JOURNAL OF PUBLIC PROCUREMENT, VOLUME 7, ISSUE 2, 213-227 2007

IMITATING PRIVATE BUSINESS IN PUBLIC PROCUREMENT: SWEDISH 'AFFÄRSMÄSSIGT'

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ABSTRACT. While implementing the EC Procurement Directives in Swedish legislation, there remains a reference to 'business-like' *(affärsmässig)* practice as an external system of norms. The problem is that the term *a.* might contradict non-economic considerations in the award of contracts. Municipal procurement is often managed by professionals with limited legal expertise, and diverging practices are found. In recent years, the term *a.* has spread to court practice in other fields and even to one act belonging to private law. The term *a.* appears as a chameleon, since when used in a context of private law, it conveys a sense of transparency and objectivity traditionally associated with the operation of the legal system rather than with private business practices.

INTRODUCTION

In 1973, a new wording of the award criterion for bids was introduced in the Swedish Public Procurement Ordinance: "taking into account all 'business-like' (*affärsmässigt)* given circumstances are to be viewed as most advantageous with respect to the purpose of the procurement". This expression was retained when Sweden implemented the relevant EC procurement directives shortly before joining the European Union in 1995. Today, the term *affärsmässigt*

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can be found in Swedish laws outside the field of procurement. Using the Rättsbanken database we find that as of March 2005, there are at least seventy different Swedish laws in force containing the term *a.* Out of these there are only a few in the field of private law, the others are related to administrative law, many referring to the Procurement Act.

Which are the fundamental principles of public procurement, and how should they be expressed in legislation, if at all? By exploring the use of a particular term *(a.)* in Swedish procurement law, we intend to throw light on the function of terms that refer to extralegal systems of norms in a society. Our investigation will also highlight a clash between a national legal tradition and principles adhered to in EC Directives. Finally, we shall map how decades of frequent use of the Swedish term in a procurement context has migrated into court rulings and recent acts within private law.

A fundamental issue is whether public bodies should mimic private firms in their procurement practices. Once non-price criteria are allowed to enter the contract award decision, we cannot be sure whether the very reason for the existence of public activity in a particular field is respected. Why cannot public procurement aim at the ecologically most advantageous proposal, if we are unwilling to concede that the lowest-price criterion is to be the single rule? How does the normative conflict between the notion of *a.* and sustainability develop in legislation and in legal practice?

Does *a.* contribute to a transfer of business thinking from the private to the public sector? On the contrary, does *a.* transfer principles such as equality and transparency from the sphere of public administration to private business? Is the word *a.* superfluous, or does it have a meaning of its own? Does the notion of *a.*, deeply entrenched as it seems to be, support the implementation of EC principles for public procurement (or, more probably, act as an obstacle because it is more closely related to economic thinking than to principles such as legal security, traditionally associated with public administration)? Does the concept of *a.* make it easier or more difficult to develop contract award criteria other than lowest price? These are the questions to be examined in this article.

PRIVATIZATION IN SWEDEN

Given that the country is perceived as an archetype of the Welfare Society with a huge public sector, it is important to recognize that public/private relations in Sweden are frequently organized as private contractors delivering public services. In fact, public procurement of goods and services corresponds to a high proportion of Swedish GDP: two estimates for 1997 are 23 per cent (Sweden, 1999, p. 56) and 18 per cent (Commission of European Communities, 2001). Even the lower figure would rank Sweden immediately after the United Kingdom as the EU member country with the highest value of public procurement as a percentage of GDP. Local and regional government, including corporations owned by them, are responsible for more than half the Swedish volume of public procurement. The pervasive use of public procurement has probably contributed to the spread of a key concept such as *a*.

Privatization in the narrow sense, amounting to a transfer of ownership, has followed a pattern typical of many other European countries. When in 1991 the first sales of central government agencies and the corporatization of a number of agencies were decided on by the Swedish government, a decade of change began. Also, the markets for mail services, telecommunications, and energy were deregulated or rather re-regulated. In 2000, a public offering of part of the shares in the state telecommunications corporation (Telia AB, created in 1993) dwarfed all other sales. The full or partial sale of public assets has also transpired for many energy producers and distributors; in some cases, municipal water utilities have been sold to the private sector, almost exclusively to foreign-based multinational corporations. In relation to GDP, privatization revenues have been slightly higher than in the United Kingdom for the 1977–2003 period, and thus Sweden belongs to the top four among the member states of the enlarged European Union (Bortolotti, 2004). However, the divestment trend is weaker today, and the issue remains controversial; in 2004, a new Act that prohibits the sale of regional or university hospitals to private companies was introduced, also barring private for-profit companies from running hospitals owned by regional government.

