

Public Procurement – Policy vs. Praxis: An Implementation Gap?

**- an analysis of environmental consideration in
Canadian procurement processes**



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Tryckt av Media-Tryck
Biblioteksdirektionen
Lunds Universitet
Lund 2005

Executive summary

Public procurement is used as a policy tool in governments throughout the world. In later years environmental policy objectives have been raised as a possible goal of public procurement. This has, however, come to prove problematic for many governments and this paper attempts to find out if there is an implementation gap between environmental consideration in the procurement process at policy level and environmental consideration in the procurement process at practice level. It further tries to identify reasons for the existence of such a gap. Canada, a country with a reputation of being pro the environment, was deemed an interesting case-study in this regard. Interviews were made with practitioners in Canadian procurement practice, the results from which were compared to the presence of environmental consideration at public procurement policy level.

The regulative framework pertaining to public procurement in Canada does not explicitly allow for environmental considerations to be integrated in the public procurement process. Nevertheless, there are possibilities to do so through a paragraph, albeit vague, that allows for other criteria than e.g. price, delivery and quality, through the expression that *any other criteria directly related to the procurement* can be used in the evaluation of bids. Furthermore, although there has been no explicit Federal Government policy goal to integrate environmental consideration in the public procurement process in recent years, at departmental level some policy initiatives are apparent. “Green” procurement is promoted through procurement policies, activity guidelines, service websites and education of procurement officers. At practical level, however, correlated activities and practices seem to be lacking, meaning that there seems to be an implementation gap with regard to the integration of environmental consideration in the public procurement process. Why is this? There are several plausible reasons, including a lack of Federal Government leadership, lack of resources, opposition from the private market, lack of information, as well as the often vague formulation of policies, leaving implementers without sufficient guidance to some degree.

Abstract

Public procurement is used as a policy tool in governments throughout the world. In later years environmental policy objectives have been raised as a possible goal of public procurement. This has, however, come to prove problematic for many governments and this paper attempts to find out if there is an implementation gap between environmental consideration in the procurement process at policy level and environmental consideration in the procurement process at practice level. It further tries to identify reasons for the existence of such a gap. Canada was used as a case study in this regard, to illustrate an international perspective and the situation in a country considered environmentally friendly internationally. Through interviews with practitioners, a pragmatic perspective on the procurement praxis in Canada was obtained. The results were subsequently compared to the findings resulting from an analysis of environmental consideration within public procurement policies. Although there is no explicit Federal Government policy goal to integrate environmental consideration in the public procurement process in recent years, at departmental level some policy initiatives are apparent. "Green" procurement is being promoted through procurement policies, activity guidelines, service websites and education of procurement officers. At practical level, however, correlated activities and practices seem to be lacking, meaning that there seems to be an implementation gap with regard to the integration of environmental consideration in the public procurement process. Several plausible reasons for this were identified. These include a lack of Federal Government leadership, lack of resources, opposition from the private market, lack of information, as well as the often vague formulation of policies, leaving implementers without sufficient guidance to some degree.

Keywords: Public procurement, Environment, Sustainable Development, Canada.

Abstrakt

Offentlig upphandling används som ett verktyg för implementeringen av policys över hela världen. Under senare år har miljöpolicy kommit att bli relevant som ett sådant mål med den offentliga upphandlingen. Det har visat sig inte vara helt oproblematiskt och detta paper ämnar undersöka om det finns en diskrepans mellan miljöhänsyn i offentlig upphandlingspolicys och miljöhänsyn i offentlig upphandling i praktiken. Vidare görs ett försök att hitta anledningar till att en sådan diskrepans uppstår.

Kanada valdes som undersökningsobjekt för att illustrera denna fråga utifrån ett internationellt perspektiv, samt på grund av landets rykte internationellt att vara för miljöfrågor.

Genom att intervjua praktiker kunde ett pragmatiskt perspektiv på upphandlingsprocessen i Kanada belysas. Intervjuresultaten jämfördes sedermera med resultaten från en undersökning av policydokument och huruvida de innehöll miljöhänsyn i offentlig upphandling.

Även om det inte gick att finna någon explicit referens till integreringen av miljöhänsyn i offentlig upphandling i den federala regeringsmakten på senare år, så visade det sig att på departementsnivå hade sådana initiativ tagits och var pågående. ”Grön” upphandling främjas genom upphandlings policys, riktlinjer för agerande, hemsidor med diverse support, samt utbildning av upphandlare. Inom praxis, däremot, fanns det ingen direkt korrelation till initiativen på policy nivå, vilket betyder att det verkade föreligga en diskrepans mellan policy och praktik. Några troliga skäl till detta identifierades såsom brist på ledarskap från den federala regeringsmakten, brist på resurser och information, opposition från den privata sektorn, samt ofta vaga formuleringar av policys, vilket sannolikt försvårar implementeringen av policys för upphandlarna.

Nyckelord: Offentlig upphandling, Miljö, Hållbar Utveckling, Kanada.

Preface

This paper was produced as a result of an opportunity to interview prominent people within procurement practices in Canada, as well as an interest in investigating “green” countries in terms of green procurement practices.

Acknowledgments are due to the following people, who have been most helpful in terms of arranging interviews and providing excellent information with regard to procurement: Mrs Janet Janota, Mr Kyle Janota, Mr Bruce Holden, Ms Patricia M. Close, Mr Terry Kiefl, Mr David Swift, Mr Paul Lalonde and Mr Rajeev Sharma. Further acknowledgments are due to Prof. Karsten Åström who has provided help in terms of guidance and support and Peter Jacobsson for being supportive and critical.

