selection criteria because some interviewees had previously evaluated environmental management systems as an award criterion, but now they perceived the differences between various contractors to be small and therefore had environmental management systems as a selection criterion.

Contract Performance Clauses. The interviewees said that they sometimes integrated ' environmental concerns in contract performance clauses. The only example that was expressly mentioned, however, was clauses restricting the type of vehicles and equipment that the contractor intended to use during the construction project.

Perceived Limitations. Our findings suggest that procurement officers take environmental criteria into consideration in Swedish local government procurement of construction work. However, there are limitations to incorporating environmental concern.

One interviewee thought that the Environmental Code is a limitation to the development of more environmentally-friendly technologies because procurement officers become more risk averse and choose conventional technologies. He said that there have

always been complaints about poor indoor air quality in school buildings. Some time ago the agency therefore decided to try a new ventilation system that would reduce carbon dioxide concentration in classrooms. But these plans were vetoed by the municipal environmental agency because it was a new technology and the effects of using such a ventilation system had to be more fully demonstrated. The interviewee said, "I think the Environmental Code inhibits innovation, because it's easier to do what you have done before, choose a conventional ventilation system. Of course you have to be careful before you test something in full scale and with humans involved, but now you have to prove, you have to sign documents where you give a guarantee. There are quite drastic expressions [in those documents]". This example suggests that procurement officers may have weak incentives to adopt new technologies.

One interviewee was skeptical about paying price premiums for more environmentally friendly construction work: "Would we be willing to pay 5 percent more for the construction and in return be able to steer the contractor in a particular direction because of social or environmental reasons? That hasn't been the case, and I hardly believe that we would get that reaction from [the board]."

Another interviewee said, "[Environmental concern] requires more resources, and many times you also need more money, usually it doesn't become cheaper to do it. But I believe that the critical question is that there is no one who is really in charge of those issues, there's no pressure." Thus, the interviewee thought that the local government agency should have someone in charge of environmental issues and someone who could support procurement officers in their work.

Procurement of Framework Agreements for Goods and Services

Framework agreements are signed for a variety of goods and services, and thus the methods for integrating environmental concern vary greatly. Here, we present some general findings from the study.

A framework agreement is often signed with one or more suppliers of a particular good or services, usually for two to four years. When users experience need of, say, a new computer, they thus turn to the firm that has signed a framework agreement with the municipality, county or region. The economic rationale of framework agreements is usually thought to be that by gathering many dispersed

purchases together into one contract, the public sector buying agency will be able to receive discounts from suppliers.

Specifications. Interviewees pointed out that it is the need that matters. "If you really want to contribute to change," one interviewee explained, "you have to involve the users of the product." Another interviewee said, "The [Public Procurement] Act is just a procedural document, which stipulates how you should behave [as a procurement officer]. But when you have a policy objective, you can't use the legislation. It's a bit sad trying to use the Act as a policy instrument, instead of purchasing power. I mean, we still have the possibility to buy cars that run on ethanol, instead of cars that run on gasoline. That's purchasing power."

Selection Criteria. As for procurement of construction work, environmental management systems or corporate environmental policies were used as a selection criterion. Furthermore, none of the interviewees recalled that they had excluded a construction firm because of any environmentally-related crime.

Awarding the Contract. Environmental managements systems were sometimes used as award criteria, but the general picture that emerges is that procurement officers prefer to integrate environmental concern in contract specifications or as selection criteria. One interviewee said, "It's better to use contract specifications or selection criteria if you think that something is really important [from an environmental perspective]".

Contract Performance Clauses. Interviewees' responses indicate that contract performance clauses were sometimes used in framework agreements for goods and services. One interviewee said: "We have started to use contract performance clauses. We want, for example, school bus contractors to improve their environmental and safety performance and thus we require that contractors, during the contract period, must implement an environmental policy, take courses in traffic safety, etc. The benefit of [contract performance clauses] is that contractors improve in particular areas although they may not fulfill these requirements in the procurement stage." In this case, using corporate environmental policy as a selection criterion was perceived to have reduced the number of bidders—only bidders having a corporate environmental policy would have passed the

selection stage—and therefore the procurement officer included it as a contract performance clause instead.

Perceived Limitations. "It's extremely difficult to know whether one product is more environmentally friendly than another product," one interviewee said, "energy efficient products are easier though, and to require [that bidders] have an environmental policy—those things we manage to do, and to use the EKU-tool. You wish you had competence so that you could describe the good or service from an environmental point of view, so that you can include it in the contract specifications." This statement represents a typical pattern in the interviews. Procurement officers were willing to integrate environmental concern in their purchases, but at the same time they tended to resort to environmental criteria that were easy to evaluate, such as whether the bidder has a corporate environmental policy or not. One interviewee explained why this might be the case, "It's a bit sad that there are specialized courses in [green procurement], because environmental requirements are the same as any other type of requirement. There are no special rules for environmental criteria." The interviewee thought that many procurement officers perceive environmental concern as something overly complex, and therefore refrain from using environmental criteria that in fact could be used.

Summary of Findings

In this section we provide a summary of our findings. In Table 1 some examples of environmental concern are given. As noted earlier, Swedish local government agencies sign framework agreements for several types of goods and services and thus the environmental concerns integrated in specifications vary.

An observation is that both selection criteria and award criteria tend to be associated with the bidding organization rather than the good or service to be delivered. Furthermore, contract performance clauses that are related to environmental concerns appeared to be unusual, although a few examples were described by the interviewees.

In Table 2, limitations to integrating environmental concerns are summarized.

TABLE 1
Examples of Environmental Concern

Type	Construction Work: Examples	Framework Agreements: Examples
Specifications	Energy efficient systems for heating and cooling, building materials	Depends on the goods or services to be procured
Selection criteria	Environmental management system, corporate environmental policy	Environmental management system, corporate environmental policy
Awarding the contract	Environmental management system, project-specific environmental scheme	Environmental management system
Contract performance clauses	Restrictions on vehicles and equipment to be used during the construction project	Requirement to implement a corporate environmental policy during the contract period

TABLE 2
Limitations to Integrating Environmental Concern

Type of Limitation	Comment
Lack of administrative resources	Due to a lack of administrative resources (including environmental know-how) in the local government agency, some procurement officers preferred criteria that are easy to evaluate.
Legal concerns	Some interviewees refrained from using environmentally related award criteria because it could result in bid protests from unsuccessful bidders. One interviewee also pointed out that the Environmental Code may result in risk-averse behavior among procurement officers.
Lean budgets	Some interviewees perceived that environmentally friendly goods and services are too expensive.

CONCLUDING REMARKS

The aim of this chapter has been to describe how procurement officers integrate environmental concern in their procurement process, and to identify limitations to integrating environmental concern. Our study of procurement officers in Swedish local government agencies shows that procurement officers prefer to integrate environmental requirements in contract specifications or in selection criteria. This may partly be explained by the fact that unsuccessful bidders in Sweden have the possibility to file a protest in administrative courts if they suspect that the public sector buying agency has violated the regulation. Furthermore, procurement officers prefer environmental criteria that are easy to evaluate, such as whether a bidder has a corporate environmental policy or an environmental management system.

Limitations to integrating environmental concern are lack of administrative resources and sometimes also lean budgets that do not allow any price premiums to be paid for more environmentally friendly goods, services, or construction work. Uncertainty regarding the legislation seems to contribute to risk-averse behavior among procurement officers, meaning that they make decisions that reduce the risk of unsuccessful bidders complaining in administrative courts.

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APPENDIX: INTERVIEW QUESTIONS

The following questions regarding environmental concern were included in the interview guide. The interviews were conducted in Swedish, but translated questions are given here. Because the interviews were semi-structured, the questions only partly convey the interactive discussions that took place.

The public procurement process

Does it happen that a supplier is excluded [from participation in the procurement], and if so, on what criteria?

Are you taking a supplier's technical capacity into consideration?

How do you reason when deciding the type of contract award criteria to use for a particular contract?

How do you reason when deciding the weights of contract award criteria?

Do you use contract performance clauses?

Environmental criteria

Can you give examples of environmental criteria or environmental requirements in public procurement?

What type of environmental criteria or environmental requirements do you use?

How do environmental policy initiatives within the municipality/county influence your procurement process?

Public procurement as a policy instrument

Do you think it would be possible to use public procurement as a policy instrument to achieve long term goals (e.g. sustainable development, technological development) in your municipality/county, or in society in general?

What do you think that "sustainable development" represents in relation to public procurement?

Paper III

Title:

Invoking public procurement rules: construction-related court cases in Sweden, 2003–2006

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Invoking public procurement rules: construction-related court cases in Sweden, 2003–2006

ABSTRACT

Despite the move towards less litigation in construction projects, procurement causes legal conflicts. Judicial review of public procurement decisions holds a potential for ensuring conformity with internationally agreed principles such as in the European Union. This study examines construction-related court cases to identify characteristics of the cases and the plaintiffs involved, the outcomes of the cases, as well as to discuss judicial review as a control mechanism in the public procurement process. The data analysis covers 574 construction-related cases in Swedish County Administrative Courts during 2003–2006. Results include that tenderers' complaints primarily concern the qualification and award stages of the procurement process. A variety of services are involved and frequent litigators tend to be large firms. The average delay between the award decision and the courts final decision was 36 days. Courts rejected half the cases, dismissed 24% or found that procurement process should be corrected (13%) or reinitiated (13%).

Keywords: construction, contracts, European Union, judicial review, procurement, public sector, Sweden

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INTRODUCTION

In recent decades, the European construction industry has witnessed a movement towards innovative procurement practices (Morledge et al., 2006). There has been an emphasis on collaborative working and partnering agreements (Wood and Ellis, 2005), supply chain integration (Briscoe et al., 2004), as well as scoring-based competitive tendering (Wong et al., 2001). While buyers in the private sector are free to develop and introduce almost any procurement practices, the adoption of new practices in the public sector is more complicated. Here, many procurement officers operate in a constrained environment where they must comply with specific rules expressed in national legislation and administrative regulations. To break these rules is not always costless, because an aggrieved supplier may decide to lodge a complaint in a court of law or a quasi-judicial body. Contrary to Swedish legal tradition, there is no authoritative commentary to the Public Procurement Act, and until recently, no central government authority had been empowered to issue guidelines. Neither is there a centralized court or a single administrative body for handling appeals. Consequently, Swedish practitioners turn to court practice for guidance in procurement by lodging complaints in the courts. Regardless of the outcome, procurement officers face increased transaction costs because of the administrative resources they consume when responding to the complaint and arising from delays in contract awards.

Although judicial review of the public procurement process has received researchers' attention in the past (Greenstein, 1993; Marshall et al., 1991, 1994a, 1994b; Kovacic, 1995; Schooner, 2001), few investigations have been devoted to construction-related procurement. One exception is the analysis of a court case concerning best-value procurement at the Minnesota Department of Transportation (Shane et al., 2006), highlighting the importance of the transparent and documented evaluation process that had been established. The scant attention that has been given to construction procurement is surprising, given its economic importance; how the courts exert influence on practice should be of interest to researchers studying public sector procurement, policy makers striving to enforce procurement rules, as well as practitioners in the industry itself.

This paper examines construction-related procurement cases that were brought before Swedish County Administrative Courts between 2003 and 2006. Still in the late 1990s, these courts experienced few public procurement cases, approximately a hundred per year. More recently, however, there has been a sharp increase. Following an amendment to the Public Procurement Act a dramatic shift took place between 2002 and 2003, when the number of protests by aggrieved tenderers rose from 343 to 865. A "litigation mentality" (Bies and Tyler, 1993) appears to pervade today's public procurement. From a construction industry perspective this might come as a surprise, because the industry has moved towards more collaborative practices, such as partnering (Kadefors et al., 2007; Nyström, 2007). However, little is known about how many of the Swedish court cases actually refer to construction-related procurement. Likewise, there is not much knowledge of on what grounds tenderers complain. Experiences from defence procurement in the United States (Gansler, 1989) suggest that procurement officers' use of scoring-based competitive tendering makes it more likely that tenderers seek redress in court. This study examines review cases to identify the outcome of these cases, geographical patterns, the type of construction-related services involved, characteristics of plaintiffs as well as patterns in their complaints.

