
ENVIRONMENTAL LAW & PROPERTY RIGHTS

BUYING GREEN: THE GOVERNMENT STEPS UP

ENVIRONMENTALLY FRIENDLY PREFERABLE PURCHASING

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With an annual contract budget of over \$400 billion, the U.S. government is the largest purchaser of goods and services in the world. Approximately \$62 billion in that outlay is spent on information technology equipment and related services. Unlike commercial entities, however, the government's purchasing power is frequently leveraged for purposes other than trying to obtain the item sought at the lowest price. Such purposes include promoting small women-owned and minority-owned businesses, those that are owned by or employ the blind and/or handicapped, and other groups that are considered to be disadvantaged. Similarly, it is often used to punish those who commit other offenses, barring them from the political marketplace for certain legal offenses. In a few cases, it is used to punish otherwise lawful behavior.¹

One of the most recent trends has been to leverage the procurement process to develop the marketplace for environmentally sound products through a process known as "environmentally preferable purchasing" ("EPP"). Broadly defined, environmentally preferable products are those that "have a lesser or reduced adverse impact on human health and the environment than competing products that serve the same purpose."² While the practice is not exactly new at the federal or state level, it has been given additional significant attention in recent years, and the pace is only accelerating as other government programs that provide certification and designation of products as "green" grow and expand as well.

Such programs have existed at the federal level since the Resource Conservation and Recovery Act of 1976 (RCRA), which required federal agencies to develop purchasing programs for products made with recycled waste materials and placed certain mandates on federal grantees to do likewise. The history of EPP, however, demonstrates the gap between policymakers' high level intentions and the actual actions "on the ground" of those doing the purchasing. This article will discuss this history and recent developments aimed at closing the gap to move EPP beyond the aspirational level to finally make it a reality in federal purchasing thirty years after it was instantiated.

I. ENERGY POLICY ACT OF 1992

Despite the law's general mandates and exhortations, little was accomplished on EPP from 1976 through 2002, most likely because the laws were focused on agency actions and did not provide the sort of concrete, comprehensible direction for individuals necessary for statutes to have any impact. After all, agencies do not purchase goods and services; individual government agents do. Some of these agents are warranted federal procurement officers with extensive training. But much

federal purchasing is done with purchase cards by regular federal employees who lack much formal training beyond being told not to use their purchase cards to buy iPods and the like.

The Energy Policy Act of 2002 tried to reinvigorate EPP. It required agencies to purchase energy efficient products and created guidelines to encourage their purchase. In addition it amended RCRA to require the purchase of recycled toner cartridges.

A. Clinton Era Executive Orders

Executive Order 12873 created the Office Federal Environmental Executive and mandated that the government purchase paper with 20% recycled content. It was followed up in 1998 by E.O. 13101, which, among other things, provided greater direction to agency EPP efforts by directing them to reference guidance from the Environmental Protection Agency (EPA). This recognized that many agencies lacked the ability and focus to create their own program, and would need guidance from an expert source.

B. Environmental Designations

Defining what is a "green" item can be very tricky, and is certainly outside the ken of the ordinary procurement official. The federal government has been working on designations that are being used both commercially and by the government to serve as shortcuts to make procuring green technology easier. The first is the EPA's Energy Star program. Energy Star, which is a standard developed in close collaboration with industry to ensure that the designation is neither impossible nor easy to attain, has the advantage of covering numerous product categories. However, it relies heavily on a single environmental metric—energy use—thereby limiting its overall usefulness in incentivizing the development of a comprehensive marketplace for environmentally preferable products.

Another program that is funded through the EPA (and other sources) is the Electronic Product Environmental Assessment Tool ("EPEAT"). EPEAT is more comprehensive than Energy Star. It considers twenty-three mandatory criteria and is flexible in that it allows for different levels of designation (bronze, silver, and gold). However, it currently exists only for desktops, laptops, and monitors. Standards for other categories of equipment are currently underway, however, which will greatly increase EPEAT's usefulness as a tool for EPP in the future.

C. Problems Identified with EPP Execution

Despite these executive orders, a 2001 General Accounting Office (GAO)³ report found that EPP suffered from two major defects.⁴ First, there was little data to verify compliance. Next, there was a low level of awareness among federal employees with contracting responsibilities. Agency procurement systems lacked the necessary mechanisms to determine whether products purchased possessed environmentally preferable traits.

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Reinforcing this lack of data collection is a lack of education among agency officials regarding the legal directives on EPP. “Until the 1990s,” GAO reported, “little action was taken to promote such purchases in a government wide or agency wide basis.” More discouraging, even after such efforts in that decade to promote EPP, “many procuring officials and other federal purchasers either do not know or implement RCRA requirements for establishing affirmative purchasing programs.”

GAO recommended that that Federal Environmental Executive and the Administrator of EPA work with officials at major procuring agencies to develop a process for providing officials with the relevant knowledge about EPP programs and methods for implementing them. Further, the agency said, the Office of Federal Procurement Policy (OFPP) should do more to provide agencies with procurement with specific guidance on fulfilling RCRA’s mandates in this regard. Next, GAO recommended that the federal procurement data system be altered to ensure that contractors were complying with RCRA mandates to purchase recycled content products. Finally, GAO recommended that the Office of Federal Financial Management should amend the “Common Rule” to incorporate RCRA’s requirements.

