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Seminar organized by the Supreme Administrative Court of Finland

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***“Recent case-law of the Court of Justice of the European Union and of the
(Supreme) Administrative Courts in public procurement litigation”***

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Answers from the Supreme Administrative Court in Sweden

1. National legal system

1.1. Which court is responsible for the implementation of the appeal proceedings with respect to public procurement falling within the scope of the directives?

It is the administrative courts that are responsible for implementing appeal proceedings in regards to reviews of public procurements within the scope of the directives. However, different courts and authorities fulfil different functions when it comes to complaints regarding a public procurement, see the answers below.

1.1.1. Is there an administrative, civil or special court, or an authority of a different kind?

A supplier may bring proceedings for a review at an administrative court, appeal the decision to an administrative court of appeal and lastly to the Supreme Administrative Court. An action for ineffectiveness is also brought at the administrative courts.

An action for damages is brought at the general courts.

The Swedish Competition Authority can investigate a complaint if it is considered to be of general interest or of interest in principle. A contracting authority is liable to provide the information that the Swedish Competition Authority requests for its supervision.



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A public procurement fine may be imposed if an illegal award of contracts has taken place, i.e. an agreement has been concluded with a supplier without a publication of a contract notice.

The Swedish Competition Authority must apply for the imposition of a public procurement fine if a court, when reviewing the effectiveness of an agreement, has determined that the contract may continue to apply despite having been concluded in contravention of a standstill period or an extended standstill period, or if a court, when reviewing the effectiveness of an agreement, has determined that the agreement should be declared ineffective, but that it may continue to apply owing to overriding reasons relating to the public interest.

1.1.2. Is there a distribution of functions between these courts (disputes for a substantiated decision? Compensation? Declaration of ineffectiveness? Any others?)

See the above answer.

1.1.3. What exactly is the role of the Supreme Administrative Court¹ in disputes pertaining to procurement contracts (judge for full remedy proceedings, court of cassation, judge for abuse of power?)

The Court understands this question as pertaining to a procurement procedure after a contract has been concluded. Under those circumstances, a supplier can bring an action for ineffectiveness of a procurement contract at an administrative court. The consequence of an agreement being declared ineffective is that any award decision shall cease to apply, that the agreement will become invalid in civil law and that all performances between the parties to the agreement shall, if possible, be returned.

¹ The Supreme Administrative Court refers to a court that is a member court of the ACA and that acts as a court of last instance.





1.1.4. Does the distribution between the courts change in relation to the proceedings for the measures introduced after concluding the contract?

A review of a public procurement may not take place after a contract has been concluded between the contracting authority and a tenderer (Chapter 16, Article 6 of the Public Procurement Act). As previously mentioned, it is still possible for any supplier to bring an action for ineffectiveness at an administrative court.

When a procurement procedure has been concluded, tenderers that consider that they have suffered damage may further bring proceedings for damages against the contracting authority at a district court as first instance. An action shall normally be instituted within one year from the date when the contract was concluded.

2. Length of court proceedings

2.1. Are there any specific proceedings or methods to verify whether the national proceeding applied is quick and efficient (for example: definite deadlines to rule on interim measures, etc.)?

There are presently no deadlines in the Public Procurement Act to rule on public procurement cases and it is not explicitly stated in the act that these should be handled with priority. It is however held, in the internal regulation of the Supreme Administrative Court, that cases pertaining to public procurement are priority cases and by these means ensuring that the proceedings are quick and efficient.

Furthermore, it has recently been proposed by a commission of inquiry that a time limit of 90 days for the administrative courts to rule on such a case shall be enacted in the Swedish public procurement legislation (Överprövning av upphandlingsmål m.m., Betänkande av överprövningsutredningen, SOU 2015:12). This proposal is currently under consideration in the Government Offices.





2.2. Is the average processing time determined for public procurement cases? Do you have specific data by type of proceedings and juridical level (level of the court)? If yes, specify.

If no statistics are available regarding the average time duration of these types of proceedings, would it be possible to have an average for the cases dealt with by the Supreme Administrative Court?

Please see the second table below. There are no statistics for solely interim measures, including suspension, but these claims are generally handled by the Supreme Administrative Court within a few days. Cases pertaining to damages are not part of the statistics shown in the second table below as they are handled by general courts. The statistics do however include cases concerning public procurement fines.

The statistics received from the Swedish National Courts Administration are given in months. When filling in the table an average month is assumed to have 21 working days and is calculated as such.

Procedure for “interim measures” (including suspension)

| Year of case resolution | Number of public procurement proceedings resolved in the Supreme Administrative Court in the reference year | Average time period for the resolved proceedings every year, calculated in working days ² | | |
|-------------------------|---|--|------------------------------------|--|
| | | First instance court ³ | Second instance court ³ | Supreme Administrative court/Court of last resort ³ |
| 2013 | | | | |
| 2014 | | | | |

² The day on which the appeal was lodged, as well as the day on which the decision was made, must be included in the calculation.