Public private partnerships involving concessions and private finance of investments are almost unknown in Sweden. An exception

is the Arlanda airport express train project, where procurement was initiated in 1993 and the rail link inaugurated six years later.

Emphasis on efficiency (as evident in the early reliance on the *a*. concept) in Swedish public administration has a long history, and there is no sudden break where we can identify the sudden appearance of business management influences. Beginning in the 1980s, there is an interest in strengthening the competitive environment for public service providers: experiments with setting up internal purchaser-provider structures that allow internal contracting, increased reliance on municipally owned corporations, and benchmarking practices (Lundsgaard, 2002). The need to harmonize Swedish procurement legislation with European directives did however impose a limit on client/provider restructuring of what still amounted to in-house production of services.

PROCUREMENT LEGISLATION

Swedish procurement legislation begins in the early 19th century with rules for military procurement, much as the origin of public procurement regulation in the U.S. (Nagle, 1999). The only award criterion for contracts was lowest bid. However, an 1888 Royal commission report (Sweden, 1888), based on a thorough examination of both Swedish and foreign procurement laws as well as administrative practices, recommended that the bid that was "taking into account all relevant circumstances, most advantageous to the State" should be selected among the three lowest bids. This was what the commission found after a lengthy discussion where the potential negative consequences (for quality and performance) of adhering to a lowest price criterion were analysed.[1] The 1888 proposal for formulating the award criterion was accepted and constituted as the basis of a series of procurement ordinances that entered the statutes in 1889, to be replaced by the phrase containing *a.* many years later, in 1973.

However, it was a circular issued by the Swedish Ministry of Finance in 1960 that first used the word *a.* in the context of Swedish public procurement. This term can loosely be translated as business-like or business-wise; its 19th century origin is half French *(affaires)* and half German (the *–mässig* suffix), the whole being a calque of German *geschäftsmässig*. The semantic development of *–mässig* words in Swedish has been studied by Söderbergh, who found that

the use of *a.* during the 20th century was dominated by what she termed denotatively specializing and reductive meanings, in contrast to the German *geschäftsmässig,* where the meaning of *–mässig* retained its original sense of "to the full extent" (Söderbergh, 1964, p. 282). Thus the present use of *a.* is ambiguous: either it refers to a practice that is entirely typical of what happens in private business, or it refers only to one or a few characteristics of private business.

The Public Procurement Act of 1992 (SFS, 1992, p. 1528), which was the first Swedish regulation to conform to EC procurement directives, came into force on January 1, 1994. The word *a*. occurs already in Chapter 1, paragraph 4. While an outline of *a*. in the context of Swedish procurement legislation has been offered by one of the more recent commissions on Public Procurement (Sweden, 2001), there is still a need for a broader view of how the term is understood by procurement officials and how it is used in the legal system. More precisely, there is a question of the effect of legal rules intended to support European integration and at the same time reflecting an instrumental view of law as means for social, economic, and ecological change (Tamanaha, 1997).

LOCAL PRACTICES

So does *a.* correspond to all three of these considerations, social, economic, and ecological? Is there another element hidden in the Swedish term, or is one or two of these three considerations absent? Is the term consistent or does it mean different things in various settings? Is there a conflict of interests between *a.* and social and ecological sustainability? To be able to answer such questions, we have to turn to facts about legal regulation and legal practice in the borderline between private business and public services.

It is instructive to see *a.* as a principle of the kind that is often associated with a framework style of legislation. Another example of this type of legal concept from the private law sector is *"god affärssed"* – good business practice. Also, in modern welfare law we find concepts like *"skälig levnadsnivå"* – reasonable standard of living.

A government proposal, inspired by UK policies, to introduce compulsory competitive tendering for a number of municipal activities was withdrawn after heavy criticism early in the 1990s (Bryntse &

Greve, 2002). Instead, the Public Procurement Act was modified so that most of its provisions would also apply to much smaller contracts than the threshold values stipulated in the EC directives. This wide range of contract sums ensures that many public bodies and employees come into contact with the main principles of the Public Procurement Act.

