Public Procurement in Sweden: overview

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LEGAL FRAMEWORK

1. What is the principal legislation that regulates public procurement?

The principal public procurement legislation in Sweden can be found in the following laws:

- **Public Procurement Act (2007:1091) (LOU).** LOU is largely based on the EU Directive 2004/18/EC on the co-ordination of procedures for awarding public works, supply and service contracts (Consolidated Public Sector Directive), and governs public procurement by contracting authorities.

- **Act on Procurement within the Water, Energy, Transport and Postal Services Sectors (2007:1092) (LUF).** LUF implements Directive 2004/17/EC co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (Utilities Directive). A contracting entity is covered by the provisions of LUF if:
  - it is a contracting authority, a public undertaking, or if it is a private entity that operates under special or exclusive rights; and
  - it is conducting a relevant activity covered by LUF.

- **Act on defence and sensitive security procurement (2011:1029) (LUFs).** LUFs is largely based on Directive 2009/81/EC on defence and sensitive security procurement (Defence Procurement Directive). It regulates procurement of military equipment or services, or militarily sensitive equipment or services.

- **Act on System of Choice in the Public Sector (2008:962) (LOV).** The law sets out a national system under which a contracting authority may, and sometimes must, use a specific system for approving suppliers for a certain service. Citizens who are entitled to receive these services can then choose what supplier will deliver the service, based on the offer they deliver. There are three additional laws on the same type of system of choice:
  - the Act on the Choice in the Employment Service (2010:536);
  - the Act on Introduction Activities for Certain Newly Arrived Immigrants (2010:197);

Other legislation that is of direct relevance to contracting authorities and contracting entities includes:


RECENT TRENDS

2. What have been the recent trends in the public procurement sector?

Litigation in the Swedish administrative courts is free of charge. In the first instance there is no leave to appeal (leave is only required in the second instance and in the Supreme Administrative Court). This has resulted in Sweden having a comparatively large number of public procurement litigations, if not the most in the EU. About 1,500 public procurement litigations occur at first instance each year, and about 700 of these are appealed to the Appeal Court. Of these 700 cases, only about 200 are actually granted leave to appeal to the Appeal Court, and only about nine of these 200 cases are granted leave to appeal to the Supreme Administrative Court and are tried by that court. This means that of all the litigation on public procurement in the Swedish courts, only 0.3% of the cases are actually tried by the Supreme Administrative Court.

The Swedish courts have handled about 160 cases on ineffectiveness since the new provisions were adopted on 15 July 2010. About 62 of those cases involved an application for an ineffectiveness order that led to the grant of such an order. 60 of those cases were appealed to the Appeal Court, and about 40 of those cases were granted leave to appeal. However, only nine of those 40 cases led to the grant of an order for ineffectiveness in the Appeal Court.

One of the largest problems with the EU provisions on ineffectiveness is what constitutes "overriding reasons relating to a general interest". The Swedish courts have attempted to interpret this provision, looking to the European Court of Justice for guidance. However, the courts are having difficulties in estimating what circumstances fulfill the criteria for overriding reasons relating to a general interest. There is ongoing important research in the field, but before this is presented there is a risk that different courts do not uniformly enforce the rules.

USE OF PROCUREMENT PROCEDURES

3. How are the four EU procurement procedures used by contracting authorities?

Open and restricted procedures are most commonly used by Swedish contracting authorities. Of the 5,431 open procedures in 2013, 13% were subjected to proceedings for breach of the procurement legislation. The 18 restricted procedures in 2013 were subjected to proceedings for breach of the procurement legislation in 15% of the procurements. The 25 procurements in
2013 that used competitive dialogue were subjected to proceedings for breach of the procurement legislation in 8% of the procurements. The average percentage of cases subjected to proceedings for breach of the procurement legislation for all 19,955 notified Swedish procurements in 2013 were 7%.

REVIEW PROCEDURES

4. Which body is responsible for dealing with procurement law breaches?

The Swedish Competition Authority (SCA) is the supervisory body for public procurement in Sweden. Its activities are prioritised with a focus on illegal direct award of contracts.

The SCA has the power to take cases involving illegal direct award of contracts to a national court and ask for the contracting authority to be ordered to pay a public procurement fine. The public procurement fine will be imposed by the court if an illegal direct award of a contract has taken place.

A court, when reviewing the effectiveness of an agreement, can determine that an agreement will continue to apply even where that agreement has been concluded in breach of a standstill period (or a prolonged standstill period) where the court is satisfied that an overriding reason relating to the public interest exists. In such cases, the SCA must apply for a public procurement fine to be imposed.

The fine cannot exceed 10% of the value of the relevant contract, and the maximum fine cannot exceed SEK10 million.

5. Does the aggrieved party have to seek review first with the awarding body?

The aggrieved party does not have to seek review first with the awarding body.

6. Is there a requirement to notify the awarding body before starting court proceedings?

There is no obligation in Swedish law for an aggrieved supplier to notify the contracting authority or contracting entity before starting court proceedings for any of the available remedies.