³ If applicable.





**Substantive proceedings (annulment, declaration of ineffectiveness,
compensation, etc.)**

| Year of case resolution | Number of public procurement proceedings resolved in the Supreme Administrative Court in the reference year | Average time period for the resolved proceedings every year, calculated in working days ⁴ | | |
|-------------------------|---|--|------------------------------------|--|
| | | First instance court ⁵ | Second instance court ³ | Supreme Administrative court/Court of last resort ³ |
| 2013 | 233 | 48 (2,3 months) | 38 (1,8 months) | 32 (1,5 months) |
| 2014 | 229 | 46 (2,2 months) | 42 (2 months) | 21 (1 month) |

2.3. Can the parties in litigation request acceleration of proceedings? If yes, does this apply to all the courts or only to the Supreme Administrative Court? If yes, in how often has this been applied?

As previously mentioned cases regarding public procurement are priority cases in accordance with the internal regulation of the Supreme Administrative Court and are dealt with as such.

A party does still have the possibility to request a declaration of precedence but as public procurement cases are priority cases, a requirement of this sort is seldom granted. This requirement can be made by a party in all administrative courts since it is not limited to the proceedings at the Supreme Administrative Court.

⁴ The day on which the appeal was lodged, as well as the day on which the decision was made, must be included in the calculation.

⁵ If applicable.





3. Dialogue between the Supreme Administrative Court and the CJEU

3.1. How many requests for preliminary rulings has your Supreme Administrative Court made to the CJEU regarding public procurement cases?

The Supreme Administrative Court has as of yet made no request for a preliminary ruling to the CJEU regarding public procurement cases. An important underlying factor is that only cases where a review permit is granted are tried by the Supreme Administrative Court. A review permit is, in principal, granted only if the The Supreme Administrative Court's decision may be of importance as a precedent, i.e. provide guidance for how similar cases should be judged in the future. Review permits are granted in approximately only three percent of all cases that have been appealed to the Supreme Administrative Court.

3.2. Is there a documentation department that systematically analyses the judgements of the CJEU and informs the members of the Supreme Administrative Court about these judgements?

There is no such specific documentation department but naturally the Judge Referees and the Justices of the Supreme Administrative Court handling public procurement cases continuously stay updated regarding the judgments of the CJEU.

3.3. Does the Supreme Administrative Court quote the jurisprudence of the CJEU in its decisions or does it make material references to its jurisprudence?

The Supreme Administrative Court makes material reference to the jurisprudence from the CJEU but it does occur that the Court also quotes specific paragraphs from the CJEU judgments in its decisions.





4. Implementation of the remedies laid down in Directives 89/665/EEC and 92/13/EEC

4.1. Is it possible for the Supreme Administrative Court (or a lower-level court) to declare a public contract ineffective and/or impose alternative or other remedies (in accordance with Directives 89/665/EEC or 92/13/EEC) *ex officio* or only if it is required?

It is not possible for an administrative court to declare a public contract ineffective if such a claim has not been made by a party of the case. It is here worth mentioning that when the court undertakes a review of an ongoing procurement, the court can decide on a remedy, i.e. that the procurement procedure should be recommenced or rectified, irrespective of how the claim of the party has been formulated in that regard.

4.2. Who can seek a declaration of ineffectiveness? Has the jurisprudence of the CJEU judgement dated 18 July 2007, Commission v/FRG, C-503/04 been incorporated into national law?

Suppliers who consider that they have suffered or that they may possibly suffer damage may seek a declaration of ineffectiveness at the administrative courts (Chapter 16, Article 1 of the Swedish Public Procurement Act).

The possibility to bring an action of ineffectiveness of a contract was incorporated into national laws in July 2010. Prior to this, contracting authorities and a supplier could be legally bound according to civil law by a contract that was not a proper contract according to the public procurement legislation. According to the Public Procurement Act, the procurement was considered to be ongoing if a contract had not been signed and thus the procurement could still be reviewed by an administrative court.

As a result of the amendments brought into force in July 2010, a review may no longer take place after a contract has been concluded. However, discontented suppliers do still have the possibility to bring an action of ineffectiveness or seek damages.





4.3. In how many cases has the balance of interests procedure been implemented for not formulating the interim or suspension measures?

In this respect the Court interprets the “balance of interests procedure” as the possibility for the court to refrain from making interim decisions if the damage or inconvenience that the measure could result in may be assessed as being greater than the damage for the supplier (Chapter 16, Article 9 of the Public Procurement Act).