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A. Introduction

Public procurement is used as a policy tool by governments all over the world, including the Canadian Government. The effective implementation of the policy, however, is not always guaranteed. Policy objectives may remain objectives and not become actual practice. What are the reasons behind this? One recent policy objective that has been raised is that of environmental protection or sustainable development. By integrating environmental considerations in the public procurement process, the government is internalizing the externality that negative environmental effects constitute and ensure that the ultimate price paid for the product reflects the true costs of production.¹

In terms of public procurement, and its use as a policy tool, the success of the policy-implementation depends on various factors. This paper tests the hypothesis that there is an implementation gap in Canadian Public procurement, with regard to the integration of environmental consideration in procurement practice. The use of Canadian public procurement as a case-study is the result of interest and opportunity.

This paper aims to identify some of the reasons for the emergence of an implementation gap, where a dichotomy arises between policy and practice.

1. Background

Public Procurement in Canada

Canadian government procurement is regulated by several trade agreements, both international and national. One after another they have contributed to the compilation of regulations that today govern Canadian government procurement.

The first steps toward a set of rules regulating government procurement in Canada, started on the international scene with the General Agreement on Tariffs and Trade (GATT) and the 1979 Tokyo Round of multilateral negotiations. These discussions lead to the GATT Procurement Code, which took effect on January 1, 1981. The provisions of this agreement only applied to those who signed it, of which Canada was one, resulting in only one quarter of the participants at the Tokyo Round being parties to it.² The aim of this agreement was to achieve greater international competition in government procurement of goods through transparent, non-discriminatory tendering policies and practices.³ Several areas of government procurement was excluded from the agreement, including services, certain government departments, as was provincial and municipal procurements.⁴

In 1989, a bilateral agreement on procurement between Canada and the US resulted in Chapter 13 to the Canada-US Free Trade Agreement (FTA), which further added to the regulation of government procurement in Canada. The threshold was lower than in the GATT Agreement on Government Procurement and provided reciprocal access to each other's public markets.⁵ There were also several limitations to the agreement, including there being no increased coverage of the federal government entities, nor an extension of the regulations to the provinces.⁶ With the procurement chapter of the FTA, an independent reviewing authority –

¹ Trepte, Peter, Regulating Procurement – Understanding the ends and means of public procurement regulation, Oxford University Press, 2004, at pp.175-6.

² Close, P.M., 2003. An Unintended Consequence: The Canadian Domestic Spin-off of Government Procurement Trade Agreements, Canadian Foreign Policy/La Politique étrangère du Canada, vol.10, no.3, pp.118-119.

³ *Ibid*, p.120.

⁴ *Ibid*.

⁵ *Ibid*, p.121.

⁶ *Ibid*.

the Procurement Review Board – was established in Canada, allowing unhappy suppliers to file bid-challenges – complaints – over federal government contracts.⁷

The signing of the North American Free Trade Agreement (NAFTA) subsequently took place in 1992, which further added to the regulative package administering Canadian government procurement. Not only was Mexico added to the equation, but the threshold was doubled compared to that of the FTA and the services and construction sectors were added.⁸

The latest development on the international scene, with regard to government procurement and Canada, is the WTO Agreement on Government Procurement (AGP), which was signed on April 15, 1994. It has been said that the AGP has not altered much in relation to Canadian procurement procedures, due to its similarity to the pre-existing NAFTA procurement chapter.⁹ At national level, on the other hand, the last relevant agreement was signed in Ottawa on July 18 1994, the Agreement on Internal Trade (AIT). It was an agreement on barriers to trade between the federal and provincial levels within Canada.¹⁰

Public procurement is defined with slight variations in different countries. Generally speaking it is the acquisition of goods and services by public authorities, departments and agencies needed by them in their daily operations and work within the relevant government. In the Supply Manual published by Public Works and Government Services Canada (PWGSC), the Canadian Government's largest purchasing agency, procurement is defined as “[t]he process of obtaining materiel and services which includes the determination of requirements and acquisition from a supply system or by purchase from the trade”¹¹. The Supply Manual also states that there are essentially four steps to the procurement process: 1) pre-contractual phase, where the needs and requirements of the government agency are defined and the procurement is planned; 2) contracting phase, which includes the entire process from the preparation of a request for proposal (RFP) (which includes the specifics of what is required), bid solicitation to contract award; 3) contract administration phase, where progress monitoring and delivery follow-up takes place; and 4) post-contractual phase, where activities such as client satisfaction, final contract amendments and completeness and accuracy of file documentation are exercised.¹²

In the evaluation of a potential supplier of a good or a service the purchasing agency or procurement officer can make the selection based on the lowest price offered or the “best value” that is offered. In the latter of the two alternatives, the procurement officer will have stipulated in the request for proposal (RFP) which factors will be considered in the evaluation of bids. E.g. factors such as the quality of the good or service, delivery time, experience of the people involved if a service is purchased, etc. In this paper, it is the second phase that is of main interest, since that is where the RFP is prepared and the evaluation and selection of bids take place.

2. Objective

The objective of this paper is to investigate the existence of an implementation gap and the reasons for it in the Canadian procurement practice. It is hoped that this will allow for the finding of methods to improve and streamline the procurement process and experience for all

⁷ The Procurement Review Board was created under Part II of the Free Trade Agreement Implementation Act in 1989. Close, P.M., 2003. An Unintended Consequence: The Canadian Domestic Spin-off of Government Procurement Trade Agreements, Canadian Foreign Policy/La Politique étrangère du Canada, vol.10, no.3, p.122.

⁸ *Supra*, note 2, pp.124-125.

⁹ *Ibid*, p.126.

¹⁰ *Ibid*, p.118.

¹¹ Public Works and Government Services Canada Supply Manual, Chapter 12, available at: <http://www.pwgsc.gc.ca/acquisitions/text/sm/chapter12-e.html#p>, last updated 2005-07-08.

¹² *Ibid*.

involved. This paper aims to achieve this by analyzing empirical information as well as legal and other documents to obtain knowledge about Canadian procurement policy and practices.

