COURT DECISIONS IN PUBLIC PROCUREMENT: DELINEATING THE GREY ZONE

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ABSTRACT. To remain effective within the public procurement process it is important to avoid revisions on contract award decisions, which prolong the procurement process and takes its toll on public resources. This paper aims to delineate the grey zone within public procurement legislation and clarify how the court interprets it, which will aid procurement officers in achieving best practice. Findings indicate a bias in favour of the procuring authority in terms of outcome of the court decisions through the use of a principle arguing for imperfect Request for Tender (RFT) and evaluation models due to fluctuations in the economic sector. The findings show that some of the most litigious issues are flawed RFT, inconsistent RFT and award evaluation and a lack of clarity in the RFT and/or the procurement process.

INTRODUCTION

The legislation on public procurement, Swedish and European, allows aggrieved tenderer s to bring a complaint before the courts, given certain conditions.[1] Although this remedy was available previously, it was really only available in theory prior to the amendment to the legislation in 2002.[2] A complaint could be brought against the procuring authority once the award decision had been made but not after the contract had been signed. Firstly, the procuring authority was not required to inform aggrieved tenderers of the award decision; and, secondly, the requirements of the Official Secrets Act[3] ensured

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confidentiality of the tender documents prior to the award decision.[4] In practice, this meant that the procuring authority could make the award decision and immediately sign the contract with the winning tenderer, leaving the aggrieved tenderers little or no ability to complain based on the award decision. Subsequent to 2002, however, the theoretical possibility became a practical possibility through the requirement that the award decision had to be communicated to all tenderers and that a ten-day period had to pass after the communication before the contract could be signed. Although the direct relation is difficult to prove, there is evidence that this change led to a dramatic increase (from 153 in 2001 to 1124 in 2004) in the number of complaints brought before the Swedish County Administrative Courts (Lennerfors, 2007).

A study conducted during the years 2003-2006, entailing interviews with public procurement officers within municipalities and regions all over Sweden, indicated that there were concerns regarding the number of complaints brought against the procuring authorities regarding various aspects of the procurement process. The exercise of the right to appeal in public procurement in Sweden has additionally been highlighted in the literature as a contentious issue (Lennerfors, 2007). The focus of the study behind the interviews entails the use of multiple criteria in the public procurement process, primarily in construction procurement. Construction was chosen because of its economic importance, and half of the interviewees were engaged in construction procurement only and the other half from central procuring functions. In the procurement process, the procuring authority has the option of selecting the tenderer with the lowest priced tender or the tenderer with the economically most advantageous tender, and must state which in the Request for Proposal (RFT). It is through the evaluation of the economically most advantageous tender that the procuring authority has the ability to use multiple criteria in the award evaluation stage, which furthermore tend to have litigious effects (Carlsson and Waara, 2007:21-22).

Throughout the interviews, there were also statements to the effect that the legislation was considered vague and complex, resulting in uncertainty on behalf of the procurement officers with regard to their decision-making in the procurement process.[5] In order to make informed and appropriate decisions, it is essential that the procurement officers have up-to-date knowledge of the current legislation and in particular its practical implications. Legal information is generally available through conferences, seminars, books and legislation or court decision updates,

and the information they obtain is an interpretation of the legislation or the court decisions in a legal language communication. To contribute to the understanding of the implications of the legislation, this paper discusses some of the case law that has evolved over a 3-year period, 2003-2006, and how the courts have interpreted the legislation with regard to construction procurement. The main emphasis of the study lies as mentioned on construction procurement. For that reason, as well as in order to limit the number of cases to be studied for practical reasons, the cases studied related to the construction sector only. This does not mean, however, that the findings are not applicable to other sectors, since the same courts deal with similar legal principles and dilemmas.

PURPOSE OF STUDY

This paper aims to delineate the grey zone within public procurement legislation as interpreted by administrative courts. By the grey zone we mean the free scope provided for procurement officers by the legislation to formulate the RFT, evaluate received tenders and make the award decision. The reason why a revision procedure is available, besides enabling an aggrieved tenderer to obtain redress, is to create a foundation for a uniform application of the law and thereby serve as guidance for tenderers, increase predictability and thus uphold the rule of law. One research question is whether courts contribute to a more uniform application by clarifying the often vague prerequisites the legislation is built upon.

The grey zone opens for discrepancy in two ways; leading to lack of legal certainty and equal opportunities, but in a positive respect also to creativity and potentially new ways to promote sustainability. A second research question is to delineate to what extent courts support legal certainty and equal opportunities on the one hand, and support or hinder creativity on the other. From a theoretical perspective outlined in the next section, the third research question is concerned with a better understanding of legal reasoning in court when applying framework law.

