



New judgment from the Supreme Administrative Court approves lottery as selection method in public procurement



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The Swedish Supreme Administrative Court recently announced a judgment, in which lottery has been approved as a selection method for equivalent suppliers in selective procurement. Suppliers must now be aware that lottery can play a decisive role at an early stage of public procurement. With this judgment, it is clear that lottery can be used if the qualification criteria set are not sufficient to limit the number of suppliers to be invited to tender in a selective procurement.

Background

Public procurement by restricted procedure involves two stages. A number of suppliers are selected in the first stage and in the second stage those are invited to submit a tender. The number of suppliers selected must be at least five (if that many exist on the market). The selection process allows a comparison of the suppliers' qualifications with regard to the procurement object and their ability to perform the contract in question.

In the recent judgment, the contracting authority had carried out a public procurement of IT consultancy services using a selective procedure. The contracting authority had set requirements in the first stage to select ten

suppliers, and if more were qualified, they would be selected by random selection through lottery. Since the first-stage restriction criteria had been applied, the contracting authority found that more than ten suppliers were qualified. A lottery was then conducted to select those who would be allowed to proceed to the second stage of the procurement and submit offers.

The Supreme Administrative Court stated that neither statutory regulations, preparatory works or case law regulates what type of criteria and rules may be used to limit the number of tenderers, nor whether lottery is allowed. The contracting authority had specified the maximum number of candidates to be invited to submit a tender, as well as the requirements for qualifying as a candidate. When all other criteria set out were applied, lottery was enforced as the final selection method. Due to this, the court concluded that the procedure did not violate the procurement regulations. Lottery was thus approved as a final selection method for selecting tenderers.

What is new?

In a judgment announced in 2009, the Supreme Administrative Court approved lottery as a method to distinguish equal tenders in an open procedure. It was stated that lottery may be used in situations where the usual selection rules are insufficient, and it is appropriate to leave the distinguishing of equal tenders to chance. Furthermore, the court declared that such a method does not in itself favor one of the participants at the expense of another. For that reason, there was no obstacle in principle to the use of lottery in the case of equal tenders.

In the recent judgment, the Supreme Administrative Court explained that the differences between the selective and the open procedure in procurement do not justify a different view of lottery than the one established in the judgment from 2009. However, the use of lottery for distinguishing of tenderers requires that the contracting authority has first assessed the ability of all tenderers to perform under the contract on the basis of the qualification and limitation criteria established.

What are the effects of the judgment?

The further effects of the judgment from the Supreme Administrative Court remains to be seen. A remaining question is if the same reasoning used for the lottery of selection of candidates that will be invited to tender could be used for drawing lots in the selection of suppliers in even earlier stages. An example could be to use the method of lottery in the phase for selection of references that will be used in the qualification of tenderers.

For more information, please contact our Procurement team through Charlotte Brunlid or Åke Larsson.