3. Hypothesis

Canadian government procurement policy and practice are at a divergence. What does Canadian policy documents regulating government procurement say about environmental considerations with regard to the procurement process? What do Canadian procurement officials say about Canadian procurement practices? Do Canadian procurement officials integrate environmental considerations in the procurement processes? What, if any, action has been taken at Federal Governmental level to integrate environmental consideration in the procurement practice? Is there an implementation gap between policy and practice with regard to environmental consideration in government procurement in Canada?

4. Method

The method chosen for this paper was that of an investigation and analysis of the Canadian procurement situation. This was done to enable an evaluation of the current situation with regard to an implementation gap between policy and practice in government procurement. Material was gathered in Canada through interviews, as well as searches for relevant documentation in libraries and on the Internet in both Canada and Sweden. The interviews undertaken were respondent inquiries conducted in terms of conversational interviews. The respondents were representatives from primarily the public sector of procurement, and the object for the inquiry was to a limited extent the legal system of public procurement in Canada, but primarily the actual processes and practice related to public procurement in Canada. The questions were based on a questionnaire previously put together for a similar study in Sweden, with a few alterations for geographical and systematical purposes.

Why Canada?

An international perspective was chosen to illuminate the practice, with regard to procurement, of another western country, that also has an international reputation of being “green”. Another reason for choosing Canada as a case study was the opportunity to interview representatives from the Canadian private and public procurement practices.

This paper is the result of a series of interviews made in Canada (Ottawa and Toronto) on October 4th, 5th and 12th, 2004, with several interesting representatives from the public sector (at federal level) and the private sector. The interviewees were found and approached by a contact in Canada, who managed to find representatives from different sectors and with different viewpoints on the procurement process. It should be remembered that the time to find interviewees, as well as the possible times available for meetings was and were very limited. In other words, this report does not attempt to give a comprehensive representation of the procurement process in Canada, but attempts to find enough patterns to draw general conclusions on the matter.

Material

The chosen method for this paper involved gathering empirical information on-site, i.e. in Canada, to ensure a true Canadian perspective. The interviewees were not numerous, yet some common points of interest can be drawn from the interviews. The interviewees provided complementing documents that clarified the procurement situation in Canada. Additional documents were gathered through literature searches to further illuminate the Canadian procurement situation.

B. Findings

1. Canadian Public Procurement Policy

As we shall see later on, Canadian procurement is based on Trade Agreements, which stipulate the guiding principles and constitutes the regulatory framework for procurement at federal and international level in Canada.

The Procurement Process in Canada

It is principally Public Works and Government Services Canada (PWGSC), as a common service agency and the government's largest purchasing agency, that buys the majority of the goods and services requested by Government Canada departments and agencies. The objective of government contracting is to "acquire goods and services, and to carry out construction, in a manner that enhances access, competition and fairness and results in best value to the Canadian government."¹³ The procurement process in Canada is very similar to that in Sweden and the European Union at large. It is often a two-step process where there is a qualification stage and an evaluation stage. It should be noted, however, that in public procurement at federal level in Canada, there is a possibility to get on a list which contains pre-qualified real property firms. The company will then be registered on SELECT,¹⁴ which is a list from which governmental agencies and departments select their supplier.¹⁵ There are different bid solicitation methods for the procurement officer to choose from. One is the Request for Proposal (RFP), where the selection of the supplier cannot be made solely on the basis of the lowest price. Instead it is the bid that is the most cost-effective solution based upon evaluation criteria, which is procured.¹⁶ The Invitation to tender (ITT)-method is used for more straightforward requirements and it is the lowest bid (that also complies with the specified mandatory requirements) that is awarded the contract.¹⁷

In the end it is the bidder who meets all the terms and conditions of the requirement and offers the best value or the lowest price (as stipulated in the bid information) who will be awarded the contract.¹⁸

Guiding principles in Canadian Public Procurement

Chapter ten of NAFTA on Government Procurement sets out some guiding principles relating to procurement that are applicable to Canada, as well as the US and Mexico, in relevant situations.¹⁹ The principle of *National Treatment and Non-Discrimination*²⁰ states that *each*

¹³ Government Canada, Public Works and Government Services Canada, at: http://www.pwgsc.ca.gc/text/factsheets/government_buys-e.html, 09/08/2005, at 14.30, last updated 08/10/2004.

¹⁴ This system is for Architectural and Engineering Consulting Services, Services related to Real Property and Construction Services only.

¹⁵ Government Canada, Contracts Canada website: <http://contractscanada.gc.ca/en/source-e.htm>, 04/08/2005, at 12.20.

¹⁶ Government Canada, Public Works and Government Services Canada, at: http://www.pwgsc.ca.gc/text/factsheets/government_buys-e.html, 09/08/2005, at 14.30, last updated 08/10/2004.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ As stipulated in NAFTA, Article 1001, Chapter ten of NAFTA *applies to measures adopted or maintained by a Party relating to procurement: (a) by a federal government entity (...), or a state or provincial entity; (b) of goods (...), services (...), or construction services; and where the value of the contract to be awarded is estimated to be equal to or greater than a threshold (...), of (i) for federal government entities, US\$ 50,000 for contracts for goods, services, or any combination thereof, and US\$6.5 million for contracts for construction services, (ii) for government enterprises, US\$250,000 for contracts for goods, services or any combination thereof, and US\$8.0 million for contracts for construction services, and (iii) for state and provincial government entities, the applicable threshold (...).*

Party shall accord to goods of another Party, to the suppliers of such goods and to service suppliers of another Party, treatment no less favorable than the most favorable treatment that the Party accords to: (a) its own goods and suppliers; and (b) goods and suppliers of another Party. In other words, the procuring entity must treat suppliers outside Canada the same way as the best treatment offered to suppliers inside Canada. This principle is restated in the AIT, Article 401. However, it does not apply to Chapter five, which is the chapter on procurement in the AIT. Instead, there is a similar Article 504, which stipulates the reciprocal non-discrimination-principle in concurrence with a Canadian setting. The principle is also stated in the GPA, Article III:1. Another important principle is the *Rules of Origin*, which stipulates that *[n]o Party may apply rules of origin to goods imported from another Party for purposes of government procurement covered by this Chapter that are different from or inconsistent with the rules of origin the Party applies in the normal course of trade (...).*²¹ This means that Canadian government entities cannot apply rules to foreign suppliers that are not normally applied in a national setting.