CHARACTERISTICS OF JUDICIAL REVIEW

In the European Union, almost all of public procurement takes place in geographically dispersed authorities. The discretion of these authorities is limited by a set of rules in EC directives and national legislation, although, as is mentioned later on, this does not mean that their hands are tied. It is a challenge for the European Commission to determine whether authorities comply with the rules or not. For instance, procurement officials may be corrupt and bribes determine who obtains a contract (Banfield, 1975; Rose-Ackerman, 1999: 59; Transparency International, 2006), or they may favour local suppliers instead of suppliers from other EU Member States (Trepte, 2004: 102).

What the motivations that underlie the decision-making process of the procurement officers are will not be discussed here, but one mechanism that can

be used as a means of improving compliance with the public procurement rules, is to give tenderers a right to protest award decisions made by public authorities. Thus, judicial review can be initiated by tenderers who participate in the competitive procurement. Since tenderers have a profit motive, they have an incentive to detect infringements and complain in court. They are also assumed to be better informed about the procurement than, for instance, auditors (see Marshall et al., 1991 for a discussion on auditing versus protests by tenderers). One advantage of judicial reviews could be to promote a more homogenous interpretation and application of legal rules. In turn this may lead to better predictability in procurement practice.

Prior research has identified four potential disadvantages of judicial review. First, complaints from aggrieved tenderers can significantly delay the procurement (Kovacic, 1995). Second, deterrence is imperfect because it might be difficult for suppliers to discern whether an award decision was made because of favouritism or because a competitor's tender was truly superior (Marshall et al., 1991), and moreover, if costs associated with unsuccessful complaints are substantial, suppliers are unlikely to complain about every questionable award decision. Third, public agencies incur costs when responding to complaints, which can result in risk-aversive behaviour or overdeterrence (Gansler, 1989: 191; Marshall et al., 1991; Kovacic, 1995). That is, procurement officers are thought to design the procurement in order to minimize expected costs associated with court proceedings instead of maximizing value for taxpayers. For example, they might abandon certain award criteria, such as environmental- or quality-related, that rely on subjective but useful data. Fourth, some infringements are harmful to taxpayers but not harmful enough to any participating supplier. Marshall et al. (1991) mention over-inclusion and technology bias as examples. Another example is procurement officers who fail to properly advertise the upcoming procurement. The participating suppliers have little to gain, because a complaint might increase the number of competitors.

CHOICE OF AWARD CRITERIA

Public procurement in EU member states has to respect Treaty principles, in particular the freedom of movement of goods, freedom of establishment and freedom to provide services and also the principles deriving from these, such as the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency. The Swedish Public Procurement Act, which came into force in 1994 and implements directives on public procurement, contains no explicit reference to these Treaty principles. However, the Swedish Act stipulates that: "The award of public contracts should be so arranged as to take advantage of existing competition and should also in other respects accord with the conventions of good business practice *(affärsmässigt)*. No unwarranted considerations should affect the treatment of tenderers, candidates or tenders." It should be noted here that the concept of 'good business practice' is vague and perhaps not entirely consistent with the European principles (Åström and Bröchner, 2007).

In public procurement, we distinguish between a qualification stage and an award stage. A qualification stage can be either a prequalification stage where suppliers have to apply to submit tenders, or a qualification stage that is integrated with the award stage. In the latter situation, all suppliers are allowed to submit tenders, but only those tenders that meet the qualification requirements can be awarded the contract.

As mentioned earlier, although public procurement legislation limits the discretion of the public authority as to who and when, it does not limit as to how. In other words the legislation stipulates who is to act and when, with regard to the public authority and the public procurement process, but does not specifically stipulate how this is to be done. Neither the EC Directives nor the Swedish Public Procurement Act prescribes exactly how tenders are to be evaluated when the 'economically most advantageous' tender is to be chosen rather than relying on the 'lowest price'. Procurement officers are free to choose award criteria, given that these criteria:

- are linked to the subject-matter of the contract,
- do not confer unrestricted freedom of choice on the contracting authority,
- are expressly mentioned in the contract notice and tender documents,

- and comply with the fundamental principles of EU law (European Commission, 2004).

Procurement officers are also free to choose an appropriate method for the evaluation of price and non-price criteria, which has led to a variety of methods being used in practice (Waara and Bröchner, 2006).

A previous study of municipal procurement of construction work (Waara and Bröchner, 2006) suggested that scoring-based competitive tendering is frequently used in Sweden. In 2003, Swedish municipalities used four award criteria on average to select the 'economically most advantageous tender'. Whereas lowest price selection of contractors is fairly straightforward and often perceived as an objective selection method, the use of non-price criteria is more challenging. That is why this paper primarily deals with cases resulting from public procurement processes where the procurement officers have used non-price criteria. For instance, procurement officers who want to take the contractor's environmental management system into consideration have to find a way to evaluate different management systems. In many cases the final award decision can be criticized for being subjective by those contractors who did not win the contract (see Waara, 2007).

OVERVIEW OF JUDICIAL REVIEW IN SWEDEN

Prior to 1994 there were no rules concerning remedies in the Swedish public procurement process. Consequently, aggrieved tenderers had no opportunity to protest against state government procurement decisions and only municipal residents were allowed to protest against municipal procurement (Ericsson, 1994). Since 1 January 1994, however, public procurement has been regulated in the Public Procurement Act (hereinafter the Act), which became the first Swedish law to implement European Community directives on public procurement—Directive 93/36 on supply contracts, Directive 93/37 on works contracts, Directive 92/50 on services contracts, and Directive 93/38 on contracts awarded in the utilities sectors. This Act also implements the procurement remedies directives—Directive 89/665 and Directive 92/13. The Act consists of seven chapters and Chapter 7 includes rules about remedies. Judicial review of the public procurement process

can be divided into pre-contractual review and post-contractual review. Given the scope of the article, we concentrate on the pre-contractual review mechanism. The post-contractual review mechanism will be covered only in brief.

Pre-contractual review

The remedies directives do not pinpoint any particular approach with regard to the choice of review forum and thus different Member States have chosen different approaches (see Arrowsmith, 1995; Danish Competition Authority, 2002; and Sigma, 2007). In Sweden, the pre-contract review system operates through the administrative courts. There are three levels of judicial review and the twenty-three County Administrative Courts represent the first level (see Figure 1 for an illustration). An appeal against the decision of the County Administrative Court can be lodged at an Administrative Court of Appeal. The third and final level of judicial review is the Supreme Administrative Court.

Insert Figure 1 about here

Basic features of the judicial review process include that standing is granted to suppliers who consider that they have been or risk being harmed, that the parties bear their own costs, and that there is no opportunity to settle disputes outside court. The administrative courts have two remedies available: either to decide that parts of a procurement process must be reinitiated, or to order a full reinitiation. Interim measures include that the court may decide that the procurement cannot be finalized before the court has reached another decision. There is, however, the exception of the situation where the measure would result in damage to the contracting authority greater than the damage claimed by the supplier.

During the 1990s the annual number of procurement cases in County Administrative Courts was fairly stable. Estimates, based on newsletters published by the National Board for Public Procurement, suggest that there were about fifty cases per year in the mid-1990s, a figure that increased to about one hundred cases per year at the end of the millennium.

In 2002, Sweden had few procurement-related complaints (see Table 1). Among the fifteen EU Member States, Sweden was ranked number nine with regard to the number of remedies actions and number eight with regard to the number of remedies actions as a proportion of invitations to tender. Since 2002, however, Sweden has experienced a dramatic increase of the number of protests lodged in County Administrative Courts. The number rose from 343 protests in 2002 to 865 protests in 2003 (see Figure 2). Although there may be several factors that have contributed to the increase, the most important one is likely to be an amendment to the Act, entering into force on 1 July 2002.

Insert Table 1 about here

Insert Figure 2 about here

Prior to 1 July 2002, it was difficult for tenderers to complain because public agencies were not required to inform tenderers about their contract award decisions, nor were they required to wait before signing the contract. Thus, agencies could make an award decision and immediately conclude the contract with the winner. Tenderers could still file protests, but since the County Administrative Courts' right to review had become forfeited after the conclusion of the contract, these protests would be dismissed. However, things changed as the European Court of Justice reached its decision in the *Alcatel* case. It was found that the member states are required to ensure that the Contracting Authority's decision prior to the conclusion of the contract in all cases is open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met (Trepte, 2007). Consequently, the Swedish Government initiated an investigation (SOU 2001:31) to identify necessary amendments to the Public Procurement Act. The ensuing amendment contained two innovations. First, it became mandatory for the procuring agency to inform every tenderer of its award decision and the reason for the decision. Second, a requirement was introduced that ten days must pass between the date when all tenderers have been

informed about the contract award decision and the date of the conclusion of the contract (see Figure 3).

Insert Figure 3 about here

Post-contractual review: damages

When ten days have passed from the date when all tenderers were informed about an award decision, the procuring agency may conclude the contract with the winning tenderer. The County Administrative Court's right to review becomes forfeited, and the option for an aggrieved tenderer is to bring a claim for damages against the procuring agency. The award of damages is within the province of the ordinary civil courts and the Act stipulates that a tenderer can claim damages within one year from the date that the tenderers were informed about the award decision (see Figure 3). Available data suggest that the number of damages cases is much lower than the number of pre-contractual review cases. According to the National Board for Public Procurement (NOU, 1999) only 21 damages cases were registered between January 1994 and May 1999; about four cases per year on average. A report issued by the European Commission (2006) suggests that during the 2000–2002 period there were no more than three Swedish damages cases. Statistics from 2003 onwards has not been found. Unlike pre-contractual review, the parties in damages cases can settle outside court, which affects the possibility to identify meaningful and exact figures. Nevertheless, prior to 2002 damages cases were much fewer than the number of pre-contractual cases.

RESEARCH METHOD

Our data set includes 574 construction-related cases in County Administrative Courts during the 2003–2006 period. It thus represents a subset of all 4,742 public procurement cases in which County Administrative Courts had reached a decision during this period (see Table 2). A few complaints lodged in the end of 2006 were excluded from the data set because the courts had yet to reach their decisions. Likewise, a few complaints lodged in the end of 2002 but with court decisions in 2003 were included. The case documentation was purchased from Allego, a firm

that keeps records of court cases and decisions in Swedish public procurement. According to Allego, their database covers all court cases in the 23 County Administrative Courts from 2003 onwards. Our own estimates, however, suggest that the coverage is more likely to be about 90 per cent of all court cases. This estimate is based on the observation that in some cases the parties make reference to previous cases that are missing from the database; omissions are revealed also by a comparison with statistics from the National Courts Administration.

Insert Table 2 about here

The unit of observation in the data set is a court case in a County Administrative Court. The typical case document includes information about the plaintiff and the defendant, a brief description of the procurement contract, the plaintiff's claims and the reasons why the procurement should be corrected or reinitiated, the reasons for the court's decision, and finally the decision. Approximately 2,600 pages were reviewed. The variables were extracted through a coding procedure.

Referring to procurement contracts (and court cases) as being construction-related raises the question of where one draws the boundary between 'construction' and 'other goods and services'. Here, the Common Procurement Vocabulary (CPV) classification system used in the European Union allowed a more fine-grained division of construction-related procurement contracts to be made. The assignment of court cases to CPV codes was done on the basis of the case documentation, although it should be noted that this data source has two shortcomings. First, it contains only brief statements about each procurement contract. Ideally, the coding of procurement contracts into different CPV codes should be based on an analysis of tendering documents. This type of data source, however, is not readily available. Moreover in 92 cases, the information on the procurement contract available in the documentation was either missing or too vague. These cases could not be coded according to the CPV classification. Nevertheless, they were included in the data set because other clues in the case documentation (primarily the identity of the plaintiff) indicated that they should

be regarded as construction-related cases. Second, a single procurement contract may include more than one type of construction-related service. The construction of a new bridge, for example, usually involves the construction of adjacent roads as well. To mitigate this problem, only four out of eight digits in the CPV tree structure were used. The procurement contracts that were included in the data set are presented in Table 3. Engineering works and construction works is the single largest category. The second largest category is engineering services.