Even though it is not possible to provide a specific number of cases where the court has applied the balance of interests and not decided on interim measures, it does occur relatively frequently.

4.4. Is the national jurisprudence subject to the balance of interests under certain conditions?

See the answer above regarding under which conditions the court may apply the balance of interests procedure in regards to interim decisions. It is also possible for the court to apply the balance of interests when deciding on a declaration of ineffectiveness of an agreement. According to Chapter 16, Article 14 of the Public Procurement Act a court may, if there are overriding reasons relating to the public interest, decide that an agreement may continue to apply even if the agreement was concluded after an illegal direct award of contracts or was concluded in contravention of the Act.

4.5. Directives 89/665/EEC and 92/13/EEC stipulate that when a first instance court, independent of the contracting authority, is reviewed by an appeal dealing with the contract award decision, the member States shall ensure that the contracting authority cannot conclude the contract before the appeal authority gives its judgement based either on the request for interim measures or the appeal.

Is it possible to have this suspension lifted automatically by your court? If yes, under what conditions?





If a contracting authority is liable to send notification of an award decision and it has been sent by electronic means, the contracting authority may not conclude a contract (standstill period) before ten days have elapsed from when the notification was sent (Chapter 16, Article 1 of the Public Procurement Act). If an application has been made to review a procurement, a standstill period shall continue to apply during the court's review (extended standstill period). The court may decide that an extended standstill period shall not apply (Chapter 16, Article 8 of the Public Procurement Act). This possibility is only applicable in the court of first instance and is used in exceptional situations, after it has been required by a party. The condition under which this possibility may be used is for example when a supplier has not given proper reasons for the application for review and it is apparent that they will not receive a judgment in their favour.

When an extended standstill period applies in the administrative court, the contracting authority may not conclude an agreement before ten days have elapsed from when the administrative court has ruled on the case. When an administrative court or an administrative court of appeal has made an interim decision, an agreement may not be concluded before ten days have elapsed from when the court ruled on the case or revoked the decision. When the Supreme Administrative Court has made an interim decision and has decided to send back the case to a lower court, an agreement may not be concluded before ten days have elapsed from the decision to send back the case. A court can however decide to lift a suspension or decide that the ten day limit shall not apply (Chapter 16, Article 10 of the Public Procurement Act).

It is thus not possible to have a suspension lifted *automatically* in any of the administrative courts and there is no legislation or jurisprudence on whether such a period or suspension can be lifted by the Supreme Administrative Court, other than what has been mentioned above.

5. Division of the award criteria into award subcriteria, balancing the award subcriteria, criteria for assessment and a scoring method for the offers (case law references: CJEU, C331/04 ATI EAC and others; CJEU, 24 January 2008, Lianakis, C-532/06)

5.1. How does your Court implement this jurisprudence in its everyday practice?

When the CJEU had decided on the Lianakis case, there were some initial concerns from the Supreme Administrative Court in regards to how this jurisprudence would play out between





contracting authorities and tenderers. However, these concerns have proven unfounded as this jurisprudence does not seem to have caused any major complications in regards to public procurements, at least not from the Court's point of view.

There are a few cases from the administrative courts of appeal that refer to this jurisprudence but as of yet there are no cases from the Supreme Administrative Court.

5.2. Does the jurisprudence or legislation allow the use of subcriteria that is not explicitly stated, and if so, under what conditions? Does the jurisprudence or legislation determine the subcriteria? Does the jurisprudence or legislation differentiate between the subcriteria and the assessment criteria?

There is no jurisprudence or legislation that allow the use of subcriteria that is not explicitly stated. On the contrary, a contracting authority cannot apply weighting rules or subcriteria in respect of the award criteria, which has not previously been made known to the tenderers. Chapter 4, Article 18 of the Public Procurement Act holds that the contracting authority shall value tenders on the basis of the award criteria. The award criteria shall be stated in the contract notice or in the descriptive documents.

The use of criteria is specified in several articles of the Public Procurement Act and they pertain to different contexts of procurement. Chapter 12, Article 1 states that when determining the economically most advantageous tender, the authority shall take into account the various criteria linked to the subject matter of the contract, such as price, delivery period or period of completion, environmental characteristics, running costs, cost-effectiveness, quality, aesthetic, function and technical characteristics, service and technical support. A contracting authority shall in the contract notice or in the tender documents indicate which ground for the award of the contract that will be applied.

Article 2 of the same chapter holds that the contracting authority shall specify the relative weighting which it gives to each of such criteria mentioned above when determining the most economically advantageous tender. Those weightings can be expressed by providing for a range with an appropriate maximum spread. Where, in the opinion of the contracting authority, it is not possible to specify the weighting of the various criteria, the criteria shall be indicated in





descending order of importance. The weighting of the criteria or the order of priority of the criteria shall be specified in:

- 1) the contract notice,
- 2) the tender documents,
- 3) an invitation to submit tenders or to participate in negotiations, or in
- 4) the descriptive documents.