The AIT applies to the federal government of Canada and all the provincial governments of Canada.²² It regulates the procurement process in Canada. It states that, *[i]n evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504.*²³ There is thus no reference to environmental considerations in this paragraph, as there is in e.g. European public procurement regulations.²⁴ There is, however, an article stating that other procurement procedures may be used, provided they do not purposely limit competition or discriminate against suppliers of another party, where compliance with the open tendering provisions in Chapter five would interfere with a Party's ability to, *inter alia*, protect *human, animal or plant life or health.*²⁵ Yet this possibility is merely an exemption to the rule, and is vaguely formulated, which means it might be difficult to put into practice.

In the provisions applicable to municipalities, municipal organizations, school boards and publicly-funded academic, health and social service entities,²⁶ a measure that is inconsistent with the principle of non-discrimination stated in the Annex,²⁷ is still permissible where it can be demonstrated, *inter alia*, that: (a) the purpose of the measure is to achieve a *legitimate objective.*²⁸ A *legitimate objective* is further stated as being e.g. *protection of the environment.*²⁹

Sustainable Development initiatives within Government Canada

As a result of International commitments to sustainable development in the early 1990's, Government Canada issued a Green Guide to Government, in 1995. It called for an amendments to the Auditor General Act to establish a Commissioner of the Environment and Sustainable Development within the Office of the Auditor General of Canada.³⁰ created a

²⁰ NAFTA, Article 1003.

²¹ *Ibid*, Article 1004.

²² AIT, Article 502 states that Chapter five on Procurement applies to *measures adopted or maintained by a Party relating to procurement within Canada by any of its entities (...), where the procurement value is: (a) \$25,000 or greater, in cases where the largest portion of the procurement is for goods; (b) \$100,000 or greater, in cases where the largest portion of the procurement is for services, except those services excluded (...); or (c) \$100,000 or greater, in the case of construction.*

²³ AIT, Article 506(6).

²⁴ DIR 2004/18/EC, Article 53, refers to *environmental characteristics* as an example of a criterion that can be used in the selection of the most economically advantageous tender.

²⁵ AIT, Article 506(11)(e).

²⁶ *Ibid*, Annex 502.4.

²⁷ *Ibid*, Annex 502.4, (D.).

²⁸ *Ibid*, Annex 502.4, (F.)(1.)(a).

²⁹ *Ibid*, Annex 502.4, (F.)(2.)(d).

³⁰ Introduction to A Green Guide to Government, available at: http://www.sdinfo.gc.ca/reports/en/ggg/guide_a.cfm.

Commissioner of the Environment and Sustainable Development to assess the development and progress of the individual departments. This evaluation is done based on Sustainable Development Strategies issued by each department regularly, stating their goals and action plans for integrating sustainable development into their policies, programs and operations.³¹ The Strategies are followed by regular evaluations and follow-ups of progress, presented in the shape of Sustainable Development Performance Reports. The Green Guide to Government additionally contained the guidelines issued by Government Canada called Greening Government Operations.³² The guidelines specifically refer to public procurement in terms of ensuring that products and services are purchased that *meet the environmental specifications wherever these are available, and consider life-cycle cost, adopt just-in-time delivery of all standard items*, as well as providing green procurement training to improve decision-making.³³

Procurement Policy within Public Works and Government Services Canada

The procurement policy within the PWGSC, being the largest procuring agency within Government Canada, is of great relevance in terms of procurement practice within Government Canada at large. Several guiding principles are set out in the Supply Manual of the PWGSC, the main one being *integrity*. It is closely followed by *client service, national objectives, competition, equal treatment and accountability*.³⁴ Other than potentially being one of the national objectives, there is no mention of sustainable development or environmental considerations in terms of guiding principles. On the other hand, in the Sustainable Development Performance Report from 2004,³⁵ the PWGSC states that there is an objective to facilitate green procurement in government. In particular, to “ensure that environmental impacts are taken into consideration in all PWGSC contracting” by March 31 2004.³⁶ So far, a Green Contracting Strategy (GCS), describing “how PWGSC will provide green procurement tools to clients to ensure that they have the capability to take environmental impacts into account in their purchases”, is in the process of being implemented.³⁷ A service website has been developed to assist client departments in the integration of environmental consideration in their procurement.³⁸ The site contains lists of close to 100 green goods and services, as well as information and tips intended to facilitate the integration of environmental consideration in public procurement. Thirdly, a green procurement course has been developed by PWGSC to educate other government departments and agencies. It is available to all contracting officers, and as of March 31 2004, the course had been given to over 100 employees, excluding contracting officers at the PWGSC.³⁹

Procurement Policy within Environment Canada

Environment Canada – the Canadian government’s environmental department – has put its own procurement policy in place. It states that its purpose is to ensure that Environment Canada’s procurement activities are being performed “in a manner that satisfies its

³¹ *Ibid.*

³² *Ibid.*, Appendix 4.

³³ *Ibid.*

³⁴ Public Works and Government Services Canada, Government Canada, online at:

<http://www.pwgsc.gc.ca/acquisitions/text/sm/chapter01-e.html#1.080>, last updated 2005-07-08.

³⁵ Sustainable Development Performance report FY 2003-2004, October 2004, <http://www.pwgsc.gc.ca/sd-env/text/performance-report-03-04-e.html>, 2005-02-15, 11.30CET.

³⁶ *Ibid.*, at p. 36.