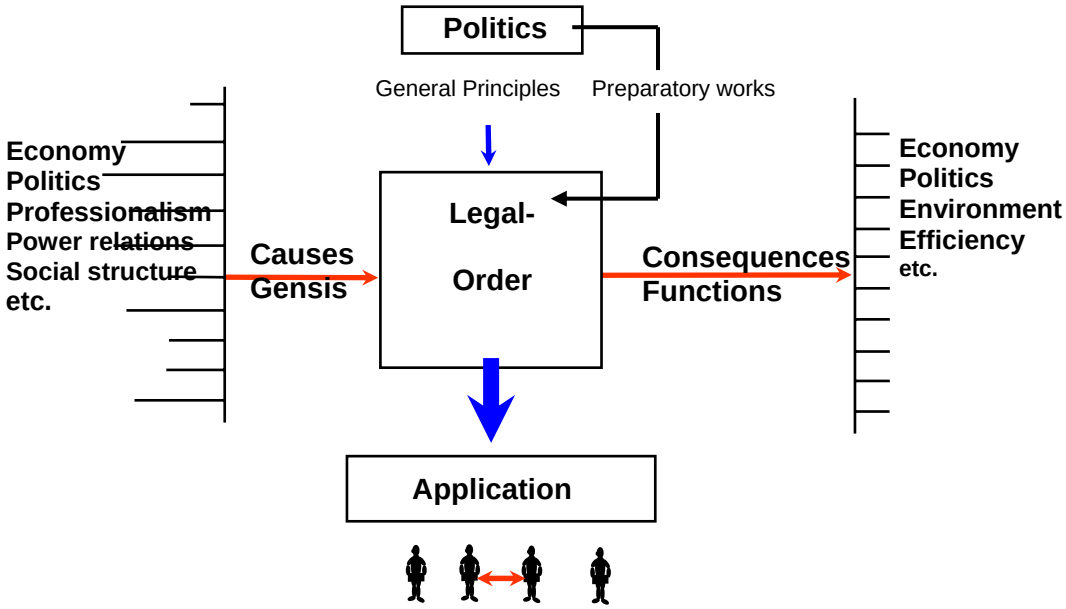
THEORETICAL PERSPECTIVE

In legal science, law is generally seen as a system of rules that manifests general principles, applied by courts or other institutions to

make decisions in individual cases. To find the content of the rule the lawyer uses legal sources such as wordings, preparatory works, precedents and doctrine. This is an internal perspective, taught at law schools. Sociology of law takes an external perspective, looking at rules and the legal order from outside putting law in context.[6] To answer the question of what does the law require, the legal dogmatic method deduces the answer from the sources of law, while the sociologist of law in addition looks at the functions of law and empirically placing the legal framework in its societal context.

The process of administering public procurement legislation involves four different forms of rationality; local politics, professionalism, market and legal application. In politics, among professionals and in the market, people act in order to fulfil goals defined in the respective setting – goal rationality, but judges shall make decisions according to rules decided on by parliaments – norm rationality. It is an empirical question if legal application in the administrative courts actually follows this formal way of looking at decision making. Framework law puts this matter at stake,

FIGURE 1
Legal Framework in a Societal Context



as framework law in a way lacks normative content. Normativity is a matter for legal practice. The legal content is formed in its application in individual cases. Legal application is not just a matter of deciding between right or wrong. Swedish procurement legislation does not stipulate a particular solution, rather that a decision does not infringe the normative provisions required by law.[7]

METHODS

The context of the empirical investigation is construction-related public procurement in Sweden and the data were gathered using empirical findings from a previously conducted quantitative study of the same cases.[8] This paper uses the gathered cases – to conduct a qualitative study of the legal content of these cases. The sample of empirical data was obtained from a database containing court cases related to public procurement.[9] The dataset originally included 574 construction-related cases in County Administrative Courts, constituting a subset of the 4,742 total number of public procurement cases during the same period.[10] The dataset was identified as "construction-related" based on the assignment of court cases to a certain code,[11] through which their relevance for construction procurement can be identified.[12]

Furthermore, due to the objective of analysing the legal content of the cases, those cases containing very limited information regarding the legal argumentation, primarily the plaintiff's complaints, were excluded from the analysis. This has the implication of excluding those cases that had been dismissed by the courts,[13] since insufficient detail on the contentious issue is given. This left the analysis with 353 cases that had been either rejected or approved. Another reason for exclusion for the purposes of this paper is where the case relates to an interim decision by the court, in which it was decided to postpone the decision on the legal content until a later date. These cases totalled 23. Consequently, 330 cases remained. These cases were analysed with regard to their legal content; that is, the complaint, the respondent's legal counter-argumentation and the court's legal reasoning and resulting decision. The purpose is to analyse the court's legal reasoning in an effort to delineate the grey zone of public procurement legislation through its application. Do the courts contribute to a better understanding of the content of the legal rules of public procurement and thereby to a better application in

the individual cases increasing legal certainty, equal opportunities and reducing uncertainty among tenderers?