Insert Table 3 about here

Furthermore, we analyse only those complaints that were either approved or rejected by the courts. There are lessons to learn from dismissed cases, but when a County Administrative Court dismisses a case, it usually gives little detail on the plaintiff's complaints in the case document. This complicates an in-depth analysis of these complaints. Focusing on approved and rejected cases, hence, left us with a subset of 353 cases. Because of the vast amount of data that can be extracted from these cases, we concentrated on typical complaints and kept the analysis at a general level. The cases were used to illustrate extracts from the general analysis.

RESULTS

Outcomes of judicial review

Since twenty-three cases only include interim decisions by the courts and lacks data on the final decisions, this section concentrates on the remaining 541 court cases. In half (50%) of these cases, the complaints by tenderers were rejected by the courts (see Figure 4). Thus, the public authorities were allowed to conclude the contract with the winner. In slightly over one-quarter (26%) of the cases the courts approved the tenderers' complaints. In about half of the approved cases, the courts ordered that parts of the procurement process should be corrected; in the other half the decision required that the whole procurement process should be reinitiated.

Insert Figure 4 about here

The remaining one-quarter (24%) of the 541 cases were dismissed by the courts. The most frequent reason for dismissal was that tendering firms lodged their complaint too late. Another reason was that tendering firms lodged a complaint but soon afterwards decided to withdraw it. A third reason why cases were dismissed was that the procuring entity had decided to cancel the procurement. The procuring entity might realize that it had violated the rules and instead of awaiting the court's decision it cancels the procurement. A fourth reason was that the complaint had been lodged with the wrong County Administrative Court, since there is a requirement that a complaint be lodged with the County Administrative Court relevant to the court circuit where the public procurement unit is situated.

Geographical patterns

Complaints by aggrieved tenderers occur throughout Sweden, but they are unevenly distributed (see Table 4). Almost half of the 574 court cases are found in the three largest regions—Stockholm, Skåne, and Gothenburg—and in the county where the Swedish Road Administration and the Swedish Rail Administration are registered (County of Dalarna). The County Administrative Courts on Gotland and in Mariestad are at the other end of the spectrum, having experienced only two cases each.

Insert Table 4 about here

Delays in contract awards

A subset of 354 cases contains information on the date of the public authority's award decision as well as the date of the County Administrative Court's decision. In the great majority of these cases (94%), the court reached its final decision within three months. The quickest court decision was reached only six calendar days after the award decision, whereas the longest court process lasted for 264 calendar days. The average delay was 36 days. Thus, if a plaintiff's complaint is

rejected by the court, the typical consequence is that the public authority may conclude the contract about one month after its initial award decision. However, if the court orders that the procurement process must be reinitiated, or if the plaintiff lodges an appeal at an Administrative Court of Appeal, longer delays can be expected.

Characteristics of plaintiffs

Although information on firm size is missing for several plaintiffs in the data set, the available data show that plaintiffs range from very small to very large firms. Frequent litigators tend to be large firms, but not all large firms belong to this category. The most frequent litigator in the data set, a nationwide construction company, lodged 34 complaints in four years. Based on the 2006 Swedish Construction Federation list of the largest construction companies in Sweden, we find that the top three accounted for 81 out of 574 complaints in the same four-year period. The 2005 Swedish Federation of Consulting Engineers and Architects list of the largest consulting engineering and architectural groups reveals that the top three groups (excluding industrial engineering) accounted for 20 complaints. Similarly, the three largest companies specialized in building services (heating, ventilation, air conditioning, plumbing, electrical installation, etc.) accounted for 36 complaints. It should be noted, however, that several companies have lodged only one or two complaints and that many of these companies appear to be small and local.

It is only exceptionally that foreign tenderers appeal against contract award decisions. Only three cases involved firms registered abroad. One case concerned a road construction contract in Northern Sweden where a Finnish firm complained about the contract award. The second case concerned a road and bridge construction contract, whereas the last case concerned a contaminated soil and land remediation contract. Here, the complaints were filed by a construction firm based in Germany. Since the EC directives emphasize non-discrimination of foreign firms, there is a gap here between intentions and the actual use of the remedies provided by national legislation. At the same time, Swedish subsidiaries of foreign firms occur more frequently in the data set. Foreign firms entering the

Swedish market might prefer to establish subsidiaries. Although ineffective remedies may constitute a barrier to cross-border trade (European Commission, 2006), the results here suggest that even when reasonably effective remedies are present, these national legal arrangements may have little influence on European integration.

Complaints by plaintiffs

In this section, Among the 353 cases, the two most frequent types of complaints could be attributed to the qualification and the award stages of the procurement process. This section presents examples of what some complaints brought before the Court are about and how the Court decides upon these issues.

Complaints: qualification stage

The collected data show that complaints about prequalification are rare in Sweden. One simple reason for this can be that the use of prequalification is limited. A recent investigation into procurement of construction work in Sweden suggests that public authorities often receive few tenders and therefore they prefer open competitive tendering (Waara, 2007). While this may be an explanation why complaints concerning prequalification are rare, complaints related to (tender) qualification are much more common. When tenderers complain about the qualification stage they do so either because their own tenders did not pass the qualification, or because they perceive that the winning tender should have been disqualified.

A typical feature of these complaints is that a tenderer has qualified the tender in one or more respects. In many cases, the winning tender contained one or several qualifications. In general, the courts find that the winning tender should have been rejected because it failed to comply with the requirements stated in the tendering documents. In a number of similar cases, the winning tender included qualifications without any prices assigned, but here the tenderer submitted additional information to the public authority after its initial tender had been submitted. Here, the plaintiff typically claims that this information constitute an inadmissible amendment to the tender, whereas the public authority's typical

response is that the tender merely has been clarified. The courts generally approve these types of complaints, stating that the principle of equal treatment has been violated.

Although the Public Procurement Act allows tenderers to make minor clarifications their tenders, it is evident that Swedish County Administrative Courts have been reluctant to approve amendments to a tender after the submission deadline. If a public authority has stated a requirement in its tendering documents and a tenderer fails to meet this requirement, the tender should be disqualified. An illustrative example involves a company that had been delivering services to a public authority for thirty years. The company, apparently well-known to the procurement officers, forgot to enclose a certificate to its tender. The tender was disqualified and the company lodged a complaint arguing that it should have been permitted to submit the certificate at a later stage. The court found that the procurement officers did not violate any rule when they had disqualified the tender.

Complaints: award stage

The award stage in the public procurement process could be said to be rather contentious due to the fact that many of the cases can be related to this stage of the process. It has also been called the stage of the procurement process that possibly is the most important (Falk and Pedersen, 2004: 91). It entails the part of the procurement process where the procuring agency evaluates the tenders that remain after the qualification stage. When complaining about aspects of the procuring agency's methods with regard to the evaluation of the tender, the tenderers refer to various national and European legal principles. One prominent example is the Swedish principle of 'good business practice'. In the application of the public procurement rules, the concept has a very broad legislative meaning, which allows for it to be invoked with regard to an array of complaints. Its broad meaning additionally becomes apparent through the fact that it is placed in the general part of the Swedish procurement legislation, making it relevant to all measures taken in the public procurement process (Forsberg, 2004: 184). Examples of when the principle has been invoked include complaints about the confusion of the

qualification stage and the award stage, which is usually not considered good business practice by the Court (Case 998-03, 333-03, 772-03), yet it can be permissible to have an imperfect method of evaluating tenderers and tenders, so long as the flaws are not of the kind or scope such that the principle of good business practice is set aside (Case 20844-03). In essence, this relates partly to the formulations in the tender documents, which must be clear in order to ensure that the tenderers know what will be of importance in the procurement process (Case 161-03), and partly to the actual evaluation process that subsequently takes place, with the requirement that the result of the evaluation process will be just (Case 161-03) and that the risk of evaluating the same circumstances more than once is eliminated (Case 333-03), or at least minimized. For example, it is not enough for a procurement officer to state that the fulfilment of a certain criteria was "good". Nor is the procurement officer allowed to evaluate the number of people employed by the tenderers when it is not stated in the tender documents, or as a determining factor in the evaluation process with regard to companies of a certain size (Case 528-03). More specifically, when evaluating award criteria such as "organisation", there must be a precise definition in order to enable a matter-of-factly and objective evaluation. Specifying "organisation" through "competence", "experience", "availability" and "reserve resources" was not specific enough (Case 998-03). The award criterion "local ties" (*lokal förankring*) was not allowed since it was in conflict with good business practice, as well as the EC-principle of equal treatment (Case 1864-03). On the other hand, the award criterion "resources", which entailed the number of employees the tenderer had, was permissible since it did not amount to an absolute requirement of a minimum number of employees (Case 2177-03).

In essence, it is important that the evaluation process during the award stage corresponds to how the procuring agency has stipulated, in the tender documents, that the evaluation process will take place (Case 20844-03, 4940-03), e.g. only the criteria stated in the tender documents can be evaluated in the evaluation process (Forsberg, 2004: 181). Furthermore, it is important that the award criteria are as specific as possible and clearly stated (Case 998-03), i.e. that they are not in

conflict with the requirements of matter-of-factness and objectivity (Forsberg, 2004: 181).

Other complaints

Although complaints concerning the qualification and award stages of the procurement process are the most frequent, there are other types of complaints. Among the 353 cases, other complaints included:

- the public authority did not advertise the tender invitation properly,
- the procurement was erroneously cancelled,
- the wrong procurement procedure was used,
- an alternate tender was rejected,
- negotiations with tenderers were not allowed,
- no award decision had been published, and
- the award decision did not include any reason for the decision.

This list shows that there is a vast array of complaints made, most of them on procedural grounds.

DISCUSSION

Judicial review of the public procurement process has received little attention from researchers in the past. The present investigation is, to our knowledge, one of few studies to explore court cases in public procurement empirically. Our investigation shows that there was a drastic increase with regard to the number of construction-related complaints following the legislative changes in 2002. The question arises as to what this increase represents. Is there a "litigation mentality" among tenderers, as mentioned earlier, and is it perhaps here to stay, or is it merely the novelty of it that is appealing, in which case it is likely to diminish again? Parallel to this increase, there is a move toward alternative and innovative procurement practices where collaborative arrangements are key. This constitutes an oxymoron in that complaints increase while collaborative measures increase. It begs the question whether the collaborative measures constitute a reaction to the increase in complaints, or is it merely a natural development within the area of construction procurement as a means of making it more efficient? Or both? This

question cannot be answered within the scope of this paper, nor has it been our ambition to do so.

Public authorities' discretion with regard to the public procurement process is limited by national and EC-legislation with regard to who is to act and when, but leaves a lot of discretion for the procurement officer with regard to decision making in the public procurement process and, more specifically, in the formulation of tender documents. Although this discretion has been misused in the past, as mentioned earlier, judicial review exists as a means of controlling the activities of the public authorities. Prior to 2002 a means of access to justice existed for aggrieved tenderers in theory, although in practice it was virtually inexistent due to limitations in the legislative framework. Subsequent to 2002 the theoretical means of access to justice became a reality due to amendments to the legislation.

Nonetheless, judicial review has its drawbacks in that it can cause delays in the procurement process, with the consequence of increased costs for the public authority and thus the taxpayers. Furthermore, if procurement officers feel that a litigation mentality exists, risk-aversive behaviour may result. This entails public authorities designing the procurement to minimize expected costs resulting from court proceedings, rather than ensuring value maximization for taxpayers. Although it would still constitute a means of control of the public authority, the purpose of providing public services to the citizens in an efficient and effective way, would be neglected.

Our investigation furthermore shows that half of the complaints brought before the Court were rejected, meaning that the tenderers complaints were not legally substantiated and that the public authority was able to proceed with the procurement process and conclude the contract with the winner. This is a rather large share of the cases, implying that, although there has been an increase in the number of complaints, it is not necessarily so that the underlying reason is that there is more to complain about, i.e. that the public authorities more frequently procure in violation of the law.

While the public authorities were successful in half of the cases investigated, the tenderers were successful in over one-quarter of the cases, whether the public

authority was required to correct parts of the procurement process or to reinitiate the process in its entirety. This, too, is a fairly large number and illustrates the need for a control mechanism. Not only does it keep procurement officers on their toes with regard to their decision making, but additionally, it ensures that legal guidance on the procurement legislation is provided through the courts. This is furthermore likely to help procurement officers in their future decision making, by establishing what procuring activities are within the realm of the legislative framework and what is not. The increase in number of cases between 2002 and 2003 shows that if there is a means of access to justice, it will be used. Tenderers, as mentioned at the start of this paper, have a profit motive and are thus a well-motivated group to detect infringements and complain in court.