³⁷ *Ibid.*

³⁸ A Publiservice website called Green Procurement Network. Sustainable Development Performance report FY 2003-2004, October 2004, <http://www.pwgsc.gc.ca/sd-env/text/performance-report-03-04-e.html>, 2005-02-15, 11.30CET, at p. 36.

³⁹ *Supra*, note 35, at pp. 36-37.

Environmental Stewardship role”.⁴⁰ The Policy encourages the reuse of material and resources already existing within Government Canada, as well as undertaking short-term rental, rather than acquiring new products. Procurers within Environment Canada must also, according to the Policy, *consider the “cradle-to-grave” impact of the good or service being procured prior to making the purchase decision, which entails consideration of possible activities relating to the extraction of raw materials, energy consumption, emissions in the air and water during processing, manufacturing by-products, the use and disposal of the product.*⁴¹ It states, furthermore, that all Environment Canada employees must, *inter alia, use EcoLogo products wherever feasible, unless the products being acquired exceed the established EcoLogo standards.*⁴² EcoLogo is the official mark of Environment Canada’s Environmental Choice Program (ECP) and there is a list of relevant products available to the procurers.

Additionally, the Policy encourages Procurement and Contract Management Personnel to: a. *develop “green” terms and conditions, selection criteria, etc. for use in bid solicitation and contract documentation so as to increase the environmental benefits associated with purchases being made while also ensuring competitive prices;* and b. *work with regular suppliers to initiate actions to increase the amount of recycled content in their packaging, to carry “green” products.*

These are thus several specific factors that procurers can and must contemplate when integrating environmental consideration in public procurement. The Procurement Policy in question, however, is only applicable throughout Environment Canada.⁴³

Additionally, as a result of the World Summit on Sustainable Development (WSSD) in Johannesburg 2002, Environment Canada has identified commitments that the department is going to focus on in the next few years. These commitments are stated in Environment Canada’s Sustainable Development Strategy for 2004-2006 and one specifically mentions public procurement: *Encourage relevant authorities at all levels to take sustainable development considerations into account in decision making, including on national and local development planning, investment in infrastructure, business development and public procurement.*⁴⁴ This is to be done through work both within the department, but also *in partnership with other federal government departments and other sectors of society.*⁴⁵

2. Empirical Study Praxis – derived from interview findings

The first interviewee was a representative from the private sector, who previously had spent several years working for government Canada in procurement.⁴⁶ Thus, he had two perspectives of the procurement process. The second meeting was with two representatives from the Canadian International Trade Tribunal (CITT), which is the tribunal to which suppliers appeal a decision made by a buyer – Government department or agency – with regard to a procurement contract.⁴⁷ Thirdly, there was a meeting with a representative of a company that provides their clients (procuring bodies, mainly government) with Requests for Proposals (RFP:s).⁴⁸ The last meeting, in Toronto, was with two lawyers – procurement experts – who

⁴⁰ Environment Canada’s procurement policy, section 1.0.1, at <http://dfait-maeci.gc.ca/sustain/EnvironMan/system/greenop/ref/policy-en.asp>.

⁴¹ *Ibid*, section 2.0.2.

⁴² *Ibid*, section 3.0.1.a.

⁴³ *Ibid*, section 1.1.1.

⁴⁴ Environment Canada’s Sustainable Development Strategy 2004-2006, available at: http://www.ec.gc.ca/sd-dd_consult/SDS2004/tablecontent_e.htm, at p. 37.

⁴⁵ *Ibid*, at p. 38.

⁴⁶ Terry Kiefl, Director, National Contracting, NAVCANADA.

⁴⁷ Dr Patricia M. Close, Vice-Chair of the Canadian International Trade Tribunal, and R.W. (Randy) Heggart, Director of the Procurement Review Division – Research Branch, Canadian International Trade Tribunal.

⁴⁸ David T. Swift, Managing Director of RFP Solutions – Procurement Strategies for Government.

were interviewed in relation to public procurement in Canada,⁴⁹ what disputes arise, how public procurement is viewed and what in the process that causes conflicts or disputes. It is on the basis of these interviews, as well as additional research, that this paper has been written.

In the process leading up to the interviews in Canada, certain specific questions were prepared to act as guidance. This was important not only to get a template for how to proceed during the interview-process, but also to ensure that all interest-areas with regard to the project as a whole were covered. An email was sent out to all project-members asking for suggestions on which interview-questions were to be put to the interviewees. The interview-questions that were brought to Canada were based on the feedback received in those emails, a questionnaire already prepared for similar interviews in Sweden, as well as other general and specific interest-areas with regard to the project.⁵⁰

In this section a description of what came out of the interviews is stated, subsequent to which an analysis of the interviews, along with relevant findings in various materials, will follow. The interviewees were, as stated earlier, from different sectors of the Canadian society, some with experience of both the public and private sectors of procurement, some dealing with resolving disputes that have arisen as a result of a public procurement, and some dealing with government departments and assisting them in the production of RFP:s. The interviewees had all something to say about environmental consideration in green procurement. Apparently, environmental consideration is used to a certain extent in RFP:s, although the tension between private and public sectors with regard to policy goals was expressed. The government sees public procurement and the integration of environmental considerations as a policy tool, which troubles the already strained private sector in that it is “an intrusion into company managers’ attempts to get the job done”. In other words, the private sector, seeing public procurement as the means to an end, want to get things done quickly and efficiently, but feel slowed down by policy goals cast upon them by the public sector. Support for green procurement and the environment was expressed as one important government objective. On the other hand, the implementation of that objective has been difficult. An interviewee illustrated this difficulty with the attempts in the 1990’s to implement green procurement. They failed due to the lack of governmental agreement on the issue. Another example was the initiation of a Clean Air Bill,⁵¹ calling for procurement of alternative fueled cars, which failed due to a firm rejection by company managers. The latter opposed due to the great operational problems such a project would involve and result in, not the least in light of the infrastructure needed across the vastness of Canada to support such a fleet.⁵² Actual examples of the use of environmental consideration in public procurement were nonexistent. Instead it seemed that it was the lack of clear criteria that caused the most disputes in the CITT and according to the lawyers, although the possibility of conflicts arising due to environmental requirements being disproportional to the goals of the procurement, was highlighted as a potential development in the courts. It was further emphasized that the Canadian Government is currently subject to intense saving, meaning that the priority lies more than ever on financial aspect and that environmental considerations thus have a harder time to be integrated.⁵³ It was further expressed that the main focus of the Trade Agreements is to ensure that there are no barriers to procurement. There is an exception allowing discrimination if the goal is environmental improvement, which, however, “is not used very often”.⁵⁴

⁴⁹ Mr Rajeev Sharma, procurement lawyer, Heenan Blaikie, and Mr Paul M. Lalonde, procurement lawyer, Heenan Blaikie.