RESULTS

The primary focus of the current study is the specific legal reasoning by the courts with regard to the complaints at hand. Prior to a statement of the more detailed results a number of general findings regarding the same cases will follow. The general findings aid in the presentation and understanding of the detailed findings.

General Findings

There are some statistics related to the cases being studied that will be presented initially. These constitute the results of a study documented elsewhere and finds that 50% of the total 541 submitted revisions were rejected (Carlsson & Waara, 2007, p.15-16).[14] This means that the complaints were unsuccessful and there was no evidence that the procuring authority had acted outside the scope of the legislation. Furthermore, 26% of the complaints were approved and the procuring authority had to correct parts of the procurement process in half of the cases and had to reinitiate the entire procurement process in the other half of the cases. The remaining 24% were dismissed by the courts for various reasons, including bringing the complaint to the wrong court or too late.[15]

General findings of the current study involved the complaints of the cases and the general types of arguments highlighted by the courts. The complaints generally concerned flaws with regard to the tender documents – lack of transparency and clarity, the evaluation of tenders – breach of the Swedish principle of *affärsmässighet*[16] or businesslike behaviour (authors translation), and finally inconsistency between the tender documents and the evaluation of tenders – lack of objectivity and predictability. Generally, the courts referred to the EC principles of transparency, objectivity and the Swedish principle of *affärsmässighet* in their legal reasoning. The tender documents are required to be transparent and clear enough for the tenderers to be able to predict what the procuring authority is going to evaluate, and the award decision must contain enough information to allow for revisions based on its content, i.e. the evaluation process.

Specific Findings

A large number of the complaints (42%) specifically concerned errors at the evaluation stage of the procurement process, in particular as when the complaining tenderers felt that their tender had received too few points in some respect or that the evaluation had not been conducted in coherence with the procedure stated in the RFT. Some of the complaints in this group of cases consisted of arguments that evaluation criteria additional to those stated in the RFT had been applied in the evaluation of the tenders. Yet other complaints contained criticism of the way different criteria had been evaluated. Interestingly, 63% of these complaints were rejected and 37% were approved.

Another substantial part of the complaints (30%) related to the qualification stage of the procurement process. The complaints primarily concerned a lack of clarity with regard the differentiation between the qualification stage and the evaluation stage and an erroneous inclusion of another tenderer or the erroneous exclusion of the aggrieved tenderer. 55% of these were rejected and the other 45% were approved

A smaller number of complaints (15%) related to a criticism of the RFT and its predictability and transparency. Principally, the complaints related to flawed evaluation models or criteria for qualification, and to the absence of stated weighting or order of preference between the different evaluation criteria. The remaining part of the complaints related to mistakes in terms of the award decision – lack of sufficient information or absence altogether, and wrongful complementary addition to the tender. 52% of these were rejected and the remaining 48% were approved.[17]

The legal reasoning behind the judgements of the courts generally referred to the broad legal principles mentioned earlier. In more specific terms, the Swedish principle of *affärsmässighet* was referred to the most in the cases (35%), while the principle of equal treatment came second (19%) and the an emphasis on transparency came third (13%). In the remaining cases the principles of objectivity, proportionality and predictability were highlighted.

One example of when the Court agreed that the procurement had not been conducted in a businesslike manner, i.e. according to the Swedish procurement legislation, was when the procuring authority had evaluated the tenders using the “good” or “not good” as units of measurement for

the evaluation criteria (Case no. 161-03). Another example is when the procuring authority added new evaluation criteria during the evaluation process, compared to those stated in the RFT.

The principle of equal treatment was decidedly breached when the procuring authority not only had used flawed information as the basis for the evaluation, but the reasons for the evaluation could not be construed from the evaluation protocol (Case no. 496-03) Another example of when the principle of equal treatment was breached was when the procuring authority decided to go back on the qualification requirements during the procurement process and allow complementary additions from some of the tenderers, which goes against the very purpose of the requirements (Case no. 1054-04).