It is not only the public authorities that have an opportunity to learn through the availability of judicial review. The rather large, and surprising, portion of complaints that were dismissed, frequently due to the tenderer having lodged the complaint too late or in the wrong court, shows that the tenderers can learn from the process too. One explanation for the large portion of dismissed cases could be that some plaintiffs do not seem to rely on any legal expertise, possibly to keep their litigation costs down. Law firms are involved only occasionally and it is doubtful that all companies have in-house lawyers specialized in public procurement matters. It is possible that if there is little or limited legal expertise involved, the requirements for bringing a successful complaint may not be fulfilled.

Another finding of our investigation was the true delay resulting from complaints being brought before the courts. The average delay resulting from the complaints was 36 days and in the vast majority of the cases, the Court reached its final decision within three months. As for tenderers, our data only allow us to speculate about the public authority's true costs of judicial review processes. Cases that are being dismissed by the courts appear to require only moderate efforts on behalf of the public authority. More intricate court cases, on the other hand, consume more administrative resources and public authorities sometimes decide to seek legal advice from external law firms. Depending on the urgency of the procurement in progress, the cost incurred due to the delay need not be that

substantial in relation to the cost of the construction project being procured. It may be worth the incurred cost to establish what the legal situation is and to ensure that a control mechanism is in place, not the least in an attempt to safeguard the tax payers' interests. The portion of rejected cases additionally supports this proposition, in that the risk of massive delays and costs due to unsubstantiated complaints is not that imminent.

Following the sharp increase between 2002 and 2003, the number of construction-related complaints was relatively stable between 2004 and 2006. The number of complaints tend to peak when large local authorities award framework agreements for engineering services and building services. Sometimes hundreds of companies compete for these agreements and if many of them choose to lodge complaints this can affect the annual statistics. Also, it should be noted that the interpretation of the 2004 peak is complicated by variation in the ways that County Administrative Courts register court numbers.

Furthermore, our investigation shows that basically all types of construction-related services that public sector clients purchase are involved. Construction-related cases occur throughout Sweden, but are more frequently found in densely populated regions and where large central government clients have been decentralized to a non-metropolitan region. Public authorities in these regions constitute a large share of construction-related procurement and therefore a high proportion was to be expected.

The typical plaintiff tend to be a large firm and the top three construction companies in Sweden accounted for about 14% of the complaints brought between 2003–2006. Although the public procurement in Sweden is open to foreign tenderers and there is an obligation to advertise procurement projects above the threshold in the European database, it is only exceptionally that foreign tenderers appeal against contract award decisions. What consequences this has for European integration with regard to the construction industry can only be speculated upon, however, it would be an important task for future research.

Our investigation moreover showed that among the segment of cases investigated more in-depth, the majority concerned the qualification stage and in particular the award stage of the construction-related procurement process.

Litigious issues related to the amendments to tenders and additional information provided by the tenderer during the qualification stage, and the requirement to evaluate award criteria in accordance with the stipulations set out in the tender documents. The question arises as to what makes the award stage so contentious? Early in this paper the example of US defence procurement was mentioned and that it has been suggested that procurement officers' use of scoring-based competitive tendering makes it more likely that tenderers seek redress in court. Furthermore, previous research has additionally found that scoring-based tendering is frequently used in Sweden. Consequently, the explanation for the many cases may be relatively straightforward. A frequent use of this method means that the opportunities to complain about it are frequent. On the other hand, there may be a complicated explanation in that the use of the method in itself complicates matters and causes uncertainty as well as increases the risks of subjectivity in the evaluation of tenders in the procurement process, which in turns leads to complaints in order to establish what is permitted and as a means of ensuring that public authorities are in compliance with the national and European legal principles.

CONCLUDING REMARKS

The ambition of this paper has been to examine construction-related court cases to identify characteristics of the cases and the plaintiffs involved, the outcomes of the cases, as well as to discuss judicial review as a control mechanism. A drastic increase in the number of cases occurred between 2002 and 2003. Was this due to a litigation mentality amongst tenderers, due to the novelty of the availability of judicial review in practice, or due to an increase in malpractice by public authorities? Although the 50% rejection rate by the Courts argues in favour of the first mechanism, the proportion of over one-quarter approved cases speaks in favour of the latter two; not necessarily that there was an increase in malpractice (although this cannot be ruled out), but that elements of malpractice exist. The increase of complaint cases furthermore indicates that the means of access to justice through the judicial review process often is resorted to, implying that

public authorities are subject to legal control in their spending of public funds on construction contracts.

There are, however, two problems with judicial review and the increase that took place. The first is that it can lead to delays in the procurement process, which can be costly for the public authority. The second is the risk-averse behaviour that may arise on the part of the procurement officer as a result of continuous complaints. It is possible that the risk of increased costs is worth the opportunity judicial review constitutes to obtain legislative clarifications through the courts. The second problem, the danger of risk-averse behaviour, is more worrying, since it could lead to the public authority setting aside the very purpose of public procurement, if that is expressed as obtaining best value for money in a taxpayer perspective. Scoring-based tendering is one way of achieving best value for money and, although it tends to be a litigious method that encourages litigious behaviour, the solution is not likely to be to move away from it (towards more price-based tendering), but rather to pursue a process of legislative clarifications within the area of public procurement.

Implications for future research are several. One is that normative approaches, intending to develop and design new methods for contractor selection in the public sector, must recognize the diversity of regulatory contexts. The quest for a set of 'universal' criteria for contractor selection (Hatush and Skitmore, 1997) is intricate because procurement officers in the European Union face regulations that differ from those in Asia or in the United States. However, further research may also take several other directions. First, systematic interviews with construction companies could provide valuable knowledge on why some of them lodge complaints and why others do not. Second, econometric approaches could rely on the outcome of court cases as a dependent variable. Examples of this approach can be found in human resources management research (Terpstra and Baker, 1988; 1992), although the use of regression analysis in this context needs care when trying to identify factors that influence judicial decisions (Roehling, 1993). Third, comparative studies of practice in several EU Member States would be valuable. Critics of the Swedish Public Procurement Act have argued that the national legislation is unnecessarily complicated and that it provides poor guidance to

practitioners. If this is true, complaints from aggrieved tenderers in Sweden might be different from complaints brought in other countries. A pan-European study would additionally be of interest to shed light on the issue of access to justice through judicial review and European integration with regard to the construction industry.

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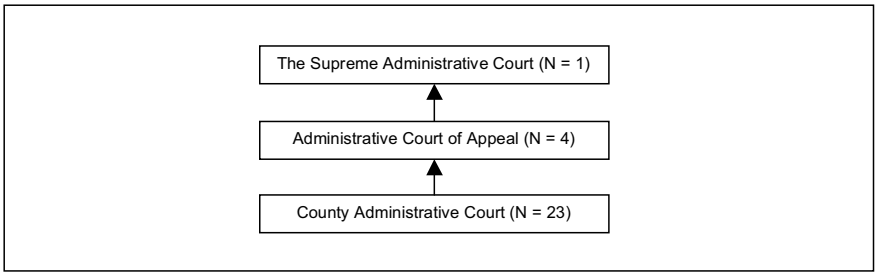

Figure 1: The Swedish court hierarchy for pre-contractual remedies

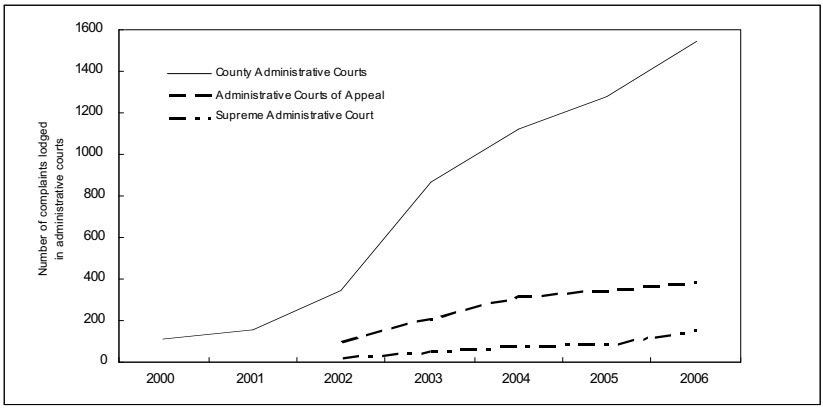

Figure 2: Increase in the annual number of complaints in Sweden since 2000 (all public procurement)

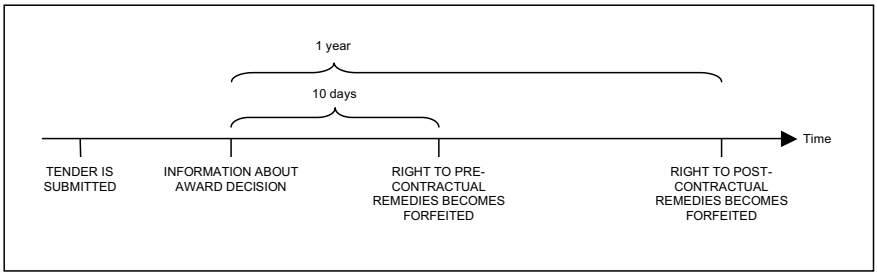

Figure 3: Rights to judicial review in Swedish public procurement since 1 July 2002

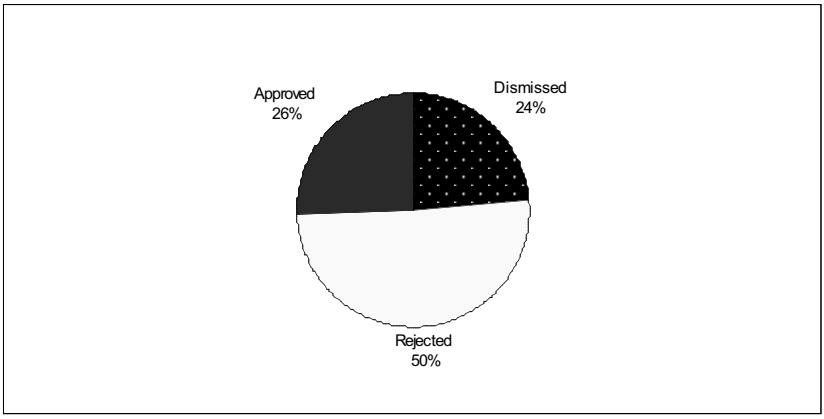

Figure 4: Outcomes of judicial review (N = 541 cases)

Table 1: Remedies actions for procurements above the EC thresholds in 2002

Country	Invitations to tender (ITT)	Pre-contractual remedies actions (PreRA)	PreRA/ITT (%)	Damages remedies actions
France	44,627	253	0.6	—
Germany	17,185	1,092	6.4	—
United Kingdom	11,986	2	0.02	1
Italy	8,343	301	3.6	12
Spain	5,548	174	3.1	—
Sweden	3,364	69*	2.1	3**
Austria	2,854	232	8.2	—
Greece	2,614	214	8.2	2
Belgium	2,384	36	1.5	1
Netherlands	1,993	34	1.7	1**
Denmark	1,495	22	1.5	5
Finland	1,368	132	9.7	—
Portugal	1,303	89	6.8	—
Ireland	927	4	0.4	3
Luxembourg	310	4	1.3	—

* Estimation (20% of all pre-contractual remedies actions).

** Cases brought between 2000 and 2002.

Source: Adapted from European Commission (2006).

