

The International Comparative Legal Guide to:

# Public Procurement 2009

A practical insight to cross-border Public Procurement



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### 1 Relevant Legislation

#### 1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

Lagen (2007:1091) om offentlig upphandling (the Law on Public Procurement and Lagen (2007:1092) om upphandling inom områdena vatten, energi, transporter och posttjänster (the Law on Utilities Procurement). The Law on Public Procurement is applicable to the public sector and the Law on Utilities Procurement to the utilities sectors of water, transport, energy and postal services. Both laws regulate procedures for contracts above and below the thresholds mentioned in the laws, for Part B service contracts and for remedies. Part B services under the Swedish legislation correspond to the Part B services under the EC Directives.

#### 1.2 How does the regime relate to supra-national regimes including the GPA and/or EC rules?

The laws implement Directives 2004/18/EC and 2004/17/EC and the remedies directives. The laws relate to the GPA rules as the directives.

#### 1.3 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

Equal treatment, non-discrimination, transparency, proportionality and mutual recognition are basic underlying principles of utmost relevance to the interpretation of the legislation. In the preparatory works to the legislation it is stated that the Swedish procurement laws shall be applied in conformity with EC legislation and the rulings by the ECJ and CFI.

#### 1.4 Are there special rules in relation to military equipment?

Only the procedures for contracts below the thresholds are applicable to contracts covered by Article 296 EC and to contracts covered by other limitations due to national security interests. Under those rules some contracts may also be totally excluded from the application of the laws.

### 2 Application of the Law to Entities and Contracts

#### 2.1 Which public entities are covered by the law and is it possible to obtain a ruling on this issue?

The Law on Public Procurement covers contracting authorities defined as governmental and local authorities including: 1) decision making bodies in municipalities and county councils; 2) publicly governed bodies whereby are understood inter alia undertakings, associations and foundations established to meet needs in the general interest not having an industrial or commercial character (i) financed mainly by the government, a municipality a county council or a contracting authority, (ii) subject to control by the government, a municipality, a county council or a contracting entity, or (iii) in which more than half of the members of the board or the managing body have been appointed by the government, a municipality, a county council or a contracting authority; and 3) associations of one or more authorities and bodies mentioned above. The Law on Utilities Procurement covers contracting entities defined as contracting authorities within the utilities, public undertakings over which a contracting authority exercise a dominant influence or bodies enjoying special and exclusive rights. It is only possible to obtain a binding ruling on which public entities are covered by the laws in connection with the remedies procedures mentioned in section 5 below. The Competition Authority may render a non-binding, but guiding, opinion on the issue.

#### 2.2 Which private entities are covered by the law and is it possible to obtain a ruling on this issue?

The Law on Utilities Procurement covers private entities enjoying special or exclusive rights. It is only possible to obtain a binding ruling on which private entities are covered by the Law on Utilities Procurement in connection with the remedies procedures mentioned in section 5 below. The Competition Authority may render a non-binding, but guiding, opinion on the issue.

#### 2.3 Which types of contracts are covered?

All contracts, above and below the thresholds, for works, supplies and services are covered. Contracts excluded are mentioned in questions 4.1 and 4.2 below. Contracts below the thresholds and contracts for Part B services, irrespective of the value, are covered by a set of rules similar to the rules applying to contracts above the

thresholds. Most of these contracts shall be advertised, all basic principles apply, as well as the rules for remedies.

#### 2.4 Are there threshold values for determining individual contract coverage?

Yes. The same thresholds apply as under the EC directives to determine what set of rules should apply to a contract.

#### 2.5 Are there aggregation and/or anti-avoidance rules?

Yes. These rules correspond to the rules of the EC directives.

#### 2.6 Are there special rules for concession contracts?

Yes. Service concessions are excluded from the application of the laws. For work concessions over the thresholds the same rules apply as under the EC directives. For work concessions below the thresholds the general rules of the laws to contracts under the thresholds apply.

### 3 Procedures

#### 3.1 What procedures can be followed, how do they operate and is there a free choice amongst them?

For contracts above the thresholds the open, restricted and negotiated procedures apply. The rules on these procedures correspond to those of the EC directives and thus under the Law on Public Procurement the contracting entity may choose freely between open and restricted procedure and under the Law on Utilities Procurement the contracting entity may choose freely between the three procedures. Below the thresholds the simplified procedure, the selective procedure or the direct procedure shall be applied. Under the simplified procedure all suppliers are entitled to submit tenders, the participating suppliers are to submit tenders and the contracting entity may negotiate with one or several of these tenderers. Under the selective procedure all suppliers are permitted to apply to submit tenders, the contracting entity invites certain suppliers to submit tenders and the contracting entity may negotiate with one or several suppliers. The contracting entity may choose freely between these two procedures. The direct procurement is a procedure without tenders being required and may be chosen only for contracts with a low value or when there are exceptional reasons not caused by the contracting entity itself.

#### 3.2 What are the rules on specifications?

These rules correspond to the rules of the EC directives. Reference should primarily be made to Swedish standards that correspond to European technical specifications.