7. Which parties have standing to launch proceedings for breach of procurement legislation?

The only party that has standing to launch proceedings in the national courts for non-compliance, annulment of a contract or damages is an economic operator that suffers, or risks suffering, loss or damage due to a breach of the procurement legislation (see paragraphs 16:4 LOU; 16:4 LUF; 16:4 LUFs; 10:1 LOV).

The SCA can, and sometimes must (see Question 4), bring a proceeding to a national court for a contracting authority to be ordered to pay a public procurement fine. The public procurement fine will be imposed by the court if an illegal direct award of a contract has taken place.

8. What conditions must an applicant meet before a claim can be brought?

There are no specific conditions that an economic operator with standing to bring a claim must comply with before it issues proceedings for a breach of the procurement laws.

9. What are the applicable statutes of limitation?

For an aggrieved supplier

A claim for non-compliance must be brought to a national court within ten days from the day the contracting authority or entity has sent a contract award notice to the participating suppliers.

A claim for annulment of a contract must as a rule be brought to a national court within six months after the contract was signed.

A claim for damages must be brought to a national court within one year after the relevant contract was signed.

For the SCA

The SCA can bring a proceeding for a public procurement fine to a national court in cases of illegal direct procurement. A request for a public procurement fine must as a rule be filed with the Administrative Court within six months from the time the decision to which the application relates has become final.

REMEDIES

10. What remedies are available to an aggrieved contractor? Can a breach of procurement legislation by a regulated body lead to criminal liability?

Remedies

A supplier can bring a claim for non-compliance with the procurement legislation and/or a claim for annulment of a contract to a Swedish Administrative Court. Actions for damages for breach of the procurement legislation can be brought to a Swedish General Court. Foreign suppliers and tenderers have the same opportunities as Swedish suppliers to bring claims regarding violations of the legal framework for public procurements to a Swedish national court.

Claim for non-compliance. A supplier can bring a claim for non-compliance with the procurement legislation to the Administrative Court if it considers that both:

- A contracting authority or entity has violated the procurement legislation.
- The non-compliance resulted (or may result) in the supplier suffering damage.

A claim for non-compliance must be brought to a national court within ten days from the day the contracting authority or entity has sent a contract award notice to the participating suppliers. If the Administrative Court finds that a violation of the Public Procurement Act has occurred and that the violation caused (or may cause) damage to the supplier, the court can either decide that:

- The procurement must be completed all over again.
- The existing procurement must be corrected so that the violation does not remain.

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The process in the Administrative Court is normally in writing, with no oral hearings.

The courts do not charge any fees for considering the claim. As a rule, each party pays its own costs. However, in 2013 the Swedish Supreme Court ruled in the case NJA 2013 s. 762 that if a claim for non-compliance with the procurement legislation results in a correction of the procurement, where the winning tenderer rightfully should have received the contract, the tenderer bringing the claim can receive damages covering their reasonable legal costs. The Supreme Court's reasoning was that the legal costs incurred by the tenderer bringing the claim were so closely linked with the procurement error that those costs should be compensated, as they are deemed to arise as a direct result of the violation of the law.

Claim for annulment. A contract between a contracting authority or entity and a contractor can be annulled by the Administrative Court where a supplier brings a successful claim for that annulment. A claim for annulment of a contract must as a rule be brought to the court within six months after the contract was signed. An agreement can be annulled if it has been signed contrary to the principle of transparency. This can occur in the following situations:

- Where a notice for the procurement of the contract was not published in the Tenders Electronic Daily (TED).
- Where the contracting entity enters into a contract before the end of the standstill period or after a prolonged standstill period has entered into force (due to a supplier bringing a claim to court).
- Where a contract is awarded after a renewed competition in framework contract.

A contracting authority or entity using a direct procurement can avoid annulment by both:

- Openly declaring, before the procurement, that it will perform a direct procurement.
- Observing a standstill period.

This is known as ex ante transparency. When a contracting authority or entity awards a contract after a renewed competition in framework contract, it can voluntarily submit an award notice to the other suppliers in the agreement, thereby avoiding the risk of annulment.

Damages. Damages aim to compensate an economic operator for the effect of the violation in the public procurement. Claims for damages are usually made for loss of profit, but can also include wasted bid costs. A claim for damages must be brought within one year after the relevant contract was signed.

The calculation of the damages is as a rule based on the procurement price, less the saved variable cost of the contract and what the supplier should have been able to earn in placement of the contract, as stated by the Swedish Supreme Court.

Criminal liability

There are no rules concerning criminal liability for contracting authorities, contracting entities or any of their employees in Swedish legislation.

11. Does an ineffectiveness order have a prospective or retrospective effect?

Under Swedish legislation ineffectiveness orders for public procurement contracts are retrospective. This means that if a contract is declared annulled by a Swedish Court, the contract is deemed to never have existed. All performances from the parties must as a rule be returned to the other party. The parties will be restored to the same position they were in just before the contract was signed.

