

The Legal Framework for Cross-Border Procurements

Jürgen Busch and Susanne Bärlein

Mannheimer Swartling

LT Cross-border procurement; Denmark; Public procurement procedures; Sweden; Tenders; Train operating companies

The Öresund Bridge (*Öresundsbron*), which opened in the year 2000, has contributed to the creation of a new business region comprising the eastern part of Denmark and the southern part of Sweden (the so-called Öresund region) with thousands of people crossing the bridge every day by car or train. In 2006, travelling over the bridge by train increased by 15 per cent to up to 7.5 million travellers. In the same year, train traffic over the Öresund Bridge became subject to new tender procedures pursuant to which train traffic should be awarded to a new operator for a period of seven years commencing January 1, 2009. This is probably one of the first times that two tender procedures in two different jurisdictions have been linked to each other although subject to different public procurement rules.

On the Swedish side, the procedure became subject to an appeal giving the Gothenburg Administrative Court of Appeal (Sw. *kammarrätten*, the Court of Appeal) the possibility to consider, among other things, issues regarding the possibilities for two public entities in two different countries to perform parallel procurement proceedings. In its ruling in *SJ AB v Skånetrafiken* (5142-5147-07), the Court of Appeal had to consider the issue of the two separate procurements in Denmark and Sweden each using a revision factor in order to allow the outcome of the procurement in one of these countries to influence the result of the procurement in the other country.

1. Background

The facts of the case can be briefly described as follows. Skånetrafiken *et al.* (Skånetrafiken) procured train services between the border to Denmark on Öresundsbron and various cities in Sweden. A corresponding procurement was performed by the Danish public entity, Trafikstyrelsen (Trafikstyrelsen) for connecting train services in Denmark.

In each of the procurements, the tenderers had the choice of submitting an offer in respect of both countries (a so-called B-offer) or for only one of the countries (a so-called A-offer). When giving a B-offer, the tenderers' offers in the two countries were dependent on each other insofar as the offer in one country would only be valid if the contract was also awarded to the same tenderer, or another co-operating entity, in the other country.

On June 27, 2007, Skånetrafiken and Trafikstyrelsen awarded the contracts to Öresundstrafiken AB and Kystbanen AS respectively whereby Öresundstrafiken AB was to perform the train traffic in the Öresund area in Sweden and Kystbanen AS was to perform the train traffic in the Öresund area in Denmark. Both Öresundstrafiken and Kystbanen are subsidiaries of a joint venture between

Danish DSB and First Group from Scotland and had provided a B-offer for the procurements in both countries.

The contract was awarded after a competitive tender procedure in which several other tenderers participated. The Swedish state-owned company, SJ AB (SJ), which was one of the tenderers in both of the public procurements, requested a review of both the Danish and the Swedish procurement. Owing to the limited possibilities of judicial review of the public procurement in Denmark, SJ filed an appeal against the decision rendered by the court of first instance, i.e. the Malmö Administrative Court (Sw. *länsrätten*, the Administrative Court) on September 28, 2007. The judgment of the Court of Appeal was handed down on December 18, 2007. Owing to SJ's appeal of the award, the contract was ultimately not concluded until the beginning of 2008. The remainder of this article will only focus on the proceedings in the Court of Appeal with particular emphasis upon the international aspects of the proceedings.

In both procurement procedures, the contract should be awarded to the most economically advantageous offer, which should be determined by a certain combination of the offered price, quality and reliability. Further, in both procurements a revision factor was used to ensure that the two procurements would come to the same result, i.e. after the results had been calculated individually in the two procurements a revision factor was used to compare and revise the results in the different procurements through a quite complicated calculation model in order to arrive at the same result. The revision factor was only used if two different bidders had won in the two countries and both of them had submitted a B-offer. If an A-offer had been successful in either of the countries, the revision factor was not to be used. However, in the procurements in question, the B-offer from the German company, DB Regio AG (DB Regio) won in Sweden and the B-offer from DSB and First Group won in Denmark. Since the offer from DSB and First Group had higher points than the B-offer from DB Regio after employing the revision factor, the offer from DSB and First Group was awarded the contract.

2. Main arguments of the parties

2.1 SJ

SJ claimed that the fact that Öresundstrafiken AB won the tender after the revision had been performed in spite the fact that DB Regio had higher points than Öresundstrafiken AB in the Swedish tender before the revision showed that the revision factor had a direct and decisive importance on the outcome of the tender procedure in Sweden. The revision factor entails that the public procurements in Sweden and Denmark are linked together in an unacceptable way as circumstances in the Danish procurement are considered in, and influence, the decision in the Swedish procurement. According to SJ, this was unacceptable particularly since the parameters in the two different procurements vary.

In addition, the revision factor would be in conflict with the Swedish Public Procurement Act inasmuch as Skånetrafiken had delegated the responsibility for a part of the decision to the Danish public entity, Trafikstyrelsen. Trafikstyrelsen cannot apply the Swedish Public Procurement Act in the Danish public procurement procedure and a Swedish court cannot adjudicate whether the evaluation conducted by the Danish public entity had followed the Swedish Public Procurement Act. This would constitute an illegal delegation of the decision-making competence of Skånetrafiken and further restrict the right of the tenderer to request review of the public procurement.

SJ further claimed that the revision factor per se was unlawful since it implied that information not provided in the procurement documentation and which was never required by Skånetrafiken was used in the evaluation. Since the Swedish Public Procurement Act as well as EU procurement law requires that the evaluation of the offers must pertain to the object of the procurement, the revision factor must be deemed as unlawful.

