How to challenge an award of a contract in Sweden

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1. Public Procurement Legislation in Sweden

The new Swedish Public Procurement Acts came into force on 1 January 2008, implementing Directives 2004/18/EC and 2004/17/EC and the remedies directives. Both acts regulate procedures for contracts above and below the thresholds mentioned in the acts, procedures for Part B service contracts and remedies. Part B services under the Swedish legislation correspond to the Part B services under the EC Directives. The acts are applied in conformity with EC legislation and the rulings by the ECJ and CFI. In Sweden, remedies are frequently sought and fairly often obtained.

The laws exclude from their application the same contracts as are excluded under the EC public procurement directives. All contracts, above and below the thresholds, for works, supplies and services are covered. Contracts below the thresholds and contracts for Part B services, irrespective of value, are covered by a set of rules similar to the rules for contracts above the thresholds. Most of these contracts must be advertised, and all basic principles apply, including the rules for remedies.

Some national provisions are based on older public procurement regulations in Sweden.

1.1 Remedies and enforcement

Administrative remedies may be sought only before a binding contract is in place, except for a period within the first ten days from the day of the award decision. All administrative remedies are sought in the administrative courts. The administrative court thus must, within the ten-day period, decide on interim measures, stating that the contracting authority may not finalise the award procedure until the court has stated otherwise. During the ten-day period all remedies are available even if a contract is signed and damages may be claimed during one year from the day administrative remedies may no longer be sought.

1.2 Optional provisions in the Directives

Dynamic purchasing systems, described in Article 33 of Directive 2008/18/EC have not been implemented; however provisions for these systems were investigated in 2006 and is currently under consideration by the government.

Implementation of competitive dialogue and electronic auctions were also investigated in 2006 but do not form parts of the current legislative proposal. At the moment, there is

no reason to believe that these instruments will be included in the current proposal to amend the public procurement acts.

New legislation to implement Directive 2007/66/EC on remedies and some of the voluntary parts of the EC public procurement directives is expected to enter into force on June 1, 2010. The proposition includes fundamental changes in the rules on remedies, (specifically, that contracts inconsistent with the procurement acts may be annulled in court). The Competition Authority will be granted a right to claim imposition of fines in court. The fine is to be set between SEK 10,000 – SEK 5 million and may not exceed 10% of the contract value. Contracting entities will be prohibited from entering into contracts within either 10 or 15 days from the day of the contract award decision. Also new time limits are introduced, inter alia, in relation to application for remedies, which correspond to the above-mentioned time limits. Furthermore, thresholds are proposed for direct procurement and will correspond to 15% of the threshold values laid down in the EC directives.

1.3 The Teckal In-house Exemption

In 2008 the Supreme Administrative Court of Sweden established in its *SYSAV* judgement that the *Teckal* in-house exemption is not applicable under Swedish law. The in-house exemption allows a contracting authority to directly enter into a contract with a service provider if

(i) the contracting authority controls the service provider in question as if it was that contracting authority's own department; and,

(ii) the service provider in question carries out the essential part of its activities with the contracting authority which controls that entity.

Where these criteria are met, the arrangement will not be treated as a contract subject to the public procurement regulation; rather, it will be deemed to be an in-house administrative arrangement. The in-house exemption has been discussed on several occasions, and an amendment to implement it in the Public Procurement Act is expected to enter into force on June 1, 2010.

1.4 Central Purchasing Bodies

Central purchasing bodies have not been included in the legislation to date. However, the new legislation proposal introduces central purchasing bodies where the central purchasing body is a contracting authority that concludes framework agreements for works, supplies or services intended for contracting entities, or where the central purchasing body participates in a public procurement on behalf of contracting entities.

1.5 Framework Agreements

Provisions on framework agreements were implemented in the Public Procurement Act that entered into force in 2008, in accordance with Article 32 of Directive 2004/18/EC. The provisions on framework agreements correspond fully with the EC directives.

2. The Cases

The following section is based on the four practical scenarios provided in the conference material. In each case, the aim is to deal with the following issues: (i) If the contracting authority acted in accordance with the EC directive. (ii) If it did not, which articles in Directive 18/2004/EC were not complied with. (iii) What measures would be appropriate if the rules in the directive were not complied with. (iv) If the supplier would be awarded any kind of compensation, and in that case assess the legal frame of the compensation and the amount awarded.

2.1 Case 1 – The Floors

Firstly, the contracting authority has not complied with the requirements concerning the design of the contract documents. In the contract documents price indications are requested for a well-known floor product named ”A” and another product named ”B or a similar product”. In the ECJ case *Bent Mousten Vestergaard,* Article 28 of the EC Treaty is interpreted as to preclude a contracting authority from including in the contract documents a clause requiring the use of a product of a specified make, without adding the words “or equivalent”.

The circumstance that one blank space was provided in the bid schedule does not have any legal status – tenderer 1 was thereby not requested to only indicated one price. Tenderer 2 indicated the price for product B in handwriting outside the designated space. In recent Swedish case law, it is stated that a contracting authority cannot disregard an indicated price simply because the tenderer has not provided the price in the designated space.