TRANSPARENCY

12. What systems are in place in relation to the publication of details/copies of completed tender and contract documentation, which include pricing and other potentially sensitive information?

Swedish law promotes the principle of public access to official documents. The transparency principle applies to all public activities in Sweden, both state and local government. The principle means that anyone (Swedish nationals and foreign nationals) has the right to inspect letters and documents sent to and from governments and administrations. The right of access to government documents is limited in two ways:

- The public is entitled to read only those documents classified as “public documents”.
- Some public documents are considered to be secret.

A document can be “public” or “not public”. An example of a not public document is an agency's internal working material. A document is public if it is held by a public authority and is considered as received or drawn up. The document can be a letter, minutes, resolutions and so on, and can also comprise e-mail, video and tape recordings. Public documents can be public or secret. All public documents that are not secret are public, which means that everybody has the right to read them.

The Swedish Public Access to Information and Secrecy Act prescribes the information that is confidential. In essence, the authorities, and eventually the courts, determine which documents are to be kept secret. Merely sending a letter to a Swedish authority marked “secret” or “confidential” is not sufficient to make that letter classified. It will only be classified if the specific information in the letter is covered as such by the regulations of the Public Access to Information and Secrecy Act.

In public procurements, all information is secret up until the contracting authority or entity publishes the award decision. After that, all information as a rule becomes public. If any of the information contained in the public procurement can still be considered to be secret after the award decision has been published (for example, trade secrets in a specific bid), that specific information can still be declared secret. However, the information still needs to be directly protected as secret by one of the regulations of the Public Access to Information and Secrecy Act. A decision of a contracting authority or entity to declare information secret can be reviewed by the Administrative Appeal Court.

CONTRACTS OUTSIDE THE SCOPE OF THE CONSOLIDATED PUBLIC SECTOR DIRECTIVE

13. Is the award of contracts which are fully or partly outside the scope of the Consolidated Public Sector Directive regulated under national legislation?

The Swedish legislator has chosen to include provisions for the procurement of contracts below the thresholds, contracts for B-services and contracts for certain other classified contracts in the procurement legislation. The provisions are contained in Chapter 15 of LOU and LUF. The provisions of these contracts were originally founded on the earlier Swedish procurement regulations, but they have after a number of legislative changes increasingly come to resemble the EU-based provisions above the thresholds. For example, they are covered by the same legal principles and are subject to the same legal remedies as the procurements covered by the Consolidated Public Sector Directive.

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14. What remedies are available in relation to the award of contracts which are fully or partly outside the scope of the Consolidated Public Sector Directive?

The Swedish legislator has decided that the remedies applicable to procurements of contracts covered by the Consolidated Public Sector Directive are also applicable to procurements of contracts not covered by this legislation. All procurements regulated under Swedish national law (including the award of contracts for B-services and contracts with a value below the EU thresholds) are covered by the same remedies.

15. What decisions have been taken to date with regard to the transposition of the revised public procurement directives where there is flexibility for the member state as to how the directives are implemented?

There is currently a government Committee working to develop proposals for new laws to incorporate the new procurement directives recently adopted by the EU. The Committee's proposals will then be circulated among interested parties. Subsequently, the government will prepare one or several Bills that will be tabled in the Swedish Parliament. If adopted, the new public procurement legislation will come into force in the spring of 2016. This means that no final decisions have yet been taken regarding the flexibility of member states as to how the directives will be implemented.

ONLINE RESOURCES

Swedish Competition Authority (SCA)
W www.konkurrensverket.se

Description. This is the official website of the SCA, the supervisory body for public procurement in Sweden. It contains information on the Swedish legislative framework for public procurement and information about the activities of the SCA, such as its recommendations and decisions. It also contains general news in the public procurement area, such as decisions from the EU and case law from the Court of Justice of the European Union. A lot of the information is also available in English. The Public Procurement Act (LOU) is translated into an (unofficial) English version, which can be found here.
Practical Law **Contributor profile**

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**Professional qualifications.** LLD, Faculty of Law, Stockholm University

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**Professional associations/memberships**

- Member of the Swedish Bar Association.
- Member of the Advisory Council for Public Procurement at the Swedish Competition Authority.
- Founder and member of the Swedish National Network for Public Procurement Lawyers (350 members).
- Founder and member of the Swedish National Legal Research Network for Public Procurement.

**Publications**

**Monographs:**

- *EG-domstolens domar om offentlig upphandling, Norstedts Juridik, 2006.*

**Academic articles:**

- *Krav avseende vinstsyfte i offentliga upphandlingar, JT 2013 pp 878-891,* peer review.
- *Aktuella frågor om offentlig upphandling, ERT 2013 pp 201-216.*
- *Fråga om krav på viss information i offentlig upphandling är förenligt med unionsrätten, ERT 2013 pp 536-554.*
- *Primärrättsens reglering av offentliga kontrakt, FT 2012 pp 469-480,* peer review.
- *Procurement in the utilities sector, article in Law in transition, published by the European Bank for Reconstruction and Development (EBRD), 2010.*