

Country case: The Results of the Swedish Competition Authority's Public Procurement Law Enforcement

Description

1. The Role and Competence of the Swedish Competition Authority

The Swedish Competition Authority, SCA, is a state authority working to safeguard and increase competition and to supervise public procurement in Sweden. SCA's task is to work for efficient competition in the private and public sectors for the benefit of the consumers as well as for the efficient public procurement for the benefit of the society and the participants in the markets. The combination of enforcement of competition and procurement rules produces valuable synergy effects and gives the SCA a unique position and advantage in the work for efficient competition and public procurement.

Public Procurement

Principle: **Capacity,**
Accountability

Procurement Stage:
All phases

Audience: **Policy Maker,**
Procuring Entity

1.1 The supervisory activities of the Swedish Competition Authority Regarding Public Procurement Law Enforcement

The goal of the SCA's procurement law enforcement is to deliver decisions and analysis of high legal quality and precision. The work also contributes to clarify the borders of what is allowed and what is not. When legal matters are unclear the ambition is to provide guidance by having strong and quality-assured arguments. Where appropriate the SCA can also provide guidance on how a procuring authority, that has been found to be in breach of the procurement law, should have acted in order to comply with the procurement regulations.

The SCA's resources are limited. For this reason, the Authority has to carefully prioritize the cases that are to be investigated. The aim is to investigate where it is needed the most and where a real difference can be made, by for example providing guidance in an unclear legal matter. The choice of areas and cases is made in accordance with the SCA's prioritization policy.

In order to conduct effective supervision, the SCA commences investigations in mainly two different ways. The first is after receiving a tip-off from the public or from its own intelligence work. The second way is by conducting a broader analysis of data in terms of time and scope, which may result in an investigation of a certain authority or a legal issue.

The SCA's supervisory activities within the field of public procurement are mainly directed at cases that can lead to either the imposition of a procurement fine or a supervisory decision. The supervisory work also includes analysing and providing information about the procurement market and procurement regulation in the form of reports.

1.2 Procurement Fines, Supervisory Decisions and Case Closure Decisions

A *procurement fine* is a financial penalty that passes to the central government. The SCA may bring proceedings at a general administrative court requesting that a contracting authority be ordered to pay a procurement fine in the following conditions:

- when an agency has carried out an illegal direct award of a contract,
- when a general administrative court has established in a review case, that a contract may stand, either
 - despite the fact that the contract has been entered into in contravention of the provisions on a standstill period, or
 - on imperative grounds of public interest.

The SCA can apply for procurement fines at its own initiative in the case of an illegal direct award of contract (a facultative application). In certain situations the SCA is required by law to apply for a procurement fine (obligatory application). This is the case if a general administrative court has established that a contract may stand either despite the fact that it has been entered into in contravention of a standstill period or on imperative grounds of public interest.

The procurement fine may be from approximately 1,000 € up to 1,000,000 €. However, the fine cannot exceed ten percent of the value of the awarded contract.

Supervisory decisions are written decisions in which the SCA states that a contracting authority has conducted a public procurement in contravention of the procurement regulations. The supervisory decisions have no sanction linked to them, that is, they cannot be associated with penalties, fines or other sanctions. Instead these decisions are intended to highlight situations where contracting authorities have failed in their duty to apply the relevant legislation in the area of procurement. Contracting authorities that are subject to a decision are expected to resolve the matter through voluntary self-correction or (if this is not possible in the particular case) to alter their behaviour in future procurements. The decisions also have a wider purpose, namely, to disseminate information and clarify the legal situation so that other contracting authorities can learn from them and avoid taking incorrect actions.

Case closure decisions are decisions where the SCA states in writing either that no infringement has been committed or, that for reasons of prioritization, it will not be investigating the case further, and therefore will not be taking a stance in the issue of whether or not the procurement was conducted in accordance with the regulations.

Reasoned case closure decisions are used when the SCA considers that a case should indeed be closed, but where the case contains a legal issue which, from a wider perspective, needs to be highlighted.

2. Follow-up on the SCA's Supervision of Public Procurement

In order to continuously improve and to stay up-to-date with the developments regarding public procurement, the SCA has followed up the effects of its supervision. The follow-up has resulted in the reports "Five years of procurement fines" and "The Benefit of Supervision". The reports are based on surveys that were sent to all contracting authorities that have been ordered to pay a procurement fine, that have been subject to a supervisory decisions or a reasoned case closure decision. Case closure decisions were not included in the follow-ups.

