Public Procurement World - Sweden

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# 1. The Laws

## a. What is the applicable legislation?

There are four Swedish procurement acts (together the "Acts"). These are the Public Procurement Act (*Sw. lag 2016:1145 om offentlig upphandling*), the Utilities Procurement Act (*Sw. lag (2016:1146) om upphandling inom försörjningssektorerna*), the Concessions Procurement Act (*Sw. lag (2016:1147) om koncessioner*) and the Defense Procurement Act (*Sw. lag (2011:1029) om upphandling på försvars- och säkerhetsområdet*). The Public Procurement Act, the Utilities Procurement Act and the Concessions Procurement Act were enacted on 1 January 2017. Please note, however, that in a transition period the older acts that where replaced will apply, e.g. for procurement procedures started before 1 January 2017. The Defense Procurement Act was enacted on 1 November 2011.

## b. Does the legislation relate to or interact with any applicable trade agreement, such as the European Union procurement rules, WTO Government Procurement Agreement (GPA) or the procurement requirements of the North American Free Trade Agreement (“NAFTA”)?

The Acts, constituting a complete set of legislation, implement the six existing EU directives on public procurement; namely:

Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts;

Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors;

Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC;

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2014/18 EC;

Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts text with EEA relevance;

Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts; and

Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities/entities in the fields of defense and security, and amending Directives 2004/17/EC and 2004/18/EC.

These in turn are influenced by the WTO Government Procurement Agreement ("GPA") as the European Union and each of its 28 Member States are signatories to the GPA. The scope of the GPA covers any law, regulation, procedure or practice regarding any procurement by any contractual means as soon as the procuring entity and the type of contract are listed in Appendix I to the GPA and the threshold values stated there are exceeded.

## c. What are the basic underlying principles of the legal framework?

The Acts are based on the five fundamental principles of EU law with regard to public procurement, i.e. the principles of non-discrimination, equal treatment, transparency (openness and predictability), proportionality and mutual recognition.

## d. Is aerospace and defense procurement treated differently from other types of procurement?

Defense procurement is treated differently as of 1 November 2011 when the Defense Procurement Act was enacted. The Defense Procurement Act grants the contracting authority/entity a larger scope of discretion by, e.g., allowing negotiated procedures at all times.

Aerospace procurement is not treated differently in so far as it is not considered being within the fields of defense or security.

# 2. Application of the Statutory Procurement Laws

## a. Which public agencies are covered by the laws?

The Acts apply to governmental authorities and local government authorities within all areas, among others state, local or other authorities and decision- making bodies of local authorities and county councils. Furthermore, the Acts apply to some publicly owned companies meeting specific criteria.

There is a list of central government authorities in annex 1 to Directive 2014/24/EU. Please note, however, that the list is not regularly updated, and also does not list all contracting authorities nor any contracting entities required to follow the public procurement regulatory framework.

There is, however, no general list of contracting authorities/entities.

## b. Which private entities are covered by the laws?

The Acts apply to private companies, associations, societies and foundations which have been established to perform tasks in the public interest and which do not have industrial or commercial characteristics and:

whose capital has (mainly) been supplied by the state, a local authority, a county council or a contracting authority;

whose public activities are subject to the supervision of the state or a local authority, or a contracting authority; or

which have a board of which more than half of the members have been appointed by the state, a local authority, a county council or a contracting authority.

Further, when a contract concerns water, energy, transport or postal services the Utilities Procurement Act applies to private entities:

over which a contracting authority may exercise a direct or indirect dominant influence; or

which operate on the basis of certain special rights.

Finally, when a contract concerns the fields of defense and security, the defense Procurement Act applies in addition to the private entities set out above and also to private entities over which a contracting authority may exercise a direct or indirect dominant influence.

## c. Are co-operations between contracting authorities exempted from public procurement law? If so, what are the conditions for the exemption?

Following, the so-called the Teckal exception cooperation between contracting authorities are exempted from public procurement law if certain legally defined conditions are met, namely that:

the contract is awarded to an entity that is predominantly controlled by the contracting authority awarding the contract (or controls the contracting authority); and

the contractor carries out the essential part of its activities for the controlling contracting authority and no private equity investment in the contractor's entity exists.

It also follows from the so-called Hamburg exception that the procurement laws does not apply to public-public cooperation on provision of public services governed solely by considerations relating to the public interest. The following conditions has to be cumulatively fulfilled for the exception to apply:

the agreement refers to a common general interest,

no private parties are participants,

no private party benefits, either directly or indirectly by the agreement, and

the contracting authorities participating in the co-operation exercise their respective operations on the open market to an extent of less than 20 percent of the businesses affected by the co-operation.

## d. Which types of contracts are covered?

The Acts cover the award of supply, services and works contracts. The Utilities Procurement Act only applies to contracts within the fields of water supply, energy, transport and postal services, while the Defense Procurement Act only applies to contracts within the fields of defense and security. The Concessions Procurement Act only applies to concessions contracts. The threshold values, which are revised every other year in accordance with the directives and the Revised Agreement on Government Procurement ("GPA"), vary depending on the nature of the contract and the nature of the contracting authority/entity.