There are 290 municipalities in Sweden, and many of these comprise several procuring units. Thus, there exists a strong degree of decentralization, while there is little in the way of central government monitoring of local procurement practices, nor is there any central activity of issuing guidelines and recommendations, if we exclude newsletters from the National Board for Public Procurement (NOU). Under these circumstances, we should expect heterogeneous practices to be emerging locally. We might think that the emphasis on commercial reasoning would inhibit the local development of contract award criteria other than lowest price.

Empirical evidence from how the framework type social legislation is transformed into typical sets of local norms indicates that the outcome of legal application varies over time and between geographical areas. We have seen many examples of parallel norm creating processes especially in the field of welfare law. Professional standards, economic strength and ideologies are the determinant factors (Åström, 1988, 2005; Hydén, Staaf & Åström, 2004). In public procurement law, there is a wider latitude for decisions than in the case of social work, where the laws contain definitions of individual rights. Therefore it is reasonable to expect that normative processes in the field of public procurement will be less structured, less standardized, and less influenced by court decisions.

Business practice as an inspiration for public sector use of non-price criteria in procurement is a possibility, particularly since the reliance on sophisticated models for purchasing is growing in the private sector (overview by De Boer, Labro & Morlacchi, 2001). On the other hand, imitating a private business concept of *a.* can also be expected to inhibit bringing other criteria than lowest price into practice. In Scandinavian legal science, Wilhelmsson (2004) has captured the phenomenon of welfare aspects brought into contract law when he identifies a form of market-correcting welfarism, where legal regulation aims at rectifying outcomes of the market mechanism in order to promote acceptable contractual behavior, such as

substantive fairness rules. Considering its origin, the notion of *a.* can be seen as a short term interest and an interest restricted to the individual actual case of action. This might contradict non-market principles of ecological and social sustainability. Therefore, it is interesting to study conflicts between short term and long term perspectives, between free market competition and politically decided goals on sustainability.

HOW PRACTITIONERS VIEW *'AFFÄRSMÄSSIGHET'*

An investigation that we are currently undertaking of how new procurement practices for construction projects develop in Swedish local government includes semi-structured interviews with 25 officials in eight municipalities and two regional administrations. Respondents have been asked to indicate what they primarily associate with the concept of *a*. and also whether they perceive any conflict between *a*. and sustainable development. Answers to the first question differ considerably. From a sociology-of-law perspective we distinguish types of norms in relation to their normative sources. Apart from legally defined norms, the interviews reveal professional norms, economic norms, social norms, ecological norms, and professional norms. Of these, two are dominant: norms with sources in law and norms originating in business customs.

Legal norms, as they are reflected in the interviews, can be characterized as procedural; norms as direct imperatives of action are exceptional in this context. Typical statements and concepts that highlight procedural features are "we shall strictly follow rules", "objectivity," "transparency," "non-discrimination," and "decisions shall be based on careful investigations of the actual situation." These responses can be traced back to either the Public Procurement Act or basic principles vested in the Public Administration Act.

However, norms originating in business life and customs are mostly non-procedural norms of action, as they appear in our interviews. One should "do good business," "do what is best for the procuring agency," "compete with the private sector," and "get best value for money." These norms stipulate what to do and what not to do, as well as defining boundaries for behavior.

There were twice as many procurement officers who stressed business norms as those who primarily referred to legal norms. Some

but not all respondents who stressed business norms mentioned inefficiencies associated with legal procedural norms: "following the rules can be time-consuming and in conflict with doing good business". Also, the interviews show that some procurement officers tend to give precedence to norms with origins in business customs over legally based rules of procedure. From this we draw the general conclusion that business norms have a stronger normative impact than legal norms on procurement officers. Nevertheless, some normative conceptions brought forward by the respondents are ambiguous, having an origin both in legal rules and in the world of private business. One such norm is "maximizing competition," which is a major norm of action in the relevant European directives.