As stated above under 1.1, tenderer 1 may seek administrative remedies only before a binding contract is in place, except for a period within the first ten days from the day of the award decision. Given that the court finds the decision by the contracting authority unjust, it may set aside a decision or order the contracting authority to correct the award decision. In such cases where needed, interim measures may also be ordered by the court.

In this case, since tenderer 1 did not comply with the absolute requirements laid down in the contract documents, irrespective of the contract documents being in breach of EC public procurement, it has not suffered any damage and can neither seek administrative remedies nor claim damages. However, should tenderer 1 have complied with the absolute requirements it is under Swedish law not possible to claim damages for harm that could have been restricted. Commencing a work without a contract award is clearly in breach with the principle of restricting the harm.

2.2 Case 2 – The Waterfront

The contracting authority in question allows tenderers to submit variants. However, this formulation does not comply with the requirements on variants laid down in Article 24. Although there is no explicit prohibition in the directives for contracting authorities to allow reservations in the tenders, the contracting authority must comply with the principles of equality and transparency throughout the procurement process. Firstly, it is not possible to make a reservation concerning an absolute requirement. Secondly, reservations may often render an evaluation impossible to comply with the principles of equality and transparency.

If the contracting authority is in breach of the rules governing the evaluation, as it would be if the reservation were found unlawful, the court would normally order the contracting authority to correct the decision. In case the evaluation is corrected there is no reason on this ground for the tenderer to claim damages since no harm has been suffered.

2.3 Case 3 – The Carpets

The claimant sets forth two arguments to challenge the contract award. When a contract award is based on the criteria “most economically advantageous tender”, the contracting authority shall take into account the various objective criteria linked to the subject matter of the contract in question. In order for the contracting authority to comply with the principles of transparency, non-discrimination and equal treatment it shall specify how each such criteria is weighted in the evaluation. By stating that the award will be based on an overall estimate of the tender, the contracting authority has a wide scope for its evaluation. Such discretionary evaluation hinders the tenderers to envisage the importance of the criteria. Hence the contracting authority seems to be in breach of Article 53.

The claimant has furthermore argued that the winning tender deviated from the requirements on material in the contract documents. The contracting authority cannot add or deviate from an absolute requirement without being in breach of the principles of equality and transparency. If what the claimant considers “considerable degree” were an alteration in quality in relation to an absolute requirement, the contracting authority should not be allowed to accept such an offer.

If the winning tenderer does not fulfil absolute requirements laid down in the contract documents, the court may order the contracting authority to correct the award decision if the claimant is able to demonstrate that it has suffered damage. However, if the claimant itself did not comply with absolute requirements, no harm has been suffered and hence the court should not rule in favour of the applicant.

On condition that the court orders the contracting authority to correct the award decision, the claimant will not be able to claim damages since no economical harm has been suffered.

2.4 Case 4 – The Cleaning

In the case at hand, the winning tenderer as well as the other tenderers challenge the annulment decision. In the remedies directive, tenderers are not granted an explicit right to appeal a contracting authority's decision to annul a procurement procedure. However, the Member States have an obligation to ensure that necessary measures exist to review decisions taken by the contracting authorities, according to Article 1 of the remedies directive. In the case *Stadt Halle,* the ECJ concludes that this obligation extends also to decisions taken outside a formal award procedure and decisions prior to a formal call for tenders. Contracting authorities' decisions to annul procurement processes may therefore be challenged.

Furthermore, in *Stadt Halle* the ECJ found that any person having or having had an interest in obtaining the contract in question who has been or risks being harmed by an alleged infringement, from the time when the contracting authority has expressed its will in a manner capable of producing legal effects shall have the possibility of review. In this case, both the winning tenderer and the other tenderers comply with these requirements and may therefore challenge the annulment decision.

The outcome of the court proceedings is dependent on if the court finds that the contracting authority has had substantive reasons to annul the procurement procedure. In case the court finds that no such substantive reasons were referred to, the court will annul the appealed decision.

In the court proceedings subsequent to the annulment decision, the contracting authority brings forth new arguments for annulment that did not form part of the decision. Although, regardless if any new argument may be deemed substantive, as long as these were not mentioned in the annulment decision they should not be considered by the court. Even if the contracting authority would put forth new grounds for its decision, the probable outcome of the court proceeding would be an annulment of the appealed decision. It should also be mentioned that the contracting authority after such a judgement can render a new annulment decision based on different grounds.

If the winning tenderer claims damages, the calculation of damages is based on the positive contractual value, i.e. the compensation for the profit expected to be gained by the claimant if the claimant would have been awarded the contract. The claimant has the burden of proof for the damage incurred and compensation for expected profit is only granted when the claimant can present objective reasons for it being the one most likely to have been awarded the contract. The other tenderers may be compensated for their losses originating in the preparations of the tenders.