## e. How are changes to an existing contract dealt with? Do changes require a new procurement procedure?

The new Public Procurement Act, Utilities Procurement Act and Concessions Procurement Act contains more detailed provisions on changes to existing contracts than before. According to these the following changes can be made without a need for a new procurement procedure:

where the overall characteristics of the contract remains the same and the increase or decrease does not equal to the threshold values contained in the European Directives; and does not exceed 10 percent of the original supplies and services, or – in case of works – does not exceed 15 percent margin. If multiple changes are made, the total net value of the changes will be compared to the original contract value;

where the modifications have been provided for in the initial procurement documents in a clear, precise and unequivocal review clause;

for additional works, services or supplies by the original contractor up, not exceeding 50 percent of the original contract value, that have become necessary and that were not included in the initial procurement where a change of contractor

cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement; or

would cause significant inconvenience or substantial duplication of costs for the contracting authority;

the change becomes necessary due to unforeseeable events, the overall characteristics of the contract are not modified and the costs of the original procurement are not increased by more than 50 percent;

The change of contract is not material. A change is material if, inter alia:

new conditions are introduced under which different bidders could have been admitted to the procurement procedure, or, a different bid could have been accepted, or if the new conditions could have attracted more bidder; or

the change modifies the contractual economic balance in favour of the bidder; or

the contract is substantially extended; or

the contractor is replaced, unless it is as a consequence of:

universal or partial succession into the position of the initial contractor, following corporate restructuring(including takeover, merger, acquisition or insolvency) of another economic operator that fulfils the criteria for qualitative selection initially established and it is provided that the transfer does not entail other substantial modifications to the contract; or

a subcontractor replacing the initial contractor if agreed between the contracting authority, the initial contractor and the subcontractor.

For the contracts awarded under the Defense Procurement Act, the rule is that a new procurement procedure is required if material changes are made. A change of contractor will, save for some specific situation, be considered as a material change.

## f. What is the applicable regime for framework agreements?

Framework agreements are contracts designed to set out the general conditions for future procurements during a given period of time and especially the cost of those procurements. Framework agreements are subject to public procurement regulatory framework. The contracting authority has to conduct a competitive award procedure to award a framework agreement. The contracting authorities that are parties to a specific framework agreement from the outset should be clearly indicated, either by name or by other means, such as a reference to a given category of contracting authorities within a clearly delimited geographical area, so that the contracting authorities concerned can be easily and unequivocally identified.

The rules on framework agreements in the Public Procurement Act are different from the Utilities Procurement Act, as the latter Act is less rigorous.

As a general rule, the length of a framework agreement is limited to four years for works, goods and services and eight years for procurements in the utilities sector.

Under The Public Procurement Act, contracts based on framework agreement with one contractor can only be awarded in accordance with the terms laid down in the framework agreement. There is no such explicit rule in the Utilities Procurement Act, and in literature it has been suggested that conditions can be specified and even added when awarding a contract.

Framework agreements with multiple suppliers are also admissible. According to the Public Procurement Act, contracts can then be awarded by:

awarding contract through objective conditions indicated in the procurement documents for the framework agreement, e.g. by ranking of contractors, rotation or distribution by percentage, or

by reopening competition (*Sw. förnyad konkurrensutsättning*), provided that this option has been stipulated in the procurements documents for the framework agreement. For a reopened competition it is possible to specify conditions and, if necessary, add conditions for the award of contracts.

In practice, these award procedures also serves as a starting points for utilities contracts as well, even though there are no explicit rules on how to award contracts based on framework agreements in the Utilities Procurement Act. This follows from that such awards must be in accordance with the general principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

## g. What is the applicable regime for public-private partnerships (PPPs)?

Public procurement law applies if a PPP is conducted based on an operating or a concession agreement. As a general rule, operating agreements will be considered as services contracts, which are subjected to public procurement law. Consequently, the selection of the private partner for the PPP requires a bid procedure in order to prevent avoidance of the Acts.

As a general rule, a PPP is awarded in a negotiated procedure under the conditions set out by the contracting authority in the procurement documents. Usually, the contracts are awarded based on price and quality criteria. An award based solely on the price criterion is uncommon.

In case of an institutional PPP, i.e. the formation of a separate legal entity in which the contracting authority holds shares, procurement law applies on the formation of the legal entity if from an economic perspective with the formation the contracting authority simultaneously awards the procurement contract e.g. by providing the newly formed company the right to provide certain works on the property of the contracting authority. Accordingly, the award of the actual works or service contract does not require a second award procedure if the formation of the legal entity was conducted pursuant to procurement law and the scope of the contract to be awarded to this legal entity was disclosed in said procedure.

## h. How are concessions dealt with?

The procurement of Concessions are subject to the Concessions Procurement Act that implements the concessions directive into Swedish law. The Concessions Procurement Act is applicable for concessions with contract value equalled to or exceeding five percent of the EU threshold value. Less rigorous national provisions will apply for concessions with contract value below the EU threshold value. The are no set procedures to award concessions that has to be followed other than the award to the concessionaire need to be in accordance with the general principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

For concessions lasting more than five years, the maximum duration of the concession shall not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital taking into account the investments required to achieve the specific contractual objectives.

## i. Are there anti-avoidance rules (including laws on bid rigging)?

The awarding of contracts is also subject to the provisions of competition law which prohibits agreements between competing enterprises that would effect the prevention, restriction or distortion of competition. Consequently, bidders are excluded from procurement procedures who are party to anti-competitive agreements regarding bidding. Anti-competitive agreements in this context are all practices capable of restricting or distorting competition. The term anti-competitive agreement is therefor not restricted to illegal practices, but also includes any other agreements and practices which do not comply with the principles of competition.