Table 2: Cases with decision in County Administrative Courts, 2003–2006

	All public procurement, no. of cases*	Construction-related procurement, no. of observations
2003	841	114
2004	1,143	166
2005	1,213	143
2006	1,545	151
Total	*4,742*	*574*

* Source: National Courts Administration (NOU, 2004; NOU, 2005;NOU, 2006a AND 2006b)

Table 3: Construction-related cases 2003–2006, subject matter of the contract

Subject matter of the contract	CPV classes	Obs
Site preparation work	4510	17
Building construction work	4521	56
Engineering works and construction works	4522–	107
Construction work for pipelines, communication and power lines, for highways, roads, airfields and railways; flat work Construction work for water projects Construction work for plants, mining and manufacturing and for buildings relating to the oil and gas industry	4525	
Roof works and other special trade construction works	4526	5
Electrical installation work	4531	40
Insulation work	4532	3
Plumbing and sanitary work	4533	43
Building completion work (floor and wall covering work, painting and glazing work)	4540	49
Hire of construction and civil engineering machinery and equipment with operator	4550	13
Architectural and related services Urban planning and landscape architectural services	7422, 7425	28
Engineering services	7423	81
Construction-related services	7426	14
Street cleaning services	9021	26
Unknown	—	92
Total		*574*

Table 4: Construction-related cases 2003–2006, per court

County Administrative Court	No. of cases
Stockholm	112
Dalarna	92
Göteborg	43
Skåne	37
Uppsala	33
Norrbotten	31
Halland	26
Östergötland	26
Västmanland	22
Kalmar	21
Västernorrland	18
Södermanland	18
Örebro	18
Vänersborg	12
Västerbotten	12
Värmland	11
Jönköping	10
Gävleborg	9
Blekinge	8
Jämtland	6
Kronoberg	5
Gotland	2
Mariestad	2
Total	*574*

Paper IV

Paper IV

Carlsson, L. and Åström, K., 2008. "Court Decisions in Public Procurement: Delineating the Grey Zone" *Scandinavian Studies in Law*, Vol. 53, pp. 407-420.

Court Decisions in Public Procurement: Delineating the Grey Zone

Lina Carlsson & Karsten Åström

Abstract

To remain effective within the public procurement process it is important to avoid revisions on contract award decisions, which prolong the procurement process and takes its toll on public resources. This paper aims to delineate the grey zone within public procurement legislation and clarify how the court interprets it, which will aid procurement officers in achieving best practice. Findings indicate a bias in favour of the procuring authority in terms of outcome of the court decisions through the use of a principle allowing for imperfect Request for Tender (RFT) and evaluation models due to fluctuations in the economic sector. The findings show that some of the most litigious issues are flawed RFT, inconsistent RFT and award evaluation and a lack of clarity in the RFT and/or the procurement process.

1 Introduction

The legislation on public procurement, Swedish and European, allows aggrieved tenderers to bring a complaint before the courts, given certain conditions.[1] Although this remedy was available previously, it was really only available in theory prior to the amendment to the legislation in 2002.[2] A complaint could be brought against the procuring authority once the award decision had been made but not after the contract had been signed. Firstly, the procuring authority was not required to inform aggrieved tenderers of the award decision; and, secondly, the requirements of the Official Secrets Act[3] ensured confidentiality of the tender documents prior to the award decision.[4] In practice, this meant that the procuring authority could make the award decision and immediately sign the contract with the winning tenderer, leaving the aggrieved tenderers little or no ability to complain based on the award decision. Subsequent to 2002, however, the theoretical possibility became a practical possibility through the requirement that the award decision had to be communicated to all tenderers and that a ten-day period had to pass after the communication before the contract could be signed. Although the direct relation is difficult to prove, there is evidence that this change led to a dramatic increase (from 153 in 2001 to 1124 in 2004) in the number of complaints brought before the Swedish County Administrative Courts (Lennerfors, 2007).

A study conducted during the years 2003-2006, entailing interviews with public procurement officers within municipalities and regions all over Sweden, indi-

1 This paper deals with cases brought under the auspices of the previous Swedish legislation on public procurement, (SFS 1992:1528), although it should be noted that there is new legislation in place on public procurement as of January 1st, 2008 (SFS 2007:1091).

2 The amendment was a result of the European case C- 81/98, Alcatel Austria, Reg 1999 p. I-7671, in which it was held that the unavailability of aggrieved tenderers to a revision of the award decision was contrary to EC-legislation DIR 89/665/EEG and DIR 92/13/EEG.

3 The Official Secrets Act (1980:100).

4 Falk and Pedersen, 2006:175.

cated that there were concerns regarding the number of complaints brought against the procuring authorities regarding various aspects of the procurement process. The exercise of the revision in public procurement in Sweden has additionally been highlighted in the literature as a contentious issue (Lennerfors, 2007). The focus of the study behind the interviews entails the use of multiple criteria in the public procurement process, primarily in construction procurement. Construction was chosen because of its economic importance, and half of the interviewees were engaged in construction procurement only and the other half from central procuring functions. In the procurement process, the procuring authority has the option of selecting the tenderer with the lowest priced tender or the tenderer with the economically most advantageous tender, and must state which in the Request for Tender (RFT). It is through the evaluation of the economically most advantageous tender that the procuring authority has the ability to use multiple criteria in the award evaluation stage, which furthermore tend to have litigious effects (Carlsson and Waara, 2007:21-22).

Throughout the interviews, there were also statements to the effect that the legislation was considered vague and complex, resulting in uncertainty on behalf of the procurement officers with regard to their decision-making in the procurement process.[5] In order to make informed and appropriate decisions, it is essential that the procurement officers have up-to-date knowledge of the current legislation and in particular its practical implications. Legal information is generally available through conferences, seminars, books and legislation or court decision updates, and the information they obtain is an interpretation of the legislation or the court decisions in a legal language communication. To contribute to the understanding of the implications of the legislation, this paper discusses some of the case law that has evolved over a 3-year period, 2003-2006, and how the courts have interpreted the legislation with regard to construction procurement. The main emphasis of the study lies as mentioned on construction procurement. For that reason, as well as in order to limit the number of cases to be studied for practical reasons, the cases studied related to the construction sector only. This does not mean, however, that the findings are not applicable to other sectors, since the same courts deal with similar legal principles and dilemmas.

2 Purpose of study

This paper aims to delineate the grey zone within public procurement legislation as interpreted by administrative courts. By the grey zone we mean the area of legal uncertainty pertaining to the public procurement legislation, in particular with regard to the legal content of the established principles stipulated in the public procurement legislation at Swedish and European levels.

5 Carlsson and Waara, 2006.

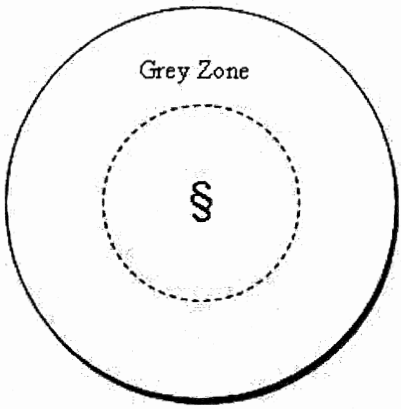

Figure 1. The grey zone relating to legal application.

The reason why a revision procedure is available, besides enabling an aggrieved tenderer to obtain redress, is to create a foundation for a uniform application of the law and thereby serve as guidance for tenderers, increase predictability and thus uphold the rule of law. One research question is whether courts contribute to a more uniform application by clarifying the often vague prerequisites the legislation is built upon.

The grey zone opens for discrepancy in two ways; leading to lack of legal certainty and equal opportunities. In essence, this discrepancy counteracts the flexibility available to the procurement officers with regard to formulating the RFT, evaluating received tenders and making the award decision. A second research question is to delineate to what extent courts support legal certainty and equal opportunities on the one hand, and support or hinder flexibility on the other. From a theoretical perspective outlined in the next section, the third research question is concerned with a better understanding of legal reasoning in court when applying framework law.

3 Theoretical Perspective

In legal science, law is generally seen as a system of rules that manifests general principles, applied by courts or other institutions to make decisions in individual cases. To find the content of the rule the lawyer uses legal sources such as wordings, preparatory works, precedents and doctrine. This is an internal perspective, taught in law schools. Sociology of law takes an external perspective, looking at rules and the legal order from the outside putting law in context.[6] To answer the question of what does the law require, the legal dogmatic method deduces the answer from the sources of law, while the socio-legal scholar in addition looks at the functions of law; empirically placing the legal framework in its societal context.

6 Hydén (2005), Hydén and Wickenberg (2008).

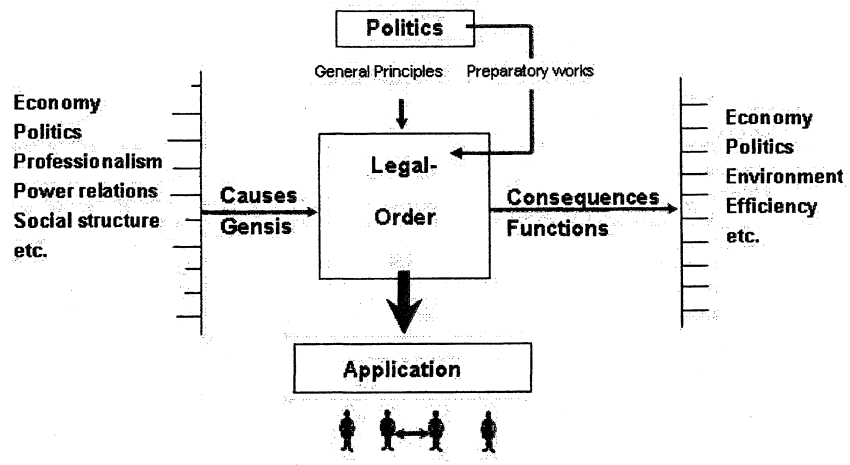

Figure 2. Legal order in two dimensions.

The process of administering public procurement legislation involves four different forms of rationality; local politics, professionalism, market and legal application. In politics, among professionals and in the market, people act in order to fulfil goals defined in the respective setting – goal rationality, but judges shall make decisions according to rules decided on by parliaments – norm rationality. It is an empirical question if legal application in the administrative courts actually follows this formal way of decision making. Framework law puts this matter at stake, as framework law in a way lacks normative content. Normativity is a matter for legal practice legal content is formed in its application in individual cases. Swedish procurement legislation does not stipulate one particular solution, rather that a decision does not infringe the normative provisions required by law.[7] Legal application is not just a matter of deciding between right and wrong.

4 Methods

The context of the empirical investigation is construction-related public procurement in Sweden and the data were gathered using empirical findings from a previously conducted quantitative study of the same cases.[8] This paper uses the

7 The Act (SFS 1992:1528) on Public Procurement. Chapter 7. § 2.

If the contracting entity has infringed the provisions of Article 4 of Chapter 1 or any other provision in this act and this has occasioned injury or the risk of injury to the supplier, the County Administrative Court shall order that the award procedure be recommenced or that it may be concluded only when rectification has been made. In cases concerning procurement as set forth in

8 Carlsson and Waara, 2007.

gathered cases – to conduct a qualitative study of the legal content of these cases. The sample of empirical data was obtained from a database containing court cases related to public procurement.[9] The dataset originally included 574 construction-related cases in County Administrative Courts, constituting a subset of the 4,742 total number of public procurement cases during the same period.[10] The dataset was identified as "construction-related" based on the assignment of court cases to a certain code,[11] through which their relevance for construction procurement can be identified.[12]

Furthermore, due to the objective of analysing the legal content of the cases, those cases containing very limited information regarding the legal argumentation, primarily the plaintiff's complaints, were excluded from the analysis. This has the implication of excluding those cases that had been dismissed by the courts,[13] since insufficient detail on the contentious issue is given. This left the analysis with 353 cases that had been either rejected or approved. Another reason for exclusion for the purposes of this paper is where the case relates to an interim decision by the court, in which it was decided to postpone the decision on the legal content until a later date. These cases totalled 23. Consequently, 330 cases remained. These cases were analysed with regard to their legal content; that is, the complaint, the respondent's legal counter-argumentation and the court's legal reasoning and resulting decision. The purpose is to analyse the court's legal reasoning in an effort to delineate the grey zone of public procurement legislation through its application. Do the courts contribute to a better understanding of the content of the legal rules of public procurement and thereby to a better application in the individual cases increasing legal certainty, equal opportunities and reducing uncertainty among tenderers?

5 Results

The primary focus of the current study is the specific legal reasoning by the courts with regard to the complaints at hand. Prior to a statement of the more detailed results a number of general findings regarding the cases will follow in order to aid in the presentation and understanding of the detailed findings.

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9 Allego, www.allego.se.

10 There is a possibility that the digit representing the total number of cases is not entirely accurate, see Carlsson and Waara, 2007:13. However, the discrepancy is not believed to be of major importance of the purposes of this study.