The last principle to be dealt with explicitly here is that of transparency. One clear example of when this principle was breached was when the procuring authority had omitted information about the reasons behind the award decision (Case no. 2809-04). An additional example is constituted by the situation where the procuring authority had failed to weight or place the evaluation criteria in order of preference (Case no. 1216-04).

Apart from the specific legal principles derived from European or Swedish legislation on public procurement, the legal reasoning in the cases additionally reveal other legal principles or guiding legal arguments. The first principle constitutes a bias in favour of the procuring authority in that it states that: “During public procurement, the starting point must be that the procuring authority itself holds the best prerequisites for determining how the tenders fulfil the requirements”. (Case no. 2664-03:11) This was stated in a large portion of the cases and primarily when the Court rejected the complaint. The second principle draws upon the Swedish Supreme Administrative Court statement that “the changing conditions that occur in the economic life allow even for those RFT:s and evaluation models that are not optimally drawn up to be accepted, provided that the principles that support the Swedish Public Procurement Act and Community legislation are not breached” (Case no. 2664-03:11).

DISCUSSION

The legislation on public procurement in Europe and in Sweden permits and enables aggrieved tenderers to bring a complaint against a procuring authority for various reasons. The successfulness and purposefulness of the revision mechanism can be discussed, and it has been (Lennerfors, 2007), yet through the amendment in 2002 it is a factor to be accounted for in the decision making of the procurement officers. It can serve as an appropriate "check against illicit influence" on the part of the procurement officers (Marshall et al, 1991:22).

The cases reveal that some of the most litigious issues relate to the evaluation of criteria in the public procurement process, although the qualification requirements additionally constitute contentious issues. The litigiousness depends upon the clarity of the RFTs as prepared by the procuring authority and the correlated qualification and evaluation processes. As stated, the evaluation stage was found to be the most contentious issue with regard to complaints, which is not surprising seeing that it is an area where the procuring authority has much discretion requiring a great deal of knowledge on the part of the procuring authority; knowledge that the procuring authority may not be able to obtain.[18] Furthermore, as mentioned at the outset, it has been revealed as a contentious area of public procurement. The qualification stage was another area of controversy where the tenderers complained about being excluded or another tenderer being wrongfully included, which are valid complaints. More disconcerting, however, are the cases where the procuring authority has been unclear about the difference between the qualification stage and the award stage. This is fundamental to public procurement and fundamental to equal treatment of tenderers. Another criticism related to the RFT and its lack of clarity, which is alarming since the RFT is what enables realistic tenders to be submitted.

The Swedish principle of *affärsmässighet* is repeatedly referred to in the complaints and legal reasoning, which is particularly interesting seeing that it is no longer explicitly part of Swedish procurement legislation as of January 1st 2008, when the new public procurement legislation came into force (SFS 2007:1091). However, the underlying legal reasoning behind the principle persists and entails ensuring competition and avoiding irrelevant considerations.[19]

The principle of equal treatment, one of the fundamental principles of the EU, implies treating all tenderers equally. In other words, all

tenderers are given the same opportunities to submit tenders or to submit complementary additions.

The transparency principle entails the procuring authority communicating all necessary information and being clear about what circumstances are taken into consideration in the procurement process and how, i.e. what their order of preference is and/or what their weightings are.

Finally, two additional principles have been identified in the cases studied. The fact that the market conditions fluctuate allows for some discrepancy in the drawing up of the RFT and the award evaluation model, in other words they do not have to be perfect.[20] Furthermore, the other principle states that the procuring authority possesses the best prerequisites to make determinations with regard to how the tenders fulfil stated requirements. In other words, there is a slight bias in favour of the procuring authority, perhaps in order to minimise the distortion of the procurement process, which prevents the procuring authority from having to remake parts of or reinitiate in its entirety the procurement process. The procurer has the advantage of setting up the RFT and thereby the procurement procedure to some extent. The court's task is to review if this procedure is followed.

CONCLUDING REMARKS

Although the legislation on public procurement in Europe and in Sweden permits and enables aggrieved tenderers to bring a complaint against a procuring authority, it is not entirely straightforward for them to resort to. Not only must the aggrieved tenderer show that it was harmed or risked being harmed by the actions of the procuring authority, it must overcome the bias that exists in favour of the procuring authority.