In a notable case in December 2016 the Swedish Patent and Market Court ordered internet providers Gothnet and TeliaSonera to pay SEK 16 million in penalties/administrative fines for having colluded in a public procurement procedure to ensure that TeliaSonera would not submit a tender.

# 3. Procurement Procedures

## a. What procurement procedures can be followed?

For concessions the contracting authority/entity is free to organize the procedure freely, provided that the general principles are upheld.

Different rules apply for public procurement procedures above the threshold values set by the European Commission and for public procurement procedures below those threshold values as well. If, and when, these procedures can be used are also different in the Public Procurement Act, the Utilities Procurement Act and the Defense Procurement Act. Contracting authorities/entities may employ the following procedures for procurements above the threshold value;

open procedure, in which all interested contractors may submit a bid (not available for procurements under the Defense Procurement Act);

restricted procedure (two-step-procedure), in which, first, a call for competition is published and the contracting authority selects a limited number of the interested economic operators to submit a bid subsequently;

negotiated procedure with call for competition, in which, first, a call for competition is published and the contracting authority selects a limited number of the interested economic operators to submit a first bid and subsequently negotiates the terms of the contract based on the first bids with a call for final bids when negotiations have been concluded;

competitive dialogue, in which a contract notice is published and the contracting authority conducts a dialogue with the candidates admitted to that procedure with the aim of developing one or more suitable alternatives capable of meeting its requirements and on the basis of which the chosen candidates are invited to bid;

innovation partnership, in which the procedure is structured in successive phases following the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works (not available for procurements under the Defense Procurement Act); and

in exceptional cases direct awards, i.e. award of a contract without publishing a contract notice and/or without conducting a formal competitive procedure (also called negotiated procedure without call for competition).

When the value of a contract is below the EU threshold value the following procedures may be used:

simplified procedure, where all interested suppliers may submit bids and the contracting authority/entity is allowed to negotiate with the bidders. The contract must be advertised in a publically available database;

selective procedure, where, qualified suppliers are invited to submit a bid, but all suppliers may apply to be invited to submit a bid. The contracting authority/entity must state the required qualifications to be invited to submit a bid in the advertisement of the contract. The contract must be advertised in a publically available database;

competitive dialogue, as described above, if a simplified procedure or selective procedure does not allow for award of contract;

direct procurement, but only under certain circumstances, please refer to 7 below; and

for dynamic purchasing systems, restricted procedure, as described above.

## b. What status do electronic means/procedures have?

According to chapter 12 section 1 and chapter 19 section 16 of the Procurement Act and chapter 12 section 1 and chapter 19 section 16 of the Utilities Procurement Act contracting authorities/entities are required to use electronic means for the entire procurement procedure.

According to chapter 10 section 1 of the Concessions Procurement Act contracting authorities/entities are required to use electronic means for the entire procurement procedure if the threshold values contained in the European Directives are equalled or exceeded. For concessions below the threshold values there is no such requirement.

For procurements under the Defense Procurement Act the contracting authorities are allowed, but not required, to use electronic means for the procurement process following chapter 10 section 1.

## c. Where are contract notices, i.e. calls for bid, published?

EU-wide calls for tenders are published on the website Bids Electronic Daily (TED): <http://ted.europa.eu/>

TED is the online version of the Supplement to the Official Journal of the EU, dedicated to European public procurement.

Most contracting authorities and entities use electronic databases to call for tenders and where it is also possible to ask questions during the procedure, submit tenders etc. The most popular databases are the following:

E-avrop - [https://www.e-avrop.com](https://www.e-avrop.com/)

Licitio - <http://www.licitio.se/>

Mercell - <https://www.mercell.com/sv-se/62475383/startsida.aspx>

Offentliga upphandlingar - <http://www.offentligaupphandlingar.se/>

VISMA OPIC - <http://www.opic.se/>

Primona - <http://www.primona.se/>

## c. Can certain prospective bidders be excluded from the competition?

In the Public Procurement Act, the Utilities Procurement Act and the Concessions Procurement Act, there are mandatory grounds of exclusion for bidders who have been convicted of any of the offences listed therein have to be excluded from the competition. The relevant offences include, e.g., forming criminal organizations, money laundering, fraud and giving bribes as an incentive to the recipient's violating his official duties. Moreover, exclusion is mandatory if the bidder is in breach of its obligations relating to the payment of taxes or social security contributions.

The contracting authority may furthermore exclude a bidder in cases of anticompetitive behavior (e.g. if the respective bidder has entered into an agreement with other bidders aimed at distorting competition or if the respective bidder has made attempts to unduly influence the contracting authority), bankruptcy or upcoming insolvency, a negative contracting track-record, a grave professional misconduct, a conflict of interest, a prior involvement in the preparation of the bid which grants the respective bidder a competitive advantage which cannot be balanced otherwise (see also below under e.), or supplying misleading information during the procurement procedure. The exclusion has to be proportionate.

Similar, but not identical, rules applies for procurements under the Defense Procurement Act.

# 4. Bidder Selection

## a. Are there any rules on the selection criteria?

Selection criteria may only relate to the economic operators:

suitability to pursue the professional activity,

economic and financial standing, and

technical and professional ability.