Turning to the question whether procurement officers experience a conflict between *a.* and sustainable development, opinions are found to be divided. When confronted with a direct question, many of those interviewed say that they do not see a conflict between *a.* and sustainable development. However, in the context of their answers to other survey questions, we detect uncertainty among respondents: which is the proper way to pay attention to sustainability, when there is a risk of higher costs in the short term? Further, many procurement officers mention the vagueness of the sustainability concept itself, which makes it difficult to measure it against business-type considerations. "Environmental demands always raise costs," as one of the respondents expresses it, and those who elaborated on this issue tended to view it as a conflict between a specific interest in the ongoing procurement process and a more general perspective related to sustainability. As one of the officers put it, "The problem is that sustainability and *a.* are conflicting interests. Talking about sustainability forces us to take into consideration matters that are only indirectly related to the product that is being procured; sustainability is a political matter and *a.* a matter of profitability." Thus we do find a conflict of norms that have different origins.

More than once, respondents have indicated dissatisfaction with Chapter 6 of the Public Procurement Act, the chapter where regulations for contracts below the threshold values are found. Transaction costs are perceived as disproportionate (cf. Boyne, 1998, on competitive tendering in UK local government). For construction contracts in Sweden, there is little evidence that foreign firms submit bids to municipalities except for very large projects. Instead, there

arises a paradox: the formalities involved and the minimum number of days for advertising a contract stand out as being only weakly related to the principle of *a.* Thus the *process* of adhering to the Act is seen as inefficient, at least for small contract sums, however efficient the *result* of applying the Act is felt to be. The strong emphasis (in the EC directives) on encouraging trade while restricting the use of procurement as a national or local policy tool (Arrowsmith, 1995) provides little incentive in practice for foreign firms to submit bids when construction projects are procured at the Swedish municipal level.

We have also found that municipalities often include non-price criteria related to the characteristics and performance of the bidding firm rather than in direct relation to the specific contract. This might discourage firms that do not operate already in the local market.

THE CONCEPT OF *AFFÄRSMÄSSIGT* IN LEGISLATION AND LEGAL PRACTICE

Starting from what can be regarded as a form of legally defined meaning of the concept we find this in the first chapter of the Procurement Act under the heading Principal Rule of '*affärsmässighet':* "Procurement should take advantage of the existing potential for competition and should also in other respects be carried out *affärsmässigt.* Bidders, candidates and bids should be treated without irrelevant considerations." (SFS, 1992, p. 1528, our translation). In sum three concepts can be identified: free competition, business-like and objectivity. A question to be developed is whether *a.* has a meaning in itself, or if it is just a concept containing the other two concepts, namely competition and objectivity. If so, one can argue that the legal construction is a form of circular reasoning.

We may compare the principle of *a.* in Swedish legislation with the principles for procurement in the EC and WTO systems. As Trepte (2004, p. 382) underlines, the objectives of these international systems are non-discrimination and free movement between member states. But they do not include economic efficiency as a primary objective, in contrast to national procurement regulations and what the World Bank expresses in its guidelines for procurement (IBRD, 2004). These guidelines list economy, efficiency, and transparency among the considerations guiding the Bank's requirements. Transparency is usually seen as alien to the commercial world, as

underlined by Schooner and Yukins (2003) in their analysis of how U.S. government procurement increasingly adopted more commercial practices beginning in the 1990s; their basic view being that the expression 'commercial public procurement' amounts to a contradiction in terms.

The Income Tax Act (SFS, 1999, p. 122) repeatedly uses the word *a*. Here, *a.* is used in opposition to business practices that are primarily motivated by a wish to reduce the tax burden. The concept of *a.* has also been used with a different meaning in other laws. Taking the Auditors Act (SFS, 2001, p. 883), the concept is used to identify firms with businesslike relationships. There is no legal definition to be found in these laws, but in some of the laws there are exemplifications of what *a.* might be. In the statute that announced the contract between Systembolaget AB, the Swedish state monopoly liquor retailer, and the state (SFS, 2001, p. 852), the meaning of *a.* appears to be that choice of products must not favor domestic produce, and that choice must be related to factors like product quality, risks in terms of injuries and customer demand. Also, the recent Banking and Finance Act (SFS, 2004) relies on *a.* when formulating new rules for banks and credit market undertakings. As reported in the Government Bill, the Swedish Financial Supervisory Authority had questioned the introduction of a vague term such as *a.* in order to minimize conflicts of interest. However, the government refused to clarify which agreements should be viewed as not being *a.,* leaving the future interpretation of the term to the legal system (Bill 2002/03:139, pp. 330seq.).

When occurring in recent legislation, the Swedish concept of *a.* thus appears to denote an application of principles associated with profit-maximizing firms, but stressing objectivity and an absence of private corruption, political considerations, tax evasion and also to fulfill politically defined social goals. The meaning of *a.* seems to change both over time and between different sectors of society, a development that we shall come back to.