Our assessment is that the courts have not appreciably contributed to a more uniform application of the law, since they have not been able to clarify the often vague prerequisites present in the legislation. Additionally, the Swedish Competition Authority, in its review of court decisions (not limited to construction procurement cases) found that case law varies in-between and sometimes within the same county administrative courts.[21] Other studies of administrative courts in Sweden also indicate that courts do not succeed in clarifying the normative content of the law with regard to the application of framework law.[22]

If we analyse the court decisions based on the theoretical perspective that differentiates between the vertical and horisontal dimensions of the law, we are in a better position to understand the role of the courts. It is not possible to handle these cases in the vertical dimension only. Rather, to enable a clarification of material rules, it is required to put the legislation in its context. This allows for the horizontal dimension to complement the vertical dimension and ways can be found to develop means of ensuring the rule of law while possibly achieving sustainability goals of green public procurement.

However, when in court, what should matter is the strength of the legal argument behind the complaint and when the procuring authority has acted in breach of the ruling principles of public procurement, the procedure should be straight forward. Where the complaint is unwarranted and the procuring authority has acted in accordance with *affärsmässighet*, equal treatment and transparency, the Court is most likely to find in favour of the procuring authority. The reason for this is probably that the open character of the legislation, with a large grey zone, invites the court to deal with the issue with the procuring authority's decision as a starting point. The discretion available to the procurement officer can be said to entail a strong preferential right of interpretation by, in the RFT, allowing for the procurement officer to establish what will later be the basis of a potential revision.

As previously established the courts tend to avoid taking a stand on material or normative issues and prefer to review the procedures. The revision often concerns whether procedural requirements have been adhered to and more resembles a test of legality, where the legality and not the expediency is subject to the court's review. However, according to the Act of Public Procurement, the review shall take up a definite position on the issue at stake, i.e. the material question, and not only determine whether procedural rules have been followed.[23]

Even in those cases where the court does review material issues, they do so in a way that avoids taking up a stand with regard to normative issues. Nevertheless, there are examples of when this is done. It is clear that the court has difficulties with regard to legal reasoning in a traditional legal dogmatic way and with regard to finding the answer to the legal issue in the legal sources alone. The answer is not to be found there, but must be sought in the context particular to the legislation. Accordingly, it is necessary that the court combine the vertical, legal

dogmatic perspective with a horizontal perspecive, which means a consideration of matters such as technical, economic, social matters and issues related to sustainable development in the decision making. Our empirical study of court decisions indicate that the courts have failed to do so in a clear manner that provides efficient guidance to procuring authorities and to tenderers.

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Prop 2006/07:128.

NOTES

1. This paper deals with cases being brought under the auspices of the previous Swedish legislation on public procurement, (SFS 1992:1528), although it should be noted that there is new legislation in place on public procurement as of January 1st, 2008. (SFS 2007:1091)
2. The amendment was a result of the European case C- 81/98, Alcatel Austria, Reg 1999 p. I-7671, in which it was held that the unavailability of aggrieved tenderers to a revision of the award decision was contrary to EC-legislation DIR 89/665/EEG and DIR 92/13/EEG.
3. The Official Secrets Act (1980:100).
4. Falk and Pedersen, 2006:175.
5. Carlsson and Waara, 2006.
6. Hydén (2005)
7. The Act (SFS 1992:1528) on Public Procurement. Chapter 7. § 2. If the contracting entity has infringed the provisions of Article 4 of Chapter 1 or any other provision in this act and this has occasioned injury or the risk of injury to the supplier, the County Administrative Court shall order that the award procedure be recommenced or that it may be concluded only when rectification has been made. In cases concerning procurement as set forth in (Missing?)
7. Carlsson and Waara, 2007.
9. llego, www.allego.se.

10. There is a possibility that the digit representing the total number of cases is not entirely accurate, see Carlsson and Waara, 2007:13. However, the discrepancy is not believed to be of major importance of the purposes of this study.
11. The Common Procurement Vocabulary (CPV) classification system used within the European Union.
12. See Carlsson and Waara, 2007:14-15, for a more in-depth description of the selection of construction-related cases.
13. There are several reasons for a court to dismiss a case, including submitting the appeal to the wrong court or too late.
14. The number was originally 574 as stated earlier in this paper, but 23 of those were interim-decisions and did not contain final decisions of the courts.
15. See Carlsson and Waara, 2007:16, for a more exclusive list of reasons.
16. For a discussion on the concept of affärsmässighet see: Åstrom and Brochner (2006).
17. These figures correspond with the findings in Konsumentverket 2007:2
18. See Carlsson and Waara, 2006, for a further discussion on the perceived lack of knowledge on the part of the procurement officers.
19. Prop 2006/07:128.
20. See also Hettne and Oberg (2005).
21. Konkurrensverket 2007:2, s 80.
22. Åström and Werner (2002).
23. See also Hettne and Öberg (2005).