## b. Is prequalification an option? If so, what are the requirements? What is the procedure?

A contracting authority/entity may establish a prequalification system for procurements under the Utilities Procurement Act equalling or exceeding the EU threshold values. The prequalification system must be advertised along with inter alia, the criteria's to prequalify and access to the system and grounds for exclusion. The applicant has to provide proof that he possesses general technical knowledge, efficiency and reliability for a certain type of contract/performance. In this perspective, the economic operator has to submit all of the necessary documents to the competent prequalification authority. It must be possible to join the system at any time and an application must be administered within six month. The contracting authority/entity may chose to invite economic operators registered in the prequalification system to a procurement procedure, i.e. no public call for competition is mandatory.

## d. Do “blacklists” for bidders exist? If so, what are the conditions for unlisting?

No such list exists in Sweden. It is up to the contracting authority/entity to assess if there is ground for exclusion of bidderd in each and every individual procurement.

## e. Does the involvement of a company in the set-up of a procurement procedure exclude the company from said procedure due to conflict of interest?

In order to prevent conflicts of interest, a company that was involved in the set-up of a procurement procedure (i.e. drafting of or advising on the specifications) can be excluded from said procedure pursuant to under the Public Procurement Act, the Utilities Procurement Act and the Concessions Procurement Act if the involvement of the company in the set-up has led to a competitive distortion that cannot be remediated by other, less incisive measures (e.g. longer deadlines to submit a bid). Although not specifically regulated in the Defense Procurement Act, the rule can be said to emanate from the general principal of equal treatment, and perhaps therefore also be applicable for defense procurements.

## f. Can bidders combine to submit a bid (bidder consortia)? What limitations apply?

A bid may not only be submitted by a sole bidder but also by a group of bidders, however, paying attention to relevant competition law. The contracting authority/entity may require that the consortia of bidders compose a specific form of legal entity if this is a prerequisite to be able to perform under the contract.

Moreover, a bidder may refer to the economic, technical and professional abilities of other companies in its bid. In such case, the bidder must prove that it will have at its disposal the resources necessary for the execution of the contract by producing a commitment from the companies in question or in some other way.

## g. Can members of a bidder consortium be changed during a procurement procedure?

This is not dealt with directly in the Acts, nor in jurisprudence from the Swedish Supreme Administrative Court. The question would most likely be determined by the question if the principle of equal-treatment would be upheld.

Please note that pursuant to the European Court of Justice case C‑396/14, *MT Højgaard and Züblin*, the contracting authorities may allow the bidder to submit a bid even if the original bidder consortium does not exist anymore. This decision has not been reflected by the national case law, yet.

## h. Do limitations apply for participation of related bidders in the same procurement procedure with competitive bids?

There is no such limitation stated in the Acts. It also seems unlikely that it would be considered to emanate from the general procurement principles that a contracting authority/entity is required to reject bids from related bidders. Furthermore, there is no unambiguous jurisprudence on whether a contracting authority/entity can make such limitations in the procurement documents.

Note, however, that this may in practice be an issue from a competition law perspective as it may constitute unlawful collaboration between competitors. Collaboration between companies within the same economic entity falls outside the scope of the competition laws. It is however possible for two companies within the same concern to be regarded as operating on individual basis to such extent that they would be regarded as separate economic entities and thus collaboration between them, such as exchanging information on their respective bids, could be prohibited under competition law.

## i. Is there a special regulation or a special requirement for a foreign company to participate in a procurement procedure?

Neither the Acts nor the EU directives provide a general framework for dealing with bids from foreign companies. Bidders from other EU member states are however protected under the general procurement principle of non-discrimination. Furthermore it is prohibited under the EU directives to treat non-member states bound by the GPA and by the other international agreements by which EU is bound, less favorable in public procurements.

The EU-commission has presented a proposal for new for a new EU regulation "on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries".

In the proposal it is suggested that it shall be possible to impose price adjustment measures against third countries which adopts or maintains restrictive and/or discriminatory procurement measures or practices against EU member states. The price adjustment measure is suggested to lead to a penalty of up to 20% to be calculated on the price of the bidders concerned.

Note also that it is quite common for contracting authority/entities to require that the bid is submitted in Swedish. the recently adopted new public procurement directives of the European Union 2 do not provide a general framework for dealing with bids containing foreign goods and services on the EU's public procurement market

# 5. Specifications

## a. Are there any rules on the specifications?

Technical specifications must be set out in the call for tender and may express the technical specifications as performance or functional requirements. The requirements may include environmental characteristics and should be formulated to clearly indicate the subject matter of the contract.

Technical specifications may further be formulated with reference to certain technical standards. The standards, which may be referred to, vary between the Acts. Where a contracting authority/entity has referred to technical standards, it may not reject a bid on the sole ground that the products or the services do not comply with the specifications to which it has referred, if the bidder in its bid can prove that the proposed solutions satisfy in an equivalent manner the requirements according to the technical specifications.

The technical specifications may not contain details of origin, production or a particular process or reference to trade marks, patents, types, origin or production, if this leads to certain suppliers being favoured or disfavoured.

Such details and references may, however, appear in the specifications if it is otherwise not possible to describe the subject matter of the contract with sufficient precision or unambiguously. Each such reference must be accompanied by the words "or equivalent".

A contracting authority/entity may also lay down special social, environmental and other conditions relating to the performance of a contract. These conditions must be stated in the call for tender.

## b. Are bidders allowed to change the specifications or submit their own standard terms of business?

Bidders are not allowed to change the specifications. In case of violation, the contracting authority has to exclude them from the procedure. There are examples from jurisprudence from courts from the lower instances where a submission of a bidders own standard terms of business resulted in exclusion from the procurement procedure as it is considered a change of the tender specifications.