11 The Common Procurement Vocabulary (CPV) classification system used within the European Union.

12 See Carlsson and Waara, 2007:14-15, for a more in-depth description of the selection of construction-related cases.

13 There are several reasons for a court to dismiss a case, including submitting the revision to the wrong court or too late.

5.1 *General Findings*

There are some statistics related to the cases being studied that will be presented initially. These constitute the results of a study documented elsewhere and finds that 50% of the total 541 submitted revisions were rejected (Carlsson & Waara, 2007, p.15-16).[14] This means that the complaints were unsuccessful and there was no evidence that the procuring authority had acted outside the scope of the legislation. Furthermore, 26% of the complaints were approved and the procuring authority had to correct parts of the procurement process in half of the cases and had to reinitiate the entire procurement process in the other half of the cases. The remaining 24% were dismissed by the courts for various reasons, including bringing the complaint to the wrong court or too late.[15]

General findings of the current study involved the complaints of the cases and the general types of arguments highlighted by the courts. The complaints generally concerned flaws with regard to the tender documents – lack of transparency and clarity, the evaluation of tenders – breach of the Swedish principle of *affärsmässighet*[16] or businesslike manner (authors' translation),[17] and finally inconsistency between the tender documents and the evaluation of tenders – lack of objectivity and predictability. Generally, the courts referred to the EC principles of transparency, objectivity and the Swedish principle of *affärsmässighet* in their legal reasoning. The tender documents are required to be transparent and clear enough for the tenderers to be able to predict what the procuring authority is going to evaluate, and the award decision must contain enough information to allow for revisions based on its content, i.e. the qualification and evaluation process.

5.2 *Specific Findings*

A large number of complaints (42%) specifically concerned errors at the evaluation stage of the procurement process. In particular where the complaining tenderers felt that their tender had received too few points in some respect or that the evaluation had not been conducted in coherence with the procedure stated in the RFT. Some of the complaints in this group of cases consisted of arguments that evaluation criteria additional to those stated in the RFT had been applied in the evaluation of the tenders. Yet other complaints contained criticism of the way different criteria had been evaluated. Interestingly, 63% of these complaints were rejected and 37% were approved.

Another substantial part of the complaints (30%) related to the qualification stage of the procurement process. The complaints primarily concerned a lack of clarity with regard the differentiation between the qualification stage and the

14 The number was originally 574 as stated earlier in this paper, but 23 of those were interim-decisions and did not contain final decisions of the courts.

15 See Carlsson and Waara, 2007:16, for a more exclusive list of reasons.

16 For a discussion on the concept of *affärsmässighet* see: Åstrom and Brochner (2006).

17 It should be noted that as of January 1st, 2008, the principle *affärsmässighet* has been removed from the Swedish legislation partly since it was considered superfluous in light of the EC principles relevant to public procurement. See: (Swedish Government Bill) Prop. 2006/07:128, at pp.151-157.

evaluation stage, an erroneous inclusion of another tenderer, or the erroneous exclusion of the aggrieved tenderer. 55% of these were rejected and the other 45% were approved.

A smaller number of complaints (15%) related to a criticism of the RFT and its predictability and transparency. Principally, the complaints related to flawed evaluation models or criteria for qualification, and to the absence of stated weighting or order of preference between the different evaluation criteria. The remaining part of the complaints related to mistakes in terms of the award decision – insufficient information offered in the award decision or absence altogether, and wrongful complementary addition to the tender. 52% of these were rejected and the remaining 48% were approved.[18]

The legal reasoning behind the judgements of the courts generally referred to the broad legal principles mentioned earlier. In more specific terms, the Swedish principle of *affärsmässighet* was referred to the most in the cases (35%), while the principle of equal treatment came second (19%) and the an emphasis on transparency came third (13%). In the remaining cases the principles of objectivity, proportionality and predictability were highlighted. Furthermore, it should be noted that in many cases more than one principle was referred to.

One example of when the Court agreed that the procurement had not been conducted in a businesslike manner, i.e. according to the Swedish procurement legislation, was when the procuring authority had evaluated the tenders using the "good" or "not good" as units of measurement for the evaluation criteria (Case no. 161-03). Another example is when the procuring authority added new evaluation criteria during the evaluation process, compared to those stated in the RFT.

The principle of equal treatment was decidedly breached when the procuring authority not only had used flawed information as the basis for the evaluation, but the reasons for the evaluation could not be construed from the evaluation protocol (Case no. 496-03) Another example of when the principle of equal treatment was breached was when the procuring authority decided to go back on the qualification requirements during the procurement process and allow complementary additions from some of the tenderers, which goes against the purpose of the requirements (Case no. 1054-04).

The last principle to be dealt with explicitly here is that of transparency. One clear example of when this principle was breached was when the procuring authority had omitted information about the reasons for the award decision (Case no. 2809-04). An additional example is constituted by the situation where the procuring authority had failed to weight or place the evaluation criteria in order of preference (Case no. 1216-04).

Apart from the specific legal principles derived from European or Swedish legislation on public procurement, the legal reasoning in the cases additionally reveal other legal principles or guiding legal arguments. The first principle constitutes a bias in favour of the procuring authority in that it states that: "During public procurement, the starting point must be that the procuring authority itself holds the best prerequisites for determining how the tenders fulfil the require-

18 These figures correspond with the findings in Konsumentverket 2007:2.

ments". (Case no. 2664-03:11) This "principle" was stated in a large portion of the cases and primarily when the Court rejected the complaint. The second principle draws upon the Swedish Supreme Administrative Court statement that "the changing conditions that occur with regard to market conditions allow even for those RFT:s and evaluation models that are not optimally drawn up to be accepted, provided that the principles stipulated in the Swedish Public Procurement Act and Community legislation are not breached". (Case no. 2664-03:11) (Authors' translation.)

6 Discussion

The legislation on public procurement in Europe and in Sweden permits and enables aggrieved tenderers to bring a complaint against a procuring authority for various reasons. The successfulness and purposefulness of the revision mechanism can be discussed, and it has been (Lennerfors, 2007), yet through the amendment in 2002 it is a factor to be considered in the decision making of the procurement officers. It can serve as an appropriate "check against illicit influence" on the part of the procurement officers (Marshall et al, 1991:22).

The cases reveal that some of the most litigious issues relate to the evaluation of criteria in the public procurement process, although the qualification requirements additionally constitute contentious issues. The litigiousness depends upon the clarity of the RFT:s as prepared by the procuring authority and the correlated qualification and evaluation processes. As stated, the evaluation stage was found to be the most contentious issue with regard to complaints, which is not surprising seeing that it is an area where the procuring authority has much discretion requiring a great deal of knowledge on the part of the procuring authority; knowledge that the procuring authority may not be able to obtain.[19] Furthermore, as mentioned at the outset, it has been revealed as a contentious area of public procurement. The qualification stage was another area of controversy where the tenderers complained about being excluded or another tenderer being wrongfully included, which are valid cómplaints. More disconcerting, however, are the cases where the procuring authority has been unclear about the difference between the qualification stage and the award stage. This is fundamental to public procurement and fundamental to equal treatment of tenderers. Another criticism related to the RFT and its lack of clarity, which is alarming since the RFT is what enables realistic tenders to be submitted.

The Swedish principle of *affärsmässighet* is repeatedly referred to in the complaints and legal reasoning, which is particularly interesting seeing that it is no longer explicitly part of Swedish procurement legislation as of January 1st 2008, when the new public procurement legislation came into force (SFS 2007:1091). However, the underlying legal reasoning behind the principle persists and entails ensuring competition and avoiding irrelevant considerations,[20]

19 See Carlsson and Waara, 2006, for a further discussion on the perceived lack of knowledge on the part of the procurement officers.

20 Prop 2006/07:128.

although a review of revisions with regard to public procurement subsequent to this change would be an interesting issue for future research.

The principle of equal treatment, one of the fundamental principles of the EU, implies treating all tenderers equally. In other words, all tenderers are given the same opportunities to submit tenders or to submit complementary additions.

The transparency principle entails the procuring authority communicating all necessary information and being clear about what circumstances are taken into consideration in the procurement process and how, i.e. what their order of preference is and/or what their weightings are.

Finally, two additional principles have been identified in the cases studied. The fact that the market conditions fluctuate allows for some discrepancy in the drawing up of the RFT and the award evaluation model, in other words they do not have to be perfect[21]. Furthermore, the other principle states that the procuring authority possesses the best prerequisites to make determinations with regard to how the tenders fulfil stated requirements. In other words, there seems to exist a bias in favour of the procuring authority, perhaps in order to minimise the distortion of the procurement process, which prevents the procuring authority from having to remake parts of or reinitiate in its entirety the procurement process. The procurer has the advantage of setting up the RFT and thereby the procurement procedure to some extent. The court's task is to review if this procedure is followed.

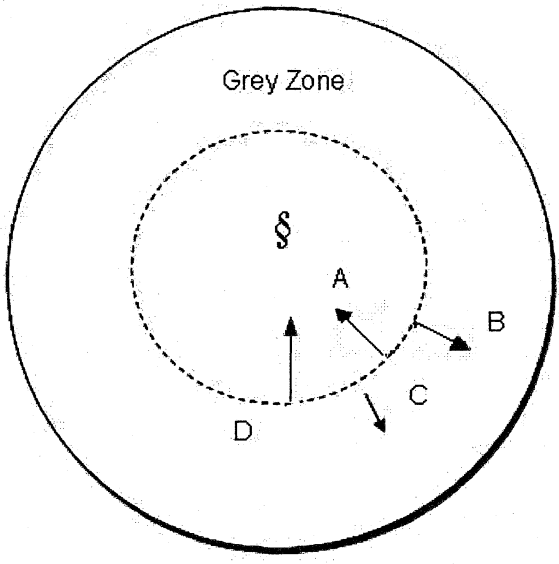

Figure 3. Enlargement or reduction of the grey zone.

21 See also Hettne and Öberg (2005).

Furthermore, these additional principles could entail either an expansion of the grey zone (figure 3, arrow C) in that they add to the principles relevant in the application of the legislation, or, alternatively, the principles increase the clarity of the legislation in that they represent a further clarification of how the legislation is to be applied (figure 3, arrow D). The increased discretion inherent in these additional principles could be said to constitute a clarification of the flexibility available to procuring authorities, while on the other hand it has been said to confuse the current legal situation with regard to the abovementioned flexibility or discretion.[22]

7 Concluding Remarks

Although the legislation on public procurement in Europe and in Sweden permits and enables aggrieved tenderers to bring a complaint against a procuring authority, it is not entirely straightforward for them to resort to. Not only must the aggrieved tenderer show that it was harmed or risked being harmed by the actions of the procuring authority, it seems it must overcome the bias that exists in favour of the procuring authority.

Our assessment is that the courts have not appreciably contributed to a more uniform application of the law, since they have not been able to clarify the often vague prerequisites present in the legislation. Additionally, the Swedish Competition Authority, in its review of court decisions (not limited to construction procurement cases) found that case law varies in-between and sometimes within the same county administrative courts,[23] which further expands the grey zone (figure 3 - arrow A). Other studies of administrative courts in Sweden also indicate that courts do not succeed in clarifying the normative content of the law with regard to the application of framework law.[24]

If we analyse the court decisions based on the theoretical perspective that differentiates between the vertical and horizontal dimensions of the law, we are in a better position to understand the role of the courts. It is not possible to handle these cases in the vertical dimension only. Rather, to enable a clarification of material rules, it is required to put the legislation in its context. This allows for the horizontal dimension to complement the vertical dimension and ways can be found to develop means of ensuring the rule of law while safeguarding flexibility.

However, when in court, what should matter is the strength of the legal argument behind the complaint and when the procuring authority has acted in breach of the ruling principles of public procurement, the procedure should be straight forward. Where the complaint is unwarranted and the procuring authority has acted in accordance with *affärsmässighet*, equal treatment and transparency, the Court is most likely to find in favour of the procuring authority. The open character of the legislation, with a large grey zone, invites the court to deal with the

22 Hettne and Oberg (2005), at p. 204.

23 Konkurrensverket 2007:2, at p. 80.

24 Åström and Werner (2002).

issue with the procuring authority's decision as a starting point. The discretion available to the procurement officer can be said to entail a preferential right of interpretation by, in the RFT, allowing for the procurement officer to establish what will later be the basis of a potential revision. This is furthermore elucidated by the second principle or guiding legal argument developed by the courts.