2.1 The effects of the SCA's Applications for Procurement Fines

In 15 July 2010, the SCA was empowered to bring legal actions to pursue claims for public procurement fines. During the period 15 July 2010 to 14 July 2015 the SCA has submitted 92 applications for procurement fines to the administrative courts. 62 of these were applications made on the SCA's own initiative, and 30 were obligatory applications. During the same period the courts have issued 64 judgments that have entered into legal force. Out of these judgments, the courts have found entirely or partially in the SCA's favour in 89% of the cases where applications were submitted on the Authority's own initiative and in 43% of the applications where the Authority was obliged to submit an application. The procurement fines imposed until August 2016 amount to a total of approximately 5,500,000 €.

The follow-up report on procurement fines shows that almost 90% of the contracting authorities ordered to pay procurement fines have implemented changes following the imposition of these fines. Many of these changes have been either wholly or partially implemented as a result of the contracting authority being forced to pay the fine.

Furthermore, the report also indicates that the contracting authorities require information regarding the implications of the procurement regulations and support in their work to bring about sound procurement procedures.

The SCA has previously had the task of supporting contracting authorities in carrying out procurements. However, on 1 September 2015 The National Agency of Public Procurement was established and this task was passed on to them.

2.2 The Effects of the SCA's Supervisory Decisions and Reasoned Case Closure Decisions

The SCA has conducted another follow-up comprising its supervisory decisions and case closure decisions. This follow-up covers 25 decisions, of which 18 were supervisory decisions where the SCA conclude that an infringement of the public procurement regulations has occurred. The remaining seven decisions were reasoned case closure decisions. 19 out of 25 authorities responded to the survey. 14 of the 18 authorities that were subject to supervisory decisions responded to the survey. The corresponding figure regarding the reasoned case closure decisions were 5 out of 7.

The follow-up shows that 13 out of 19 (70%) respondents have or plan to implement changes regarding the management of purchasing or procurement activities following the decision of the SCA. Among the 13 respondents, who have or plan to implement changes, 12 stated that the change occurred wholly or partly in response to the SCA's decision. In addition 10 out of 13 respondents considered the changes as positive. No respondent expressed that the changes were perceived as negative.

If the results are divided up into authorities who were subject to supervisory decisions and those who were subject to reasoned case closure decisions, a clear difference is evident. Of the 14 authorities subject to supervisory decisions, 12 have implemented, or plan to implement changes. All of them state that this is entirely or partially as a result of the SCA's decision. On the other hand, of the five authorities subject to case closure decisions, only one has implemented changes, and this was not as a result of the SCA's decision.

Another question in the survey related to the areas in which changes occur. Most commonly, changes were implemented in the procurement routines or with regard to working methods.

2.3 In Conclusion - the Impact of the SCA's Supervisory Activities

The follow-up reports show that 88% of the authorities ordered to pay procurement fines and 85% of the authorities that were subject to a supervisory decision have implemented organisational changes following these supervisory activities. The changes have mainly been either wholly or partially implemented as a result of them being forced to pay fine or being subject to a supervisory decision. The opposite is true for the reasoned case closure decisions, where only one out of five authorities made changes as a result of the decision.

There are also indications that the reasoned case closure decisions are not perceived as the SCA has intended. Instead of providing an enhanced understanding of the legal matters addressed in the decisions, the contracting authorities in the follow-up seem to perceive the decisions as either an acquittal or as the SCA not taking a stance at all in the legal issues.

To sum up, experience from the follow-up suggests that supervisory activities, in the form of procurement fines and supervisory decisions, contribute not only to correct application and increased awareness of the procurement regulations, but also to organisational changes within the contracting authorities. This will benefit in establishing sound procedures and routines for public procurement and bring about a more efficient public.

For more information on the supervision of the SCA on the procurement regulations, please see SCA reports on "Five Years of Procurement Fines" and "The Benefit of Supervision" which are available on SCA's webpage: www.konkurrensverket.se.

Source: KONKURRENSVERKET (Swedish Competition Authority) (2016), "Supporting the Implementation of the 2015 OECD Recommendation on Public Procurement – The Results of the Swedish Competition Authority's Public Procurement Law Enforcement".