## c. Is the protection of Small and Medium Enterprises addressed in procurement legislation? If so, how?

The protection of Small and Medium Enterprises ("SME") is one of the main objectives of the new directives. As a main consequence of this requirement, in procurements under the Public Procurement Act the Utilities Procurement Act and the Concessions Procurement Act the contracting authority shall divide all contracts into lots in order to guarantee an award chance for Small and Medium Enterprises. For procurements under the Public Procurement Act the Utilities Procurement Act, but not the Concessions Procurement Act, a deviation from the principle of lot division requires an economic or technical justification resulting form the subject-matter of the contract that has to be documented by the contracting authority in writing. There are no similar rules in the Defense Procurement Act.

Additionally, a contracting authority can as a suitability criterion only request a minimum annual turnover twice as high as the value of the bid, except if the risks of the bid require a higher amount. This limitation is also aimed at guaranteeing a reasonable chance to participate for SMEs.

# 6. Contract Award

## a. Are there any rules on the award of contracts?

Procurements under the Public Procurement Act and Utilities Procurement Act.

Contracting authorities/entities shall base the award of public contracts on the most economically advantageous tender based on:

the best price-quality ratio;

cost (where also life-cycle cost can be considered); or

price

The selection criteria intended to be used must be stated in the procurement documents.

Procurements under the Concessions Procurement Act

Concessions shall be awarded on the basis of objective criteria's that

complies with the general procurement principles;

ensures that tenders are assessed in conditions of effective competition so as to identify an overall economic advantage for the contracting authority or the contracting entity;

are linked to the subject-matter of the concession; and

does not confer an unrestricted freedom of choice on the contracting authority or the contracting entity.

Those criteria shall be accompanied by requirements which allow the information provided by the tenderers to be effectively verified.

Procurements under the Defense Procurement Act

Contracting authorities/entities can award contract to either the most economically advantageous bid or the bid with the lowest price. The award criteria must be stated in the advertisement of the contract or in the tender documents.

## b. Are there any limitations regarding the offered bid price?

For procurements under the Public Procurement Act and the Utilities Procurement Act a contracting authority/entity shall reject abnormally low bids. This is also possible, but not mandatory, for procurements under the Defense Procurement Act. However, the bid may only be rejected after the contracting authority/entity has requested in writing a reasoned submission for the low bid and has not received a satisfactory answer. The Supreme Administrative Courts judgment from 2016 with case no 6578-14 and 6159--6160-14 offers useful guidance on the application of the rules on abnormally low bids.

There are no explicit rules on exclusion of abnormally low bids in the Concessions Procurement Act.

## c. Are there any rules on alternative bids?

For procurements under the Public Procurement Act, the Utilities Procurement Act and the Defense Procurement Act the contracting authority/entity may allow bidders to submit alternative bids. The contracting authority/entity must state in the advertisement whether it will accept alternative bids. If this is not stated, alternative bids may not be allowed.

If alternative bids are allowed, the call for tender must state the minimum requirements to be met by such bids and the specific requirements for how they are to be presented. Only bids that satisfy the minimum requirements may be considered in the procurement.

There are no explicit rules on alternative bids in the Concessions Procurement Act.

# 7. Exemptions to Competitive Bidding

## a. Are there any exemptions to competitive bidding, i.e. under what conditions is a direct award/single sourcing permissible?

Contracting authorities/entities may in some exceptional cases conclude contracts with suppliers without competitive bidding.

One such exception is when the contracting authority's/entity's combined procurement of the same kind under a financial year is below the threshold values stated in the Acts. For 2017 the threshold value for lawful direct procurement are SEK 534,890 under the Public Procurement Act and SEK 993,368 under the Utilities Procurement Act and the Defense Procurement Act, and SEK 2,387,903 under the Concessions Procurement Act.

Another exemption is if there are exceptional reasons for the contracting authority/entity to conclude a contract with a supplier without any competitive bidding. This exception is, however, subject to a narrow interpretation and it must be applied in a restrictive manner.

In addition, there are some other specific exceptional situations where a contracting authority/entity may conclude a contract without competitive bidding. One such example is when the object of the procurement can only be performed by a particular supplier for technical or artistic reasons, or owing to exclusive rights. Another example is when it is strictly necessary to award the contract, but extreme urgency caused by events unforeseeable by the contracting authority/entity make it impossible to keep to the time limits for the normal procurement procedures.

## b. What are the consequences for violation of the competitive bidding requirement?

If a contracts is awarded without following the right procedure set forth in the procurement regulations, e.g. unlawful direct procurements, the contract can be deemed void, meaning that the contract is considered retrospectively ineffective as of the first day it came into effect and that all performances of the contract shall be reversed between the parties (i.e. payment of money or supplies of goods must be returned).

However, the voidance of the contract has to be declared in a judicial review procedure. A frustrated bidder or a company interested in the contract has to initiate such a review procedure within certain time limits (see 8 d. below). If those time limits expire and no review procedure has been initiated, the directly awarded contract cannot be challenged as void anymore.

# 8. Remedies and Enforcement

## a. Are there any remedies and enforcement mechanisms in the procurement legislation?

There are various remedies and enforcement mechanisms in the Acts.

First, suppliers may challenge the contracting authority's/entity's decision to award a contract by claiming that the procurement must be either recommenced or that the procurement may be concluded only after a certain rectification has been made. The basis for such a claim is that the contracting authority/entity has breached any of the five fundamental principles of EU law with regard to public procurement (see Section 1(c) above) or has breached any other provision in the Acts and the supplier can substantiate that it has suffered or may suffer damage because of the specific breach of the contracting authority/entity.

