



Swedish Supreme Administrative Court Confirms Burden of Pleading in Public Procurement Reviews



Charlotte Brunlid
Lawyer, Special Counsel



Åke Larsson
Associate

The Swedish Supreme Administrative Court confirms previous case law that the applicant for judicial review of a contract carries the burden of pleading in reviews of public procurements in administrative courts.

Introduction

The Swedish Supreme Administrative Court (Sw. Högsta förvaltningsdomstolen) ("HFD") has ruled in a judgment which was delivered in the final months of 2023, that the applicant has an explicit duty to plead in review cases (HFD 2023 ref. 44). The HFD states that a case for exemption from the procurement obligation may not be based on anything other than what the applicant has invoked. This means that it is the applicant in must ensure that all facts on which a court may base its judgment has been presented to the court. The judgment confirms what has already applied according to previous practice, namely that the applicant has carries the burden of pleading in review procedures.

Background

A Swedish regional council ("**the Region**") decided to join a travel system for public transport developed in collaboration between several regional public transport administrations. The Region did not carry out any published procurement procedure. A competitor of travel systems claimed that the decision to join the new travel system constituted an illegal direct award of contract.

The Administrative Court in Växjö rejected the competitor's application and referred in its decision to case law stating that the applicant has the burden of pleading in review procedures. The Administrative Court found that the competitor had not made it likely that the conditions under Chapter 3, Section 17 the Act on Procurement in the Utilities Sector (*Sw. lag (2016:1146) om upphandling inom försörjningssektorerna*) ("**LUF**") for exemption from the obligation to carry out the procurement in accordance LUF had not been met. The competitor had only claimed that one of the conditions for exemption under the provision was not met. Under Chapter 3, Section 17 LUF (the so-called Hamburg exception), contracts between two public authorities are excluded from the scope of LUF provided that the purpose of the contract is to establish or implement a cooperation between the authorities, that the cooperation is governed solely by considerations relating to the public interest, and that less than 20 percent of the activities covered by the field of cooperation is carried out on the open market.

The Administrative Court of Appeal in Jönköping reversed the Administrative Court's judgment because the Region had not shown that all the conditions for exemption under Chapter 3, Section 17 LUF were fulfilled. Because the Region, as the contracting authority, had the burden of proof (as opposed to the burden of pleading) that all the criteria for exemption was met, the Administrative Court of Appeal ruled that the Region had breached the provisions of the LUF when not advertising its procurement.

The question when the case was tried by HFD was whether an Administrative Court may base its decision in a review procedure on circumstances that the parties had not invoked. HFD stated that the Administrative Court must ensure that the case is investigated as much as its nature requires. At the same time, HFD referred to the fact that a court's decision should only be based on what the documents in the case show and what has otherwise been alleged in the case. HFD referred to its prior judgment RÅ 2009 ref. 69 and stated that the starting point in review procedures should be that the party claiming that a procurement is incorrect – in this case the company – should state the grounds for its complaint in a clear and unambiguous manner. HFD ruled that the court may not base its decision on conditions other than those raised by the applicant in a review procedure and therefore referred the case back to the Administrative Court of Appeal for a new review.

What is new?

HFD confirms previous case-law stating that the applicant carries the burden of pleading in review procedures. The Administrative Court may only base a judgment on facts invoked by the parties. HFD's decision confirms that this general rule applies in cases concerning the use of exemptions from an obligation to follow the procurement legislation. Even if the contracting authority has the burden of proof that the procurement is exempt from the procurement legislation, it is not required that the contracting authority has carried out a satisfactory investigation of its procurement obligation unless the opposite is claimed by the applicant for review.

What are the effects of the decision?

HFD's decision establishes that the party seeking to have a decision to award a contract changed in a review procedure is liable to invoke all the circumstances that can be relevant for the court's assessment. Although a

contracting entity or authority is obliged to prove that a contract can be exempted from the procurement legislation, an applicant in a review procedure is required to invoke every single circumstance that the contracting authority was responsible for investigating.

The case is a reminder of the importance of invoking all facts that may be of significance, as the nature of procurement cases means that the court's role in the procedure is severely limited.

For more information, you are welcome to contact our procurement team through [Charlotte Brunlid](#) eller [Åke Larsson](#), and we will tell you more.

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