⁵⁰ See Appendix 1 for interview questions.

⁵¹ Bill S7.

⁵² Mr David Swift.

⁵³ Mr Sharma and Mr Lalonde.

⁵⁴ Dr Close and Mr Heggart.

Interestingly, with regard to environmental consideration in the procurement practice in Canada, there is great potential for change through the 2010 Winter Olympics in Vancouver, British Columbia. It has been stated, by the games organizers, that the three pillars for the games are sport, culture and the environment, which is being effectuated in terms of, *inter alia*, a Sustainable Management Policy through which sustainable development goals are integrated into the procurement process.⁵⁵

C. Discussion and Analysis

In light of the above description of the policy and practice situation in Canada, a discussion of those findings will follow, along with an analysis of potential reasons for such findings.

1. Environmental consideration in Canadian procurement policy

Taking the above presentation about Canadian procurement policy into consideration, the following paragraphs will discuss the existence of environmental consideration in Canadian procurement policy.

Firstly, the primary statement with regard to the objective or purpose of public procurement in Canada emphasizes that government contracting or public procurement should “result in best value to the Canadian Government”. What stipulates “best value” is not detailed, however, leaving the statement inherently vague. Is it best value in the long or short term? Is it merely direct monetary “value” or is it also indirect or other values, such as savings through improved environment and human health, which could potentially be the result of the integration of environmental consideration in the procurement process? These are issues that should be raised and specified. There is thus, not entirely surprisingly, no reference to environmental considerations in terms of the objective of public procurement in Canada at a general level. As for the guiding principles in the Trade Agreement, regulating public procurement in Canada, they are primarily concerned with ensuring free trade, competition and open markets in the exercise of public procurement. There is accordingly no mention of the possibility to integrate environmental considerations in the procurement process in NAFTA. In the AIT there is no mention of environmental considerations explicitly. However, there is room for the integration of environmental consideration in the procurement process according to the agreement’s Article 506(6), which states, as mentioned earlier, that “a Party may take into account ... and any other criteria directly related to the procurement that are consistent with Article 504” (principle of non-discrimination). There are, though, two express references to environmental factors in the AIT, mentioned earlier. One is in relation to the procurement procedure being chosen, where it is stated that other procurement procedures than the open tendering provisions in Chapter five may be used where the latter would interfere with a Party’s ability to protect human, animal or plant life or health. This is only possible where the procedure does not purposely limit competition or discriminate against suppliers of another Party. There are thus several limitations to the use of this opportunity, and it requires some creativity on the part of the procuring agency and officer to take advantage of it.

The other explicit mention of environmental factors is in the provisions applicable to municipalities, municipal organizations, school boards and publicly-funded academic, health and social service entities, also mentioned earlier. Here a measure that is inconsistent with the principle of non-discrimination is still permissible if it can be demonstrated that the purpose of the measure is to achieve the objective of, e.g., protecting the environment. This is a potentially

⁵⁵ *Greening the Games – Green procurement key for 2010 Olympics*, Jeff Jedras, SUMMIT Magazine, June 2004, pp. 6-8.

useful paragraph, although clearly limited by the fact that it might prove difficult to demonstrate that the purpose is to achieve protection of the environment, as well as the fact that is only applicable to certain agencies and institutions and for procurements above a certain threshold.

Apart from the Trade Agreements, there are important departments within Government Canada in terms of environmental consideration and public procurement, including the aforementioned PWGSC as well as Environment Canada. Their initiatives within this area can have a significant impact upon the procurement practices within Government Canada, especially PWGSC. In the PWGSC Supply Manual, there is no mention of sustainable procurement or environmental considerations, which is a short-coming. Not the least in light of the fact that it is very much emphasized as an objective in other documents, including the Sustainable Development Performance Report from 2004 and the explicit objective to ensure that environmental impacts are taken into consideration in all PWGSC contracting. The deadline for that objective was March 31st 2004, and it was not achieved. Some tools have been developed to facilitate the attainment of this goal, which is positive in terms of actual, practical progress. There is a service website and course that are available to those interested and willing to integrate environmental considerations into the procurement practice, although the existence of these seemed unknown to those interviewed. There is also the Green Contracting Strategy which further identifies tools the PWGSC will provide to its clients to ensure that they have the capability to take environmental impacts into account in the procurement process. This is a positive development and could potentially contribute to the integration of environmental consideration in procurement practice throughout the Canadian Government. Furthermore, Environment Canada is another important department within Government Canada in terms of integrating environmental consideration in all decision making, not the least within public procurement. The department identifies its "Stewardship role" in terms of environmental issues, and thus states that its purpose is to ensure that procurement activities within the department are performed in a manner that is in accordance with that role. This is as should be expected from an environmental agency, although a bit vague as to actual goals. In the Environment Canada Procurement Policy, such goals are specified to a greater extent and encourages the consideration of a "cradle-to-grave" impact of goods and services, the use of EcoLogo products, i.e. environmentally friendly products, "wherever feasible", as well as the development of environmental or "green" selection criteria in the procurement process. This represents specific policy goals that can be achieved within the department, however they only apply within Environment Canada and to employees within that agency. Furthermore, Environment Canada promises in its new Sustainable Development Strategy for 2004-2006 to integrate environmental considerations into decision making at both national and local levels and explicitly mention public procurement as an applicable area.