Second, suppliers may claim that a contract concluded between the contracting authority/entity and a supplier should be declared ineffective. The basis for such a claim may, for example, be that the contract has been concluded without prior publication of a notice by the contracting authority/entity.

Third, suppliers may claim damages from a contracting authority/entity. The basis for such a claim is that the contracting authority/entity has not complied with the provisions in the Acts and this violation has caused the supplier damage. The contracting authority/entity must in that case compensate the supplier for the damage in question. The starting point is that the supplier is entitled to full compensation for its damage including compensation for lost profit. In any case, the supplier is entitled to compensation for its incurred costs for preparing a bid and otherwise participating in the procurement, provided that the infringement of the provisions of the Acts has had a detrimental effect on the supplier's chances of being awarded the contract.

Fourth, the supervisory authority, i.e. the Swedish Competition Authority (*Sw. Konkurrensverket*) may claim that the contracting authority/entity must pay a special procurement fine to the state. The basis for such a claim is that:

the general administrative court has determined by a ruling that has entered into final legal force that an agreement may remain in force, despite having been concluded in contravention of the provisions on standstill periods;

the general administrative court has determined by a ruling that has entered into final legal force that an agreement may remain in force for overriding reasons relating to the public; or

the contracting authority/entity has concluded an agreement with a supplier without prior publication of a contract notice.

## b. Are remedies available outside the scope of procurement legislation, e.g. civil law damage claims?

There are no remedies available outside of the scope of the Acts. There are provisions on right to damages in the Acts, se section 8 a. above.

## c. Is there a specific forum before which procurement disputes are heard?

The administrative court in whose judicial district the contracting authority/entity is based is competent to hear disputes either where suppliers challenge a decision to award a contract or where suppliers claim that a contract concluded between the contracting authority/entity and a supplier should be declared ineffective. Such disputes will be dealt with as so-called administrative cases at the administrative court. This means that the administrative court in most cases will review the documents submitted to the court by the parties and base its judgment solely on this review, i.e. written proceedings. Normally there will be no final hearing. It is possible to appeal against the judgment rendered by the administrative court, however, leave to appeal is required before the administrative court of appeal will hear the case.

The administrative court in whose judicial district the contracting authority/entity is based is also competent to hear disputes where the Swedish Competition Authority claims that the contracting authority/entity must pay a special procurement fine to the state. The same rules as described above will apply also in this case.

The district court in whose judicial district the contracting authority/entity is based is competent to hear disputes where suppliers claim damages from a contracting authority/entity. Such disputes are dealt with as civil cases at the district court. This means, for example, that the unsuccessful party will be ordered to reimburse the prevailing party for its reasonable legal costs.

Before the district court renders its judgment, a final hearing including examination of witnesses normally takes place. It is possible to appeal against the judgment rendered by the district court, however, leave to appeal is required before the court of appeal will hear the case.

## d. Are there any timing requirements for the review?

Suppliers who want to challenge a decision on the awarding of contracts, i.e. claiming that the procurement must be recommenced or that rectification has to be made, have to file an application with the competent administrative court at the latest within 10 days from the date when the contracting authority/entity has sent a notification of the award decision. However, should the contracting authority/entity send the notification of the award decision other than by electronic means, i.e. by regular mail or courier, the time limit is extended to 15 days. Note also that it is also possible to challenge the procurement procedure before the award decision, e.g. on the ground that the procurement documents are in violation with the general procurement principles.

Suppliers who want to claim that a contract concluded between the contracting authority/entity and a supplier should be declared ineffective have to file an application with the competent administrative court as a main rule at the latest within six months from the date the contract was concluded. However, if a contracting authority/entity has sent a notice of the results of the award procedure to the European Commission, the supplier must file the application with the competent administrative court before 30 days have elapsed from the European Commission publishing the notice sent by the contracting authority/entity. Further, if the contracting authority/entity has notified the candidates and the bidders in writing that the agreement has been concluded and issued a summary of the reasons thereof, the supplier must file the application with the competent administrative court before 30 days have elapsed from receiving such information.

Suppliers who want to claim damages from a contracting authority/entity have to file its application for a summons with the competent district court at the latest within one year from the date when a contract was concluded between the contracting authority/entity and a supplier or the contract was declared ineffective. If the claims for damages are made on the ground that the procurement process had to be cancelled due to circumstances attributable to the contracting authority/entity it has been suggested in literature that summons must be made within one year from the date of the decision to cancel the procurement. Should a supplier fail to file its application for a summons within the stipulated time, the right to damages is precluded.

The Swedish Competition Authority has to file its application regarding payment of a special procurement fine with the competent administrative court at the latest within six months from the date when the contracting authority's/entity's ruling on which the application is based has gained legal force. However, when no suppliers have applied for a review of the validity of an agreement within the relevant time limits, the Swedish Competition Authority has to file its application regarding payment of a special procurement fine with the competent administrative court within one year from when the agreement was made.

## e. What are the main preconditions for review?

Besides filing an objection with the contracting authority as detailed above, a bidder only has standing to file a petition for review if he can claim (i) an interest to receive the award, (ii) a violation of his individual rights resulting from public procurement law provisions and (iii) demonstrate that as a consequence of such violation he suffered damages.

## f. What are admissible grounds for starting a review proceeding?

A review proceeding can be made to challenge either a procurement procedure or the validity of a contract.