5.3 What are the consequences of the jurisprudence using subcriteria that are not explicitly stated? Does the same question apply to the assessment criteria?

The *jurisprudence* does not use subcriteria that are not explicitly stated. If the question on the other hand refers to the consequences of the contracting authority using subcriteria that are not explicitly stated, the answer is as follows.

As mentioned above, subcriteria and assessment criteria must be stated in the tender documents. A court makes an individual assessment of cases brought before the court. There are no specific articles in the Public Procurement Act that handles this precise situation.

The principle of equal treatment of economic operators and the obligation of transparency require that potential tenderers should be aware of all the elements to be taken into account by the contracting authority in identifying the economically most advantageous offer, and their relative importance, when they prepare their tenders. If a contracting authority would use subcriteria and/or award criteria that are not explicitly stated, this could be in conflict with the principles of equal treatment and transparency.

5.4. Does the national legislation or jurisprudence require any prior communication as regards the assessment method for the offers?

See the answer to the above question. The assessment method for the offers needs to be stated in the tender documents. If the method is subsequently changed, this needs to be communicated with the potential tenderers to ensure that they are aware of the elements that the contracting authority take into account when making an assessment of the tenders.





6. In-house horizontal cooperation [CJEU cases, C-15/13, Technische Universität Hamburg-Harburg; C-386/11, Piepenbrock Dienstleistungen; C-159/11, Azienda Sanitaria Locale di Lecce and C-480/06, Commission v. Germany (Grand Chamber)].

6.1 Did your Supreme Administrative Court face any difficulties as regards the procurement contracts in the cooperation proceedings?

The jurisprudence in question was incorporated into national legislation, temporarily in 2010 and later on permanently.

6.2 In concrete terms, how is the examination of the fulfilment of these carried out?

The examination of the fulfilment of these is conducted on the basis of how the parties present their case before the court.

7 Confidentiality of the documents upon judicial review (case law references: CJEU, 14 February 2008, Varec, C-450/06)

7.1 Is the confidentiality of the documents frequently invoked in litigations concerning public procurement that you deal with?

During an ongoing procurement, the procurement documents are strictly confidential in accordance with the Public Access to Information and Secrecy Act. If someone requests access to procurement documents during a review procedure, the question of whether access may be granted is tried ex officio by the Court.

7.2 How does the national legislation or jurisprudence obtain the confidentiality and the incentive for the decisions of the contracting authorities and the courts?





The Public Access to Information and Secrecy Act includes certain provisions that specify which official documents are secret. Secrecy means prohibition to disclose information, whether verbally, by the passing on of an official document or by some other means. Secrecy also entails a restriction in the right of the general public to access official documents. In other words, the contents of secret documents are protected by a duty of confidentiality. In addition, secrecy means that the information may not be used outside the organisation in which it is classified as secret.

7.3 Is the question of access to confidential documents during the jurisdictional phase regulated by a specific legislation in your country? Are there general rules and/or specific rules for public procurement documents?

In addition to the general rules on confidentiality, there are provisions that protect the economic interests of the general public as well as those of individual counterparties in a public procurement set out in Chapter 19, Article 3 and Chapter 31, Article 16 of the Public Access to Information and Secrecy Act.

7.4 Does the national judge rule on the confidentiality of the documents? Must he/she refer to a specific instance in the matter? What criteria does the jurisprudence use to authorise or deny access to documents that are classified as confidential? Is there a difference depending on whether accelerated proceedings are applied or not?

Anyone who wishes to obtain an official document should refer to the public authority keeping the document. The authority keeping the documents in question does the first assessment of whether these are confidential according to the provisions in the Public Access to Information and Secrecy Act. The matter is considered in the first instance by the official responsible for the care of the document. In doubtful cases, the official should refer the matter to the authority if this would not delay determination of the matter. If the official refuses to provide the document or supplies it subject to reservations, the matter must be referred to the authority on the request of the applicant. The applicant should be advised that he or she may make such a request and





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that a decision by the authority must be made in order for it to be possible to appeal against a decision.

A person whose request to obtain a document has been rejected or whose request to an official document has been granted subject to reservations, is normally entitled under the Freedom of the Press Act to appeal against the decision to an administrative court of appeal, and further to the Supreme Administrative Court. There is no difference depending on whether accelerated proceedings are applied or not.

7.5 When some documents are classified as confidential, how is the right to a fair trial guaranteed?

There is currently a case at the Supreme Administrative Court that, among other issues, raises this question with reference to the Varec case at the CJEU, which has not previously been tried by the Court. A decision is expected this autumn.



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