The courts tend to avoid taking a stand on material or normative issues and prefer to review the procedures. The revision often concerns whether procedural requirements have been adhered to and more resembles a test of legality, where the legality and not the expediency is subject to the court's review. However, according to the Act of Public Procurement, the review shall take up a definite position on the issue at stake, i.e. the material question, and not only determine whether procedural rules have been followed.[25]

Often courts avoid confronting normative issues other than in a vertical or internal manner. We argue that the horizontal, or external, dimension must be considered. Otherwise courts will not be able to review material issues like best value for money with respect to social, ecological and economical sustainability. It is clear that the court has difficulties with regard to legal reasoning in a traditional legal dogmatic way and with regard to finding the answer to the legal issue in the legal sources alone. The answer is not to be found there, but must be sought in the context particular to the legislation. Accordingly, it is necessary that the court, in the legal reasoning, combine the vertical, legal dogmatic perspective with a horizontal perspecive, which means a consideration of matters such as technical, economic, social matters and issues related to sustainable development in the decision making. Although some progress is made with regard to delineating the grey zone when legal principles gain actual, practical content, (figure 3, arrow B) our empirical study of court decisions indicate that the courts have failed to do so in a clear manner that provides efficient guidance to procuring authorities and to tenderers.

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Paper V

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Public Spending and Public Participation

– How is Participation Effectuated in Public Procurement?

Lina Carlsson

Introduction

Public procurement entails acquiring the right item at the right time, and at the right price, to support government actions.[1] In light of the concept of governance – "the creation, execution and implementation of activities backed by the shared goals of citizens and organizations"[2] – the use of public procurement as a means of achieving societal objectives is relevant in the normative rationality of the governance concept. That is, taken that governance is about the integration of societal values in decision-making, the use of public procurement as a means to achieve shared, societal goals, would qualify as a concomitant to the governance concept. In light of the desiderata pertaining to governance, public authorities must not only "manage complex networks" – a characteristic of public procurement – but also "provide transparency, (...) provide channels for citizens to participate and supply bottom-up accountability to the public".[3] Consequently, governance is not primarily about top-down steering, but also about transparency, participation and accountability.

These concepts are highly prominent in the public procurement discourse and in light of the aspect of spending public funds. As such, governance with regard to public procurement could arguably be supplemented by the concept of reflexivity to generate a reflexive governance method. Hobbs and Njoya argue that the traditional "top-down uniform rules (...) will fail to achieve their objectives because of the nature of the interaction between the legal system

1 OECD, (2005), *Good Governance for Public Procurement: Linking Islands of Integrity*, GOV/PGC/ETH(2005)2, at p.5

2 Blomgren Bingham, L., Nabatchi, T. and O'Leary, R. (2005), "The New Governance: Practices and Processes for Stakeholder and Citizen Participation in the Work of Government", *Public Administration Review*, Vol.65, No.5, pp.547-558, at p.548.

3 *Ibid*, at p.548.

and other systems".[4] Instead, they argue "reflexive governance methods seek to achieve their ends indirectly by adopting a procedural orientation which is intended to induce actions by social actors and encourage autonomous processes of adjustment, in particular by supporting mechanisms of group representation and participation".[5]

In public procurement, the legislation largely stipulates procedural rules that provide a framework for procurement officers' decision-making with regard to the public procurement process. It has been stated that the challenge is to "harmonize the legal, institutional and procedural frameworks (...) while providing managers with sufficient flexibility", and one particular aspect of such "good governance" is to avoid corruption, by ensuring transparency and through challenge and review systems.[6] Marshall *et al.* furthermore argue that challenge and review systems – or "protests" – can be used to deter and correct agency problems among procurement personnel,[7] which is an additional aspect of coming to terms with corruption. Challenge and review systems – judicial review, complaints procedures – can be considered means of participation in terms of governance in general and reflexive governance methods in particular, in that they, according to Hobbs and Njoya, entail the enhancement of communication between different systems and "procedural safeguards against discriminatory treatment".[8] Although this is not "participation" in a traditional sense – as citizen participation in processes of representative, elective democracy – it is a means for the public[9] to participate in the public procurement process in that it allows for aggrieved bidders to bring a claim against a public procurement authority's decision. Therefore, this paper will discuss participation in terms of the participation through review procedures.

In light of the recent debates about public participation (hereafter "participation") in decision-making processes, this paper explores the workings of participation in the public procurement process. Does the public procurement legislation include or exclude in terms of participation? Who is allowed to enter and

4 Hobbs, R. and Njoya, W. (2004). "Regulating the European Labour Market: Prospects and Limitations of a Reflexive Governance Approach", *British Journal of Industrial Relations*, 43(2): 297–319, at pp. 297-298.

5 *Ibid*, at p. 298.

6 *Supra* note 1, at pp. 4, 7–8.

7 Marshall, R. C., Michael, J. M. and Richard, J-F. (1991). "The Private Attorney General Meets Public Contract Law: Procurement Oversight by Protest". *Hofstra Law Review*, 20:1–71, at p.2.

8 *Supra* note 4, at p.304.

9 As will be discussed below, there are conditions limiting the members of the "public" that can participate in the public procurement process through review procedures.

on what premises? These questions are explored in order to examine the final question: Is the public procurement legislation functional in terms of participation processes?

Reviewing Public Procurement Decisions

A Review Procedure

A general definition of a review procedure – or judicial review – is "the testing of norms"[10], which is valid for various forms of review and complaints procedures. In its traditional (American) meaning, judicial review relates to "constitutional rights" and the testing of constitutional rights as legal norms,[11] or "statutory, rights-based judicial review".[12] However, in the literature it is clear that it is not as straightforward as that. It is argued that judicial review is "an anti-democratic institution",[13] due to the interference of individuals with the democratic and majority characteristics of the legal norms to be tested – that it provides a "superior decision-making mechanism"[14] and thus "undermines democratic participation"[15]. Spector subsequently rejects this notion and states that it rather "serves the value of public deliberation" and thus serves the value of deliberative democracy (or participatory democracy).[16] His arguments being that "courts handle real cases and thus can test more effectively the particular implications of abstract principles and discover problems the legislature could not forecast"[17] and that it creates a "judicial dialogue"[18].

It is outside the scope of this paper to get into a comprehensive discussion about the democratic validity of judicial review;[19] rather it is the relevance of the complaints procedure under the public procurement legislation as a review procedure and a means of participation by the public that is of interest. A review

10 Whittaker, S. (2001). "Judicial Review in Public Law and in Contract Law: The Example of 'Student Rules'" 21(2):193–217, at p.198.

11 Spector, H. (2003). "Judicial Review, Rights, and Democracy" *Law and Philosophy* 22:285–334, at p.286.

12 Eylon, Y and Harel, A. (2006). "The Right to Judicial Review" *Virginia Law Review* 92:991–1022, at p.993.

13 *Supra* note 11, at p.314.

14 *Supra* note 12.

15 *Ibid*, at p.1018.

16 *Supra* note 11, at p.286.

17 *Ibid*, at p.319.

18 *Ibid*, at p.320.

19 Apart from the authors mentioned in this text, see also Anonymous. (2005). "Judicial Approaches to Direct Democracy" Harvard Law Review 118(8):2748–2769.

procedure in terms of public procurement relates to the complaint of a public authority's decision. In other words, it is an executive review that takes place, which differs from the (statutory) judicial review (or legislative review[20]) in that the latter is a testing of legislative norms and the former a testing of executive (decision-making) norms. It has been argued that executive review – or "due *ex ante* consideration", in light of a wider conception of direct public participation and participatory democracy, asserts that "individuals shall be allowed to participate directly and effectively *ex ante* in the making of political decisions which affect them (...)."[21] He argues that "judicial review *ex post* is frequently not an adequate check on the substance of political decision-making since the courts do not have the political authority and/or expertise necessary to second-guess legislative of executive choices on how to achieve political goals or reconcile conflicting social interests."[22]

A review procedure can be both executive and legislative, whereby an executive review procedure can take the shape of a complaints procedure. Subsequently, the following section will discuss how the review procedure available within the public procurement process is legally constructed.

The Review Procedure – Who is Included/Excluded and on What Premises?

The purpose of the review procedure available in the public procurement legislation is to ensure that the established procedural rules for the public procurement process are being adhered to.[23] As such, the purpose is not to join in the participatory democracy crusade for public participation in decision-making processes, but rather to fortify the goal of the procedural rules – to ensure competition in the public procurement process. This should be kept in mind when examining the legislation on public procurement and the legal remedies available, but does not make the discussion regarding executive review procedures as mechanisms of participatory democracy less interesting.

The legislation on public procurement stipulates by whom and how a complaint can be brought against a procuring authority. The right to standing – who is able to bring a complaint – is conditioned by the following legal requirements:

20 *Supra* note 12, at p.1010.

21 Mathiesen, A. S. (2003). " Public Participation and Access to Justice" *European Environmental Law Review* February:36-52, at p.38.

22 *Ibid.*

23 Sundbom, P-A., Report by the Swedish Competition Authority, Konkurrensverkets rapport, 2007:2, at p. 38.

- The party must be a bidder in the procurement process – has or has had interest in obtaining a particular public contract;[24] and
- The party must have been harmed or risk being harmed.[25]

To establish whether or not the party is a bidder in the procurement process is not likely to be difficult to establish since it is a question of fact. Nonetheless, it has been stated that the phrase "interest in obtaining a public contract" cannot be interpreted strictly.[26]

Whether or not the party has been harmed or risks being harmed has turned out to be a contentious issue. This is illustrated by a statement made by the former supervising authority, the Swedish Board of Public Procurement (NOU),[27] in which it was requested that the Swedish Supreme Administrative Court clarify the meaning of "being harmed or risk being harmed". It has been stated that "risk of being harmed" is not directly related to a risk of *economic injury* in terms of an action for damages, nor can there be said to be a requirement that the injury is related to *not having won* the procurement award, which would entail a too far-reaching requirement on the part of the aggrieved bidder.[28] These principles consequently broaden the right to standing on the part of the aggrieved bidders.

Furthermore, there are formal requirements that must be fulfilled for the court to hear the case:

- The complaint must be brought before the appropriate court;[29] and
- The complaint must be brought within the stipulated 10-day-period.[30]

A potential limitation here is the lack of knowledge and/or resources. If the aggrieved bidder has limited legal expertise available, it may be that the specifics of these rules are not known. A study has shown that complaints are rejected on these grounds, which is a limitation from an equality perspective on participation.

For the court to order some kind of legal remedy to the aggrieved bidder, the procuring authority must have acted in breach of the legislation on public

24 Bovis, C. H. (2006). "Developing Public Procurement Regulation: Jurisprudence and its Influence on Law Making." *Common Market Law Review* 43: 461-495, at p.490.

25 Swedish Public Procurement Act, Lag om offentlig upphandling SFS 2007:1091, 16 kap. 2§.

26 *Supra* note 24.

27 December 2001.

28 County Administrative Court, Case nr 5913-04, at pp.11-12.

29 That is the court where the procuring authority has its domicile.

30 The 10-day period spans from the time when the procuring authority makes its award decision and onwards 10 days.

procurement. Available remedies include interim measures, set aside and annulment of the acts of procuring authorities – testing the lawfulness of the act, and actions for damages.[31] It is outside the scope of this paper to get into further detail in relation to the legal remedies available.[32] Importantly, however, when hearing a review procedure, the national court may declare a procuring authority's decision unlawful irrespective of which decision is being contested by the aggrieved bidder.[33] This is valid also for decisions taken "outside the formal award procedure and decisions prior to a formal call for tenders".[34] This means that the span of control is wider than the decisions being contested by the bidders, namely to include all decisions taken by a public authority in the public procurement process.