A procurement procedure can be challenged on the ground that the general procurement principles not being upheld or violations to any of the provisions in the Acts. Challenges of the validity of a contract can be made on the ground that

a contact has been concluded without prior advertisement in violation with the Acts, i.e. unlawful direct awards;

a contract has been concluded under a framework agreement or a dynamic purchasing system in violation with the Public Procurement Act or the Utilities Procurement Act or the terms in the agreement; or

a contract has been concluded before the end of the standstill period.

## g. Does a review proceeding affect an ongoing procurement procedure or an awarded contract respectively?

If no contract award decision has been notified, the procurement will not automatically be affected by a petition for judicial review filed with an administrative court. It is, however, possible to state the demand that the courts shall decide on an interim decision that a contract cannot be concluded before anything else is decided by the court.

If the contracting authority has notified a contract award decision, a petition for judicial review will prolong the standstill period until ten days after the administrative courts judgement. The court may, however, decide that the prolonged standstill period shall not apply, e.g. when a petition is obviously unfounded. In practice the courts seldom exercise this right. Note that the standstill period will not be automatically prolonged if the judgement is appealed, and therefor a state of demand of an interim judgment as described above is necessary to avoid a contract being concluded during the appeal process.

## h. What are the consequences of a successful review proceeding for the affected procurement procedure or awarded contract respectively?

For a review proceeding regarding a procurement the court may decide either that the procurement procedure must be recommenced or that the procurement may be concluded only after a certain rectification has been made, e.g. an exclusion of a specific bidder. Note that the court is free which measure to order. The court will normally order to recommence the procurement when the violation refers to the competitive seeking stage, and otherwise that a rectification shall be made, e.g. when the contract award notice identifies a tenderer that should have been rightfully excluded.

The only measure available for a court in a review proceeding regarding the validity of a concluded is to declare the contract void. It is not possible to order recommencement or rectification of the procurement.

## i. How long does a judicial proceeding for review take?

Public procurement cases are prioritized at the administrative courts. It has been proposed in state investigations that the process in the first instance shall take no more than 90 days, but such limits has not yet been introduced in the law.

Statistics from the Swedish Competition authority (*Sw. Konkurrensverket)* and The National Agency for Public Procurement (*Sw. Upphandlingsmyndigheten*) from 2015 shows that on average the turnaround time in the first instance was 2.3 months. However, we have experienced cases where it took almost ten months between the referral to the court to a judgment from the first instance. Furthermore, the statistics shows that in average the turnaround time for appeals in the administrative courts of appeals is 5.3 months (total turnaround 7.6 months) and an additional 3.7 months for appeals to the Supreme Administrative Court (total turnaround 11.3 months).

## j. Must unsuccessful bidders be notified before the award? If so, when?

The contracting authority/entity must send out a notification of award of contract before a valid contract can be concluded. There are no specific timelines for when such a notice must be sent out. The notification triggers the standstill period under which contracts cannot be concluded.

## k. Are review proceedings common?

Yes. Sweden has the highest quota of review proceedings per procurement in the EU. A total of 18.435 procurement notices was published in accordance with procurement regulations in 2015 of which 1 374 (7.5 percent) where subject to review proceedings in courts.

## l. Are damage claims in relation with procurement procedures common?

**Claims for damages from public procurement are relatively unusual. The Supreme Court delivered two noticeable judgments in 2016 (NJA 2016 s. 358 and NJA 2016 s. 369) that in effect softened the conditions to claim damages caused by cancelled procurements. It is likely that the new jurisprudence will result in more damage claims. m. What are the leading court decisions involving procurement disputes?**

The Supreme Administrative Court has in the last years taken a more active approach to public procurement.

The most noticeable judgments in recent years was HFD 2016 ref. 37 I and II that has had a big impact on courts assessments in lower instances. In short, the Supreme Administrative Court found that a contracting authority acted correctly when it rejected a tender which did not fulfill a mandatory requirement (I) and incorrectly when the authority accepted a tender with a view to such a requirement (II). Furthermore, the court stated that when a contracting authority has concluded that a specific requirement must be mandatory to fulfil, potential suppliers must be able to assume that the requirement is so important that those who consider themselves unable or unwilling to fulfill the requirement refrains from submitting a tender.

In a ruling from 2015, the Supreme Administrative Court concluded that negotiations conducted in a manner that directly or indirectly has been able to provide information on competing bids is contrary to the principle of equal treatment (HFD 2015 ref. 63).

Other noticeable cases from the Supreme Administrative courts regards abnormally low tenders (HFD 2016 ref. 3), directly or indirectly disclosing information from a bid to another bidder during negotiation procedures (HFD 2015 ref. 63), obligations in some cases for courts to retrieve confidential information in submitted tenders necessary to ensure an efficient review in a judicial proceeding (HFD 2015 ref. 55) and changes in a contract awarded by public procurement (HFD 2016 ref 85).

The Supreme Court also delivered two judgments that in effect softened the conditions to claim damages caused by cancelled procurements, (NJA 2016 s. 358 and NJA 2016 s. 369).

# 9. Other Relevant Rules of Law

## a. Are there any related bodies of law of relevance to procurement by public agencies?

When central government authorities, county councils and local government authorities and companies owned by municipalities and county councils act as contracting authorities/entities, they are subject to the principle of public access to information. This means that when the award decision has been made or all bids have been published, all documents relating to procurements by such bodies are subject to the ordinary rules on public access to documents and confidentiality.