Why has *a.* spread from procurement law? One explanation is that the perception that *a.* is the overarching principle of all Swedish procurement regulations leads to EC principles such as non-discrimination and transparency, while hardly characteristic of private business practice being understood as subsumed under *a.* For another way of understanding the spread of *a.* to other legislation,

Montesquieu provides a clue when he asserts that the spirit of trade produces in the mind of a man a certain sense of exact justice (Spirit of the Laws, xx.2). But does the Swedish legislator assume that competition entails justice?

If we explore legal practice, looking at court records from 1960 and onwards, omitting courts of the first instance, we find that there are fewer cases referring to the concept of *a.* in the courts of Appeal and the Supreme Court than in the corresponding administrative courts, 110 against 170. In the administrative courts almost nine out of ten cases that refer to *a.* deal with matters of public procurement, whereas only half of the cases in general courts are about public procurement. Even if these cases are disputed in relation to the Procurement Act as an administrative law, matters at stake are relations between private subjects, normally regulated in private law. Law regulates private relationships where the public sector must be regarded as a third party. Conflicts between private subjects and relations between a private subject and a public organization are thus objects of legal decision making in the very same process, which might be one explanation why *a.* refers to private interest in terms of free competition as well as to formal procedural values such as justice, equal treatment and transparency.

There are, at least, two different legal issues relating to *a*. in court practice: on the one hand as a fact of material content and on the other as a procedural matter. In a case concerning architectural services, a municipal agency argues that a refused bidder had submitted a bid that was at an unrealistically low level and therefore not *a.* (NJA, 1998, p. 873). From this example of a material matter let us turn to an example of the procedural meaning of *a.* In this case the court referred to *a*. as equal treatment giving all bidders the same opportunities (NJA, 2001, p. 3).

CONCLUSIONS

The concept of *a.* appears as a chameleon. In a public law perspective, *a.* refers to practices typical of private business, except for the lack of transparency that is usually associated with private sector dealings. In private law, the term conveys principles like equality, legal certainty, and transparency; principles strongly related to public sector formal procedural values in public administration. Thus private business and public sector borrow from each other, also

transferring (in both directions) meanings of the concept of *a.* Does this result in a more businesslike public administration or a more formalized transparent way of conducting business in the private sector? The current emphasis on corporate social responsibility appears to serve as a vehicle for conveying values from the legal system into private business; transparency is particularly important, although there is a difference between the pressures on 'a pharmaceutical company trying to restore consumers' trust' and how a hedge-fund manager has to operate (Davis, 2005).

Our analysis has shown that instead of preserving a lowest-price bias in Swedish public procurement, the meaning of *a.* itself has been changed because of four decades of practical use in the context of procurement. The surprising fact is that *a.* was first used in the context of public procurement law and has now migrated into legal text and court practices that are intended to regulate private business.

Rather than narrowing the implementation of 'economically most advantageous' according to the EC directives, the concept of *a.* has taken on meanings of objectivity and transparency. The ensuing combination of private law and administrative law does not appear to have narrowed local interpretations of economically most advantageous bids, in the sense that the EC directives provide.[2]

ACKNOWLEDGMENTS

Support for this investigation through a grant from the Swedish Research Council for Environment, Agricultural Sciences and Spatial Planning is gratefully acknowledged.

NOTES

1. Evidence that the necessity of taking account of quality and not only price in public procurement was a live issue in the Swedish 1870s is found in the satirical description in The Red Room: central government officials who spend their time on testing steel pen nibs (Strindberg, 1967 [1879]).
2. A recent proposal by the 2004 Procurement Commission (Sweden, 2005, pp. 216 seqq.) for implementing Directive 2004/18 (Arrowsmith, 2004) recognizes that Article 2 of the

directive prescribes equal treatment, non-discrimination, mutual recognition, proportionality and transparency, but that one element of Sw. *a.* is absent. This Commission sees that to emphasize the essence of *a.,* there should be a requirement to "use available opportunities for competition", a phrase that is proposed to come before the three requirements expressed in Article 2. An argument raised against retaining *a.* is that it might be thought to refer to economic objectives exclusively, to the detriment of social and ecological considerations. If this proposal is accepted, the word *affärsmässig* would no longer be found in Swedish procurement regulations.

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