II. EARLY BUSH ADMINISTRATION EXECUTIVE ORDERS

In August of 2001, President Bush signed executive order 13221—Energy Efficient Standby Power Devices. EO 13221 mandated that only those commercially available, off the shelf, electronic devices that used less than one watt when in “standby” mode be purchased by the US government. If not available, those items with the lowest standby power use should be purchased. This requirement, however, only applied where such products were “life cycle cost effective and practicable” and where the product’s “utility and performance was not compromised.” GSA, DOD and Energy were to compile a list of items subject to the requirements.

Although 13321 remains “on the books,” its utility is fairly minimal. The exceptions pretty clearly undercut the original rule, which was, itself, not very well thought-out. Mandating the use of low power items except in those cases where it did not make sense for one reason or another merely created a situation where acquisition officials were burdened with criteria they were not equipped to apply. 13221 has since been surpassed by more far reaching legal requirements.

A. Energy Policy Act of 2005

Section 104 of the Energy Policy Act of 2005 requires agencies to purchase Energy Star or a Federal Energy Management Program (FEMP) designated products except in those cases where a written determination is made that it is (a) not life cycle cost effective or (b) reasonably available to meet the agency’s needs. Although at first blush this might seem to codify existing executive orders, in fact it significantly advances EPP by placing the onus on procurement officials to take action if they are *not* going to purchase an environmentally preferable product. It also provides clear directions to government purchasers by directing them to existing designated products rather than giving them performance metrics, which could be subject to lengthy analysis or, even less helpful, just general direction to purchase “green” products.

Understanding why this is important requires that we contemplate the current state of the federal acquisition workforce. That workforce is universally accepted to be overworked and lacking in sufficient resources. Told that the only way out of an environmentally preferable purchase is to execute a finding, and that to do so would not be cost-effective, or would result in the failure to meet the agency’s needs, most overworked procurement officials will simply purchase the environmentally approved item and move on to the next task. The FEMP or Energy Star product is the default purchase barring further analysis, which is not required. It is also important that the Act does not use vague terms, but is specific in what is required. If an Energy Star or EPEAT designated version of what you are looking for is available, you must buy it. Procurement officials are not left to wonder what they need to do to make an “environmentally preferable” purchase.

B. Executive Order 13423 and Subsequent Administrative Action

In early 2007, President Bush signed E.O. 13423, which, among other things, mandates that agencies meet 95 percent of their electronic procurement requirements in those categories with an existing EPEAT standard with EPEAT products among other requirements. This was followed up by forty pages of implementation instructions. Because the procurement mandate is agency-wide, however, rather than focused on individual officials, there will need to be further agency action to ensure that it is implemented through individual performance.

In December, OFPP announced that it was preparing to implement EO 13423 via a policy paper, and issued a draft for comment. The draft provides both substantive guidance and procedures for agencies to implement, and contains a handy reference guide to the myriad provisions existing in law and regulation calling for agency action on EPP. Among these is a mandate that agencies “ensure representation of environmental and energy experts, managers, or technical personnel on integrated procurement teams for all major acquisitions,” and consider sustainable design practices, life cycle costs, product take back opportunities, and maximization of energy and resource recovery. Agencies are also required to develop formal affirmative procure programs (“APPs”). APPs will need to, among other things, provide for adequate data reporting on green purchasing, remedying one of the shortfalls identified with EPP in GAO’s 2001 report.

CONCLUSION

More mandates, rules, and exhortations will only go so far in getting federal procurement officials and others who actually put their purchase cards on the counter at office supply stores to look for Energy Star, EPEAT designations, and other required indicia of environmentally preferable products. The overburdened federal workforce will need help if it is to ever implement EPP in a meaningful manner. First, it needs to learn of the mandate and requirements. Next, it must be presented with a clear set of operational instructions that allow procurement officials to do their job without significant additional burdens. Finally, there must be mechanisms for meaningful oversight to ensure that these requirements are not being ignored.

One possible tool for oversight may be the development by OFPP and OFEE of an annual scorecard to grade agencies on environmental stewardship. One measure will be an agency's progress on EPP. Similar scorecards for other aspects of the President's Management Agenda have proven useful for communicating to agency heads what administration priorities they will be held accountable for. Scoring performance and making personnel decisions based on it would go a long way to making sure that EPP emerges as something other than just one more box to be checked.

With the expansion of EPEAT, the means to meaningfully implement EPP in a relatively painless manner will soon be at hand. At the end of the day, however, sustained efforts will be needed to communicate to the people "on the ground" the importance of ensuring that the federal government purchases green electronics. This can be done by dedicating the resources to both training procurement officials, and by holding them accountable if they fail to implement the rules. It will be up to the next administration to continue the momentum if EPP in the federal government is to move ahead. EPP's troubled history demonstrates that without sustained support from the top, the progress made since 1976 may slip away as it has in the past.

Endnotes

- 1 A recent example of this is the prohibition against awarding Department of Homeland Security contracts to those companies that executed a "corporate inversion," which results in a corporate restructuring that moves the headquarters off shore, and reduces the company's US taxes.
- 2 Federal Acquisition Rule 2.101
- 3 GAO has since been renamed the "Government Accountability Office."
- 4 Report of the US General Accounting Office, *Federal Procurement: Better Guidance and Monitoring Needed to Assess Purchases of Environmentally Friendly Products*, GAO-01-430 (June 2001)