Consequently, the principle of public access to information applies to the information contained in such documents. This means that, as a general rule, anyone is then entitled to gain access to these documents provided they are not subject to any exemption rule on confidentiality. Should anyone ask for access to such documents in procurement by central government authorities, county councils and local government authorities and companies owned by municipalities and county councils as contracting authority/entity, the contracting authority/entity is obliged to expeditiously consider whether confidentiality applies to the information contained in the documents.

Information that is subject to confidentiality must not be disclosed. Confidentiality may apply if it may be assumed that either the public or an individual supplier would suffer damage if the information were to be disclosed. However, requests to participate and bids are subject to absolute confidentiality until the contracting authority/entity has decided to award a contract to a particular bidder or the contracting authority/entity has before then concluded the procurement in some other way.

## b. Does a specific contract law apply for public contracts?

There is no specific contract law applicable for public contracts. However, as changes in a public contract can render it void, procurement law can be said to apply for the contract even after its conclusion, se section 2 e above.

# 10. Industry sectors of special importance or with a specific procurement regime

## a. Are there any specific laws or practices that apply in the technology sector?

There are no specific laws that apply when procuring technology. However, there are certain related pieces of legislation and practices that contracting authorities/entities as well as bidders should be aware of in connection with the procurement of technology.

An issue for contracting authorities/entities and bidders to keep in mind is data protection, especially in connection with the procurement of IT outsourcing, such as e-mail hosting or other services of cloud computing character. The Swedish Data Protection Authority has published a set of enforcement decisions and guidelines concerning data protection requirements in relation to cloud computing services. Some of the most important implications of the Swedish Data Protection Authority's decisions and guidelines from a practical perspective are that the contracting authority/entity must have knowledge of all subcontractors that may come to process its personal data, and conclude data processing agreements with all such subcontractors. Given that providers of cloud computing services generally instruct a large number of subcontractors located in various parts of the world, this is a somewhat burdensome requirement to comply with.

However, it is permitted for the contract awarding authority/entity to have the supplier enter into data processing agreements with the subcontractors on its behalf.

## b. Are there any specific laws or practices that apply in the defense sector?

The Defense Procurement Act, which transposes the European Directive 2009/81/EC, applies for awarded in the fields of defense and security for:

the supply of military equipment, including any parts, components and/or subassemblies thereof;

the supply of sensitive equipment, including any parts, components and/or subassemblies thereof;

works, supplies and services directly related to the equipment referred to above for any and all elements of its life cycle; or

works and services for specifically military purposes or sensitive works and sensitive services.

The Defense Procurement Act contains similar provisions as the other procurement acts. Some features includes provisions allowing the contracting authority to require a tenderer to meet certain requirements to protect security-classified data, to provide evidence regarding security of supply, and to limit the use of subcontractors.

## c. Are there any specific laws or practices that apply in the health care sector?

The Act on System of Choice in the Public Sector (2008:962) applies when a contracting authority opens parts of its activities for competition, by establishing a system of choice for the services covered by the system. It is mandatory for County councils to establish system of choice in primary care. Municipalities can also establish such systems for health care and social services.

In short, the establishment of a system of choice allows for the users of the services to choose freely of a service provider with whom the contracting authority has concluded a contract in the system. The service provider gets reimbursement for use of its services by the contracting authority in an amount stated in the contract. The Act on System of Choice is similar to the Acts. The general procurement principles are applicable and the contracting authority must publish information about the system and admit all service providers that fulfils the requirements in the contract notice and contract documents.

## d. Are there any specific laws or practices that apply to any other particular industry sector?

The Act on System of Choice in the Public Sector (2008:962) described in section 10 c. above also applies to Swedish Public Employment Service may apply the Act when procuring services within its labour-market activities. Furthermore, the establishment of systems of choice is mandatory for some of its activities focusing on recently arrived immigrants. From the Act (2013:311) on System of Choice regarding Services for Electronic Identification follows that contracting authorities also can establish systems of choice for services for electronic identification.

In short, the establishment of a system of choice allows for the users of the services to choose freely of a service provider with whom the contracting authority has concluded a contract in the system. The service provider gets reimbursement for use of its services by the contracting authority in an amount stated in the contract. The Act on System of Choice is similar to the Acts. The general procurement principles are applicable and the contracting authority must publish information about the system and admit all service providers that fulfils the requirements in the contract notice and contract documents.

Procurement of public transportation may also be subject to specific procurement rules in the Act of Public Transportation (2010:1065) and the EU regulation 1370/ 2007 Public Transportation regulation.

# 11. Looking Ahead

## a. Are there any proposals to change the law in the future?

The Acts which transposes the EU directives from 2014 was enacted 1 January 2017. There are, however, already discussion on changes of the new acts.

The Government has submitted a proposal to the Parliament regarding labor law requirements in procurements. The background is that the Governments first proposal for the new procurement acts had to be revised as its proposal on labor law requirement did not have sufficient parliamentary support. In short, the new proposal means that for procurements where the EU threshold values is equalled or exceeded it shall be mandatory for contracting authorities/entities to impose on procurement requirements for pay, vacation and working hours if necessary.

The question if there should be a cap on profits in welfare, e.g. in the health and elderly care and education, has been subject for many discussions in the political debate in Sweden. As of April 2017, no proposal has been presented and there is much uncertainty weather or not it will, and if so, if it such caps on profit even would be compliant with EU law.

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