Hopefully, the procuring officers within Environment Canada can be a groundbreaking group in terms of integrating environmental considerations within the Canadian Government as a whole. By developing methods for measuring or assessing the cradle-to-grave impact of goods and services, identifying products that are environmentally friendly and perhaps cost-saving in the long term, as well as developing "green" selection criteria, employees within Environment Canada can contribute to the integration of environmental consideration in practice and assist other departments in doing so too. Together with the work done in the PWGSC, Environment Canada could contribute significantly by spreading the information and knowledge necessary to take action within this area.

As for Government Canada as a whole, there were initiatives in the early 1990's starting the process of integrating a sustainable development-thinking into decision-making at all levels of government and in all sectors, e.g. through the use of public procurement as an implementation tool. These efforts have not been sustained, however; a new Green Guide to Government should have been issued to encourage further action and commemorate those taking action toward the goals of sustainable development. The lacking ability of the Canadian

Government to do just this or *send a stronger signal* was also the comment of the Commissioner of Sustainable Development and Environment in the Report from 2004.⁵⁶

2. Environmental consideration in Canadian procurement practice

The information obtained through the interviews was not detailed or substantial enough to make assumptions beyond doubt as to the procurement practice in Canada. Nonetheless, some things can and will be said with regard to the integration of environmental consideration in the procurement process in Canada.

Firstly, the general impression from the interviews is that environmental considerations are not the norm in the public procurement practice in Canada. Nonetheless, it was stated that environmental criteria are used to a certain extent in RFP:s, although to what extent or to what effect was not possible to find out. What was emphasized by the interviewees, however, was the apparent tension between the public and private sector in terms of policy goals and business incentives and objectives. The private sector, or the suppliers, see public procurement as the means to an end and want to get things done quickly and efficiently. This stands in stark contrast to the often long-term properties of public policy goals, such as the integration of environmental consideration into public procurement processes. However, it was recognized that the protection of the environment was a policy concern and an important objective to the Canadian Government. On the other hand, the difficulty of implementing that policy goal was acknowledged in terms of the rejection of green procurement regulative initiatives, partly due to a lack of government agreement, and partly due to firm rejections by the private market players in light of the operational difficulties that would result if the policy was put in practice. Another important issue with regards to these difficulties is the account that the Canadian Government is subject to intense saving, thus leaving policy implementers with tighter budgets and tougher decisions as to what area to prioritize.

There seem thus to be some elements of environmental consideration in the public procurement practice in Canada, although not to a very great extent and not such that it is having any significant effect. It is furthermore apparent that there is a rather hostile environment confronting policy initiatives attempting to integrate environmental considerations into public procurement practice in Canada. Not only does there seem to be a lack of agreement, as well as resources, within the Canadian Government, but there is also a lack of support among the suppliers and private market players in Canada for such initiatives. Furthermore, it has been said that 10 years after initiating green procurement on paper, the federal government cannot demonstrate the effectiveness and progress of such a statement.⁵⁷ Perhaps the 2010 Winter Olympics and the initiatives taken there will reduce the gap between policy and practice and contribute to actual change in this area.

3. Policy vs. Praxis – An implementation gap?

In theory, the Canadian Government does not seem to be in agreement throughout its departments as to the consideration of sustainable development or the integration of environmental considerations in terms of public procurement. There have been attempts at

⁵⁶ Report of the Commissioner of the Environment and Sustainable Development to the House of Commons – Commissioner's Perspective, 2004, at p. 9, available at http://www.oag-bvg.gc.ca/domino/reports.nsf/html/c2004menu_e.html.

⁵⁷ Catherine Morrison, *Leaders of the Pack*, Summit Magazine, Focus on Green Purchasing, Green Issue Article, vol. 5, 2001: www.summitconnects.com/Articles_Columns/Summit_Articles/2001/special_focus/Green_Issues/1001/1001_calling_all_cars.htm, 10/12/2004.

departmental level to initiate and integrate environmental consideration in the procurement process through policy documents of various kinds, but only to a limited extent. At governmental level more generally, however, which also goes for the large majority of the governmental departments, there have been no such initiative or statement with regard to public procurement since the 1990's. In other words the Government is not leading by example. In light of the attempts having been done by a small number of departmental agencies within the Canadian Government, there can be said to be an implementation gap. Their activities and policies do not seem to have resulted in a "green" procurement practice, not within government Canada as a whole and not within their own departmental procurement activities. Why is this? The next section will analyze the plausible reasons for this corollary.

4. Plausible reasons for an implementation gap

First and foremost, it should be remembered that finding reasons for why the implementation of policy fails is not an easy task. It has been stated that scholars have identified over 300 variables that might affect implementation,⁵⁸ meaning that pin-pointing which factors are of greatest relevance in each circumstance is not an effortless job. Nonetheless, this section will attempt to illuminate some factors that could play an important role in terms of environmental consideration and public procurement in Canada.

The first issue at hand in terms of finding reasons for the lack of implementation of environmental consideration in public procurement in Canada is the inability of the Government to issue federally applicable goals and policies, as well as sending *strong signals* with regard to this area. There were attempts in the early 1990's and only a few departments are still attempting to pursue the goals set back then and are setting their own goals. There have been and are fragmented attempts at integrating environmental consideration into public procurement. Were the whole of the Canadian Government to collaborate in the pursuit of these goals, the likelihood of achieving them would certainly increase. This could thus be considered a plausible reason, although not in isolation, for the lack of policy-implementation. Another important factor in terms of Canadian public procurement, which could also be related to the abovementioned factor, is the strength of the opposition, i.e. the suppliers and the private sectors. They had enough power to stop one environmentally friendly procurement-related piece of legislation and are likely to be capable of preventing the implementation of policy initiatives.