2.2 Skånetrafiken

Skånetrafiken took the view that the revision factor was only a way to adjust the ranking between the B-offers if the situation arose that two different B-offers were successful in the two countries. In such circumstances, the revision factor was intended to identify the B-offer which would be considered to be the best overall offer.

Skånetrafiken further denied that there had been any delegation of decision-making authority to a foreign public authority. Skånetrafiken compared the connected procurements in Denmark and Sweden with joint procurements which can be made between different public authorities in Sweden which are not considered to entail any delegation of decision-making authority. A joint procurement between Skånetrafiken and Trafikstyrelsen had been discussed and subsequently rejected since such was deemed to give rise to further legal issues.

3. The Court of Appeal's judgment

The Court of Appeal began by noting that, prior to the use of the revision factor, DB Regio had received higher points than the offer from Öresundstrafiken. The Court of Appeal went on to state that since DB Regio had submitted a B-offer subject to the condition that the offer would only be valid if DB Regio was successful in both Sweden and Denmark and since DB Regio did not win the Danish procurement it could not be claimed that DB Regio would have won without the revision factor.

The Court of Appeal further noted that there was no doubt whatsoever that the use of the revision factor had led to a significant decrease of the total cost for Skånetrafiken. Accordingly, the revision factor must be considered as having been used in a businesslike manner.

The Court of Appeal made the following statements in response to the issue of whether the revision factor would otherwise be contrary to Swedish or EU law. Since two procurements had taken place, one in Sweden and one in Denmark, and the required decisions had been taken in both countries, there had been no formal delegation of the competence to take decisions or of any other responsibility incumbent upon Skånetrafiken in the Swedish procurement procedure. The Court of Appeal took the view that the fact that a certain basis for the decision originated from another participant did not entail an unpermitted delegation of the competence to take decisions. Further, since the tenderers could choose whether to submit an offer in one or both of the countries and the possibilities to appeal the awards in both of the countries existed, the tenderers had not been deprived of any legal remedies.

The Court of Appeal further confirmed that the criteria which a public entity uses in order to establish the most economically advantageous offer must have a connection with the object of the procurement. In this respect the Court of Appeal referred to judgments of the Court of Justice dated

December 4, 2003 (C-448/01)¹ and October 27, 2005 (C-234/03).² The Court of Appeal established that the revision factor was a necessary condition to be able to perform two parallel procurements of the extent at issue in Denmark and Sweden and to find the most advantageous offer. The criteria in the Danish tender which had been of importance in the Swedish tender thus had a connection to the object of the Swedish tender.

4. Comments

In its short and concisely reasoned judgment, the Court of Appeal seems to have taken the view that there had been some delegation of decision-making power although this had been approved in order to encourage the international aspect of the procurements in the current case.

In the procurements in question, Skånetrafiken and Trafikstyrelsen had held a meeting with representatives from the European Commission in connection with the development of the revision factor in order to discuss its compatibility with EU law. During the discussions, the representatives from the Commission forcefully emphasised that the principles of non-discrimination and transparency had to be taken into account, as well as all other principles of procurement law. The representatives pointed out that it would entail a minor risk using the revision factor but continued by stating that the tenderers in this case had to argue that it is a question of an "overall service" notwithstanding that it was, in fact, "two procedures and one project". It is obvious from the representatives' comments during this meeting that they were of the opinion that the international element of the procurements was of a greater importance than the legal uncertainties in connection with the revision factor.

The Court of Appeal leaves a few questions unanswered. For example, what would have been the outcome if a claimant could have proved that it would have been awarded the contract if the revision factor had not been used? Nor has the Court of Appeal further expanded upon the question that legal protection in Denmark regarding tender procedures was hardly developed in a manner required under public procurement law in Sweden and issues which might have been in conflict with Swedish and Danish public procurement law could not be made subject to review by the courts in Denmark but nevertheless influenced the decision in Sweden. Another interesting question not answered by the Court of Appeal related to the quality and reliability factor of the evaluation model. Obviously, some parts of the offered concepts of the tenderers in relation to the B-offers could have positive effects on the traffic situation in Sweden and concurrent adverse effects on the traffic situation in Denmark and vice versa. Whereas this would increase the quality evaluation by Skånetrafiken it would nevertheless have a negative effect for the Swedish tender through the indirect negative evaluation by Trafikstyrelsen.

The judgment is also notable because neither the Administrative Court nor the Court of Appeal materially discussed the claimant's claim that the award-winning company had received unlawful state aid. The claimant was of the opinion that the alleged state aid constituted a reason for measures according to EU procurement law. Unfortunately, both the first instance court and the Court of

¹ *EVN AG and Wienstrom GmbH v Republic of Austria* (Case C-448/01) [2003] E.C.R. I-14527; [2004] C.M.L.R. 22.

² *Contse SA, Vivisol Srl and Oxigen Salud SA v Instituto Nacional de Gestión Sanitaria (Ingesa), formerly Instituto Nacional de la Salud (INSALUD)* (Case C-234/03) [2005] E.C.R. I-9315; [2006] 1 C.M.L.R. 28.

Appeal dismissed the claim in this respect without developing its reasoning further. In the present case, the services procured were train services, an area where many of the tenderers have enjoyed monopolies in their countries, e.g. SJ, DSB, DB Regio. Could it be that the Court of the Appeal found the international competition of such importance in this particular service area that it intentionally left the question open?