In practice, a study of court cases in public procurement has shown that half of the cases were rejected by the courts.[35] In other words, the complaint was not legally substantiated and the procuring authority was allowed to proceed with the procurement process. One quarter of the complaints brought before the County Administrative Courts were dismissed on formal grounds, which means that the complaint had been brought too late or before the wrong court. The court approved the remaining quarter of cases and the procuring authority accordingly had to take some kind of action to rectify the breach.[36]

Consequently, the actual threshold for participation in terms of access to legal remedies seems to be rather high initially in terms of the legal requirements for standing. Additionally, once access has been obtained to the courts, the chances of success are not great in that approximately 75% of the cases are rejected or dismissed. Although merely 25% are due to formal limitations, while the remaining 50% are due to legal substance and argumentation. It has been stated that the European Court of Justice, in its application of the EC public procurement legislation, has adopted a *rule of reason approach*, which means that public procurement legislation is identified as "an instrument verifying conceptual links" that "[authenticates] established principles of European Community law".[37]

31 *Supra* note 24, at p.488.

32 For more information see e.g. Bovis, C. H. (2006). "Developing Public Procurement Regulation: Jurisprudence and its Influence on Law Making." *Common Market Law Review* 43: 461–495.

33 *Supra* note 24, at p.489.

34 *Ibid*, at p.492.

35 Carlsson, L, Bröchner, J. and Waara, F. (2007). "Invoking Public Procurement Rules: Construction-Related Court Cases in Sweden, 2003–2006". Submitted manuscript.

36 For a further discussion see Carlsson and Waara, (2007), submitted, at p.16.

37 *Supra* note 24, at p.461.

The 10-day lay period was introduced in 2002 (following an ECJ ruling[38]) in response to national legal systems making it possible in practice to eliminate the ability to contest the award decision, since the award decision and the conclusion of the contract took place at the same time.[39] In addition, the amendment required that the procuring authority inform all bidders of the award decision, such that the possibility of bringing a complaint was enabled. In essence the situation prior to 2002 limited or even incapacitated the means of participation and means of control available in the public procurement process.

Access to Review as a Means of Participation

The Concept of Participation

The concept of participation is tricky seeing that it can be construed broadly or narrowly, as a means of access to justice and the fulfilment of a right to be heard or as a means of collaboration between citizen(s) and government, and in terms of direct or indirect involvement in executive and legislative decision-making processes. In the introductory part of this paper the concept of participation is allied with direct, participatory democracy, and is as such construed broadly (allowing for a wide array of participants) and in terms of direct involvement in decision-making processes. Indirect involvement and representative democracy implies participation through the voting of elected officials that should act on behalf of citizens, while direct involvement entails participation in the decisions of the state.[40]

In terms of governance, direct public participation has been argued to be a prerequisite for a participatory democracy and popular legitimacy.[41] This is related to "the Habermasian idea of rational discourse as the basis of legitimation of law" and the objective of consensus on the societal level through the creation of possibilities for discourse.[42] The latter can be achieved through "proceduralisation", which often is used interchangeably with the concept "reflexive law".[43]

To refer back to participation, "reflexive law is thought to increase the efficiency of legal regulation by [e.g. causing an internalisation of] (...) the rules that have

38 Case C-81/98, *Alcatel Austria and Others*. [1999] ECR I-7671.

39 *Supra* note 24, at p.492.

40 Callahan, K. (2007). "Citizen Participation: Models and Methods." *Intl Journal of Public Administration* 30:1179-1196, at p.1179.

41 *Supra* note 21, at p. 38.

42 Wilhelmsson, T. "Administrative Procedures for the Control of Marketing Practices – Theoretical Rationale and Perspectives". *Journal of Consumer Policy* 15:159–177, at p.170.

43 *Ibid.*

been instituted with their direct or indirect participation".[44] When discussing the relationship between public authorities and enterprises, Wilhelmsson argues that "the theory of reflexive law highlights the fact that the success of regulative measures requires a sufficient consideration of the autonomy of social systems" and that "this presupposes (...) that the authority adopts *negotiation* strategies which aim at the internalization of the standards in the decision-making of the enterprises".[45] (Emphasis added.) In other words, participation – as an expression of negotiation – by the public (in one form or another) in decision-making processes adds to the success of regulative measures and as such should enhance legitimisation.

Callahan discusses citizen participation as "participation in the planning and administrative processes of government"[46] and differentiates it from political participation, which is an example of indirect involvement and representative democracy. Callahan argues that the challenge for public administrators, when enabling participation, is "to balance the traditional values of equity, fairness, and participation with responsiveness and efficiency".[47]

Drawing on that, participation can be contrasted with efficiency claims, stating that "the limited access of the public to challenge general legislative measures or decisions which do not formally concern them directly and individually is a cornerstone of the efficacy of the legislative and administrative process in public law theory".[48] Inefficiency in legal and/or executive systems is one of the main arguments of those critical to, or concerned about, public participation.[49] On the other hand, as mentioned earlier, according to the theory of reflexive law, efficiency of legal regulation is seen as one of the consequences of communicative initiatives such as discourse and negotiation. Mathiesen suggests a solution to the problem of inefficiency due to participation or broad criteria on standing. Namely to limit "the scope and intensity of substantial judicial review in annulment actions to situations in which the legislator or executive appears to have manifestly exceeded the constitutional or legal limits to their powers or to have infringed essential procedural standards in the exercise of discretion in

44 *Ibid*, at p.168.

45 *Ibid.*

46 *Supra* note 40, at p.1181.

47 *Ibid.*

48 *Supra* note 21, at p. 48.

49 See e.g.: Callahan, K. (2007). "Citizen Participation: Models and Methods." *Intl Journal of Public Administration* 30:1179–1196, at p.1183; Marshall, R. C., Michael, J. M. and Richard, J-F. (1991). "The Private Attorney General Meets Public Contract Law: Procurement Oversight by Protest". *Hofstra Law Review*, 20:1–71.

the decision-making process".[50]

The breach of public procurement rules can be said to constitute an example of when the executive has infringed essential procedural standards in the exercise of discretion in the decision-making process. This brings us to the next section: a discussion regarding the public procurement process and participation.

Participation in Public Procurement – Does the Legislation Include/Exclude?

Taking that the concept of participation is construed broadly, an executive review procedure can be said to constitute a means of participation in decision-making processes. The complaints procedure in the public procurement process, as discussed earlier, is an executive rather than a legislative review procedure,[51] and as such the means of participation can be found in the shape of legal remedies. As stated above, the means of participation through the legal remedy of bringing a complaint against the procuring authority is strictly limited from a broad, participatory democracy perspective.

The legislation on public procurement stipulates who is allowed to bring a complaint. This is based on a standing rule, which "requires a difficult balancing between the benefits of deterrence and the various costs of protests"[52]. This means that if the standing rule is too broad – or inclusive – there is a risk that the number of protests increases, at the cost of the public authority. On the other hand, were the rule construed too narrowly – exclusive – the situation would arise (as was the situation in practice prior to the amendment in 2002) where the ability to bring a complaint was limited. Consequently, the ability to participate in the process and the means of controlling the procuring officers would be similarly limited. Another excluding factor is the fact that the formulation of the "public" able to participate with regard to the review procedure in public procurement is in itself exclusive since it is only bidders related to that specific procurement process in one way or another. Nonetheless, it would be impractical to allow for a more inclusive formulation of the term "public" in light of efficiency and procurement purposes.

Furthermore, given that the initial threshold of inclusion through the legislation on public procurement is set rather high, at the same time the courts have

50 *Supra* note 21, at p. 48.

51 It should be noted that the public procurement process can arguably be seen as a norm forming process, in that traditions of norm application are created in the process, which in turn forms new norms.

52 *Supra* note 7, at p.57.

interpreted the legislation rather broadly. This has been done in an attempt to widen the gap of inclusion for the purposes of the objectives of the legislation through statements to the effect that certain excluding terms cannot be interpreted strictly and cannot constitute a too far-reaching requirement on the part of the aggrieved bidder. These are statements that ensure that the ability to bring a complaint is not debilitated in practice.

Other formal requirements, although they do not concern *who* is able to bring a complaint (and thus are not about a rule of standing), pertain to the excluding or including effect of the legislation on public procurement. These are the formal requirements of bringing a complaint before the appropriate court and within the stipulated 10-day period. Seeing that a study has shown that approximately 25% of complaints are rejected on these grounds, it is potentially a rather excluding stipulation. In essence, the excluding mechanism is not necessarily the legislation, but rather it may be the competency and/or resources to build competency amongst the bidders that constitutes an excluding mechanism.

Efficiency from a public procurement perspective entails "the selection of a vendor who offers the greatest difference between gross value and cost"[53] or "the primacy of maximizing value of a procurement for the government".[54] As stated in section 2.2 above, efficiency aspects of participation bring both arguments for and against direct participation in decision-making processes. In public procurement it is primarily the efficiency-arguments against participation that are articulated.

It should be mentioned that, apart from an executive review procedure, the public has two ways of "participating" or expressing themselves with regard to the expenditure of public funds. One is the route available through the media (publishing opinions through various media and raising awareness) and the other is by participating in the political process, be it voting or debating about the issue through participation in the legislative decision-making processes. However, these aspects are beyond the scope of this paper.

Concluding Remarks

The review procedure available in public procurement allows for some means of control of the public procurement authority's decisions, which contributes to the achievement of a transparent and accountable procuring authority. It is clear

53 *Ibid*, at p.5.

54 *Ibid*, at p.6, note 17.

that (subsequent to interpretations by the European Court of Justice), irrespective of what decision is being criticised by the aggrieved bidder, the national court is free to declare any decision taken by the procuring authority in the public procurement process unlawful. This broadens the function of the review procedure as a means of controlling the procuring authority and consequently contributes to the consideration of the public interest in the procurement process, although it does not affect the excluding or including effect of the legislation or in terms of the direct participation by the public. Nonetheless, it contributes to the bottom-up accountability of the procuring authority with regard to the public and thus contributes to the desiderata pertaining to governance.

Is the Legislation Functional in Terms of Participatory Processes?

To answer this question the concept of participation must be explored such that the content of "participation" is clarified. In light of the above discussion regarding the concept of participation, it is clear that it can be interpreted and construed in different ways. For the sake of argument and in light of a participatory democratic perspective, this paper construes the concept broadly to include review processes that aim to control the executive and decision-making processes that take place. Another issue of relevance to the answer, is that of what does the term "functional" imply? In this text, the functionality of the legislation is determined on the basis of exclusion/inclusion of the public in decision-making processes. Moreover how the exclusion/inclusion is related to some of the desiderata pertaining to governance and reflexive law: providing transparency, providing channels for participation and bottom-up accountability.

Although the legislation on public procurement related to the review procedure in essence is excluding in terms of the traditional content of public participation or access to justice and the construction of *public*, there are demands for efficiency and flexibility on the part of the procuring authorities to allow for the objectives of public procurement to be achieved. These demands are legitimate in their own right in order for the procuring authority to execute its duties.

As stated earlier (and as argued by Callahan), one of the challenges public administrators face is to balance values such as participation with efficiency. The courts have widened the gap of inclusion to ensure that the ability to bring a complaint is not debilitated in practice. The formal requirements stipulated by the legislation are in themselves not necessarily excluding stipulations, as they are not related to who can bring a complaint, but rather they are potentially structural excluding mechanisms in that they require legal knowledge or expertise. Subsequent to the court rulings and changes in the public procurement

legislation at the start of this millennium, the functionality of the legislation in terms of participatory processes has greatly improved. The legislation was including in terms of the public (as bidders in the public procurement process) in theory, although in practice it was inherently excluding. Yet, currently, not the least in light of an exponential increase in the number of complaints brought before the courts (in Sweden) subsequent to the legislative changes, the legislation could be said to be functional in terms of participatory processes. Given the proviso that the term "public" is narrowly defined, while the concept of public participation is broadly construed to include review procedures as a participatory mechanism.

Participatory mechanisms are, as stated at the outset of this text, important constituents of reflexive governance methods, which induce actions by social actors – such as procurement officers or entrepreneurs – and encourage autonomous processes of adjustment. Consequently, participation – in particular deliberative, democratic participation – is important in terms of governance and thus the integration of societal values in decision-making.

The statistics on the outcome of the complaints being brought indicates that there are limitations to the success of the complaints; the reasons for which is beyond the scope of this paper. Yet it is telling on the part of the achievement of certain purposes of participation. Is it sufficient to ensure access to justice and participation through review procedures or should the subsequent structural mechanisms and conditions be investigated in order to determine what the actual effects of participation are? Does the public really have a say or do the structural mechanisms exclude or marginalise the participatory content?

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