Furthermore, the issue of Government savings was raised by the interviewees as a possible limitation to the integration to environmental consideration in the procurement process. Increasing resources has been identified as a factor contributing to implementation success.⁵⁹ Five factors have previously been identified as influenced decision-making in an environment-related policy situation: 1) short-term rationality out competes long-term rationality; 2) competitive behavior drives out cooperative behavior; 3) fragmentation of interests and values; 4) fragmentation of responsibilities and authorities; and 5) fragmentation of information and knowledge.⁶⁰ These may all be applicable in this circumstance, although those that can be identified based on the obtained information are 1), 2), and 5). The first factor, short-term versus long-term rationality, is of relevance in light of the above discussion with regard to resources and savings. It is often thought that environmental policy-initiatives and solutions are

⁵⁸ O'Toole, L. J. Policy recommendations for multi-actor implementation: An assessment of the field., Journal of Public Policy, 1986, vol.6, no.2:263-88, in Hill, Heather C., Street-Level Bureaucrats' Resources for Reform. Journal of Public Administration Research and Theory, Vol. 13, no. 3, pp. 265-282, at p.267.

⁵⁹ O'Toole, Laurence, J., Jr, The Theory-Practice Issue in Policy Implementation Research. Public Administration, Vol. 82, No. 2, 2004, at p.317.

⁶⁰ Yaffee, Steven, L., Why Environmental Policy Nightmares Recur. Conservation Biology, Vol.11, No.2, April 1997, pp.328-337, at p.329.

naturally more expensive than others. This is sometimes true in the short-term perspective, but not always so in the long-term perspective. Also, the private sector thinks and acts in terms of quick and efficient – forcing them to make short-term decisions – and, as has been said elsewhere,⁶¹ miss to the long-term objective of positioning the organization in a place that is more effective in the long term. The latter is something that could become of importance where government agencies to start requiring innovative, environmentally friendly solutions to their procurement requirements. Secondly, procurement is inherently competitive. It is about ensuring open markets, non-discrimination and competition, not to encourage collaboration to achieve the common goal of sustainability. It is naïve to think that such collaboration is going to happen, but allowing for better dialogue between actors within the public procurement system could contribute to a reduction in one of the potential results of competitive behavior, which, according to Yaffee,⁶² often is misrepresentation and bias of information. Lastly, the fragmentation of information and knowledge is another factor applicable in the case of public procurement. Information and knowledge in terms of environmental factors and effects is important to enable the integration of environmental consideration in the procurement practice. Yaffee argues that agencies, and others, often have a tendency to not want to share information too easily, due to the potential conviction that information is power.⁶³ It seems, however, that attempts are being made by PWGSC to disseminate whatever information they have with regard to green products and potential environmental criteria to be used. In fact, the formulation of the abovementioned policies with regard to green procurement or environmental considerations tended to be vaguely formulated. This is often a problem in itself in terms of implementation and means that, as argued by Hill, implementers of policy often work under incomplete, inaccurate, or idiosyncratic understandings of what policy means for their everyday work or practice.⁶⁴

D. Conclusion

Despite having issued statements and guidelines encouraging sustainable development and the integration of environmental considerations in the public procurement process in Canada in the early 1990's, little such practice is currently being undertaken within the Canadian Government's procuring agencies today. Some departments within the Canadian Government promote a green purchasing strategy and have been doing so for several years. The Canadian Government has not, at large, come to an understanding of which priority environmental considerations should have within public purchasing. All departments are clients requesting products and services and have thus the ability to influence the market. If the Canadian Government does not have its own "house in order", then how can the market be expected to demand and supply environmentally friendly products and services? There seems to be an implementation gap in Canadian public procurement. The policies and guidelines issued by the Federal Government in the 1990's and by some departments today, have not yet been translated into public procurement practice. There seems to be several plausible reasons for this, including a lack of Government-wide agreement as to the integration of environmental considerations in the procurement process and how to achieve sustainable development, as well as a lack of Governmental leadership on this issue. Other reasons could potentially be the tension between the public and private sectors in terms of interests and priorities. However, what is positive with regard to the existing public-private sector tension, as stated by the interviewees, is that the preparation of the Sustainable Development Strategies to be prepared

⁶¹ *Ibid*, at p.330.

⁶² *Ibid*, at p.332.

⁶³ *Ibid*, at p.335.

⁶⁴ Hill, Heather, C., Street-Level Bureaucrats' Resources for Reform, *Journal of Public Administration Theory and Research*, Vol. 13, No. 3, pp. 265-282, at p.267.

by each department must be prepared in collaboration, or at least after a discussion, with the affected sectors and market players. Provided the private sector is aware of coming policy-initiatives, they could become more acceptable to the changes they would bring along. Other reasons are likely to be a shortage of resources in times of Government savings, the preference for short-term solutions and competition over cooperation, as well as the lack of relevant information. Finally, a potential reason for the implementation gap is the often vague formulation of the policies themselves, leaving the implementing agent – in this case a procurement officer – with little guidance as to what the resulting practice should encompass.

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Appendix 1

Interview questions:

- How are the procurement laws in Canada generally formulated?
- Are there/has there been any ongoing discussions on public procurement in Canadian media?
- How are appeals on procurement decisions performed?
- Are evaluation-criteria in terms of “best value” used or is it the lowest price that determines who gets the contract?
- Are there fundamental principles in terms of “businesslike” or “non-discrimination” in Canada?
- Is public procurement used as a policy making/political tool in any areas of policy-making?
- Are environmental considerations part of the procurement process in Canada?
- Are environmental criteria used in the evaluation process of bids?
- In what direction is public procurement heading? What is the prognosis for the future in this area? Are the routines changing?
- How do you formulate the Request for Proposals to make them as clear as possible?