#### 3.3 What are the rules on excluding tenderers?

The compulsory rules of the EC directives apply. A tenderer may also be excluded if he is bankrupt, is being wound up, his affairs are being administered by the court or likewise, is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or for an arrangement with creditors or similar proceedings, has been convicted of an offence concerning his professional conduct by a

judgment which has the force of *res judicata*, has been guilty of grave professional misconduct and the contracting entity can furnish proof this circumstance or has not fulfilled obligations relating to the payment of social insurance fees or taxes in the country in which he is established or the country in which procurement takes place.

#### 3.4 What are the rules on short-listing tenderers?

These rules correspond to those of the public procurement directives.

#### 3.5 What are the rules on awarding the contract?

A written motivated decision shall be sent to all suppliers.

#### 3.6 What methods are available for joint procurements?

No special methods are directed by the legislation.

#### 3.7 What are the rules on alternative bids?

Alternative bids are accepted only if so stated by the contracting entity.

### 4 Exclusions and Exemptions (including in-house arrangements)

#### 4.1 What are the principal exclusions/exemptions and who determines their application?

The laws exclude from their application the same contracts as are excluded under the public procurement directives. The rules do not apply to contracts awarded by contracting entities and intended to enable them to carry out electricity generation or the sale of electricity in Sweden according to a decision by the European Commission of October 29, 2007.

Whether or not a contract is covered by any of the laws can be determined only by a court during procedures for remedies as stated in section 5 below. If a contracting entity argues that a disputed contract is excluded from the procurement legislation the court has to rule over this.

#### 4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

The laws do not apply to contracts awarded within a single entity. They apply within groups consisting of different legal persons being able to conclude binding agreements with each other and between public bodies.

### 5 Remedies and Enforcement

#### 5.1 Does the legislation provide for remedies/enforcement and if so what is the general outline of this, including as to *locus standi*?

A court may decide to set-aside a decision or to order the contracting entity to correct an award decision. Interim measures may be ordered. Damages may be claimed.

## 5.2 Can remedies/enforcement be sought in other types of proceedings or applications outside the legislation?

No, they cannot.

## 5.3 Before which body or bodies can remedies/enforcement be sought?

Damages are sought in civil courts; other remedies in administrative courts.

## 5.4 What are the legal and practical timing issues raised if a party wishes to make an application for remedies/enforcement?

Administrative remedies may not be sought when a binding contract is in place with the exception for the first ten days from the day of the award decision. The administrative court thus has to decide on interim measures, stating that the contracting entity may not finalise the award procedure until the court has finally decided the case, within the ten-day period. Otherwise a supplier loses his right to seek remedies if the contracting entity concludes an agreement with the supplier having been awarded the contract. Damages may be claimed during one year from the day administrative remedies may not be sought.

## 5.5 What remedies are available after contract signature?

After ten days from the notice of the awarding of a contract has been sent, damages may be sought by a supplier initiating court proceedings during one year from the day administrative remedies may not be sought. During the ten-day period all remedies are available even if a contract is signed.

## 5.6 What is the likely timescale if an application for remedies/enforcement is made?

The likely timescale is 1-4 months for administrative remedies in the first instance and 12-18 months for a case on damages in the first instance of the civil courts. All judgments from the administrative and civil courts may be appealed.

## 5.7 Is there a culture of enforcement either by public or private bodies?

Remedies are frequently sought.

## 5.8 What are the leading examples of cases in which remedies/enforcement measures have been obtained?

This occurs within all areas of public procurement. Remedies are fairly often obtained. A contracting entity in breach of the rules during the evaluation phase is normally ordered by the court to correct the evaluation. A contracting entity being in breach of the rules governing the contract notice and the contract documentation is normally ordered to set aside the award decision and initiate a new award procedure. Remedies have also been obtained in cases where the contracting entity has decided to suspend a procedure without having objective reasons for this.

## 6 Changes During a Procedure and After a Procedure

### 6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) or changes to contract terms post-signature? If not, what are the underlying principles governing these issues?

The legislation does not specifically govern this issue. The general underlying principles of the EC directives govern this. It is considered that changes may be made if these do not constitute a new contract compared to the awarded contract.

### 6.2 In practice, how do purchasers and providers deal with these issues?

Changes are agreed within the limits stated in question 6.1.

## 7 Privatisations and PPPs

### 7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

No, there are not.

### 7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

No special rules apply; however, as the laws do not cover the procedure of competitive dialogue, the restricted or negotiated procedures have to be applied in these cases.

## 8 Other Relevant Rules of Law

### 8.1 Are there any related bodies of law of relevance to procurement by public and other bodies?

The Secrecy Act. Up until the award decision, no information may be revealed by the contracting entity. Thereafter the Secrecy Act secure access for all interested to most documents related to the procurement procedure, including at least parts of all tenders.

## 9 The Future

### 9.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

During 2008-2010 new legislation and proposals for changes of the legislation are expected in relation to privatisations and remedies and for the implementation of the part of the directives on public procurement covering competitive dialogue, dynamic purchasing systems, electronic actions and central purchasing bodies.

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Louise Widén works predominantly with litigation regarding public procurement and provides general advice regarding public procurement. She also advises on competition law. She has collaborated on books and articles on competition law and public procurement.

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