

# Swedish regulation on public procurement

doktoral student/advokat Andrea Sundstrand



# Convicted in the EC Court

- Directive 2004/17/EG and directive 2004/18/EG should have been implemented by January 31st, 2006.
- In Sweden, the laws came into effect on January 1st, 2008.

C-258/07, Commission vs Sweden and C-259/07,  
Commission vs Sweden



# Convicted once more?

Directive 2007/66/EG on remedies, should be implemented by December 20, 2009.

In Sweden will be delayed again, probably until Spring 2010.



# Two laws instead on one

## Utilities – LUF

- Directive 2004/17/EG Directive 2004/17/EG
- Contracting authority

## Klassical sector – LOU

- Directive 2004/18/EG
- Contracting entity



# Only obligatory provisions

- The new laws only contain the obligatory provisions in the directives.
- The voluntary provisions, such as competitive dialogue etc., will not be implemented until 2010.
- Just one exception – framework agreements/contracts.



# Fundamental principles

- equal treatment
- non-discrimination
- proportionality
- transparency
- mutual recognition

”certain cross-border interest ”



# New general clause in LOU and LUF

Contracting authorities/entities shall treat suppliers in an equal and non-discriminatory way, and perform their public procurement in an open manner. They shall observe the principals of mutual recognition and proportionality when conducting public procurement.

1:9 § LOU & 1:24 § LUF



# Frameworks

- The provisions on framework agreements/contracts have been implementet in the LOU and LUFS.
- In the proposal for the new laws, the Swedish Government has stated that frameworks with all provisions laid down and with more than one supplier, must have a list of order or an allocation key (?).





# Utilities – article 30

Possible for a sector to be excluded from the directives, if the MS can show that the sector is open for competition in the relevant geographical area – de facto and de jure.

MS apply to the Commission, but can also allow contracting entities to apply.

Sweden received an exemption for production and sale of electricity on the 29 of Oktober 2007.



# Postal sector

Sweden has decided to postpone the move of the postal sector from the classical directive to the utilities directive to January 1st, 2009.

The Swedish postal authority has chosen not to follow the regulation in the classical directive before that date.



# LOV

- New Swedish legislation from 1st January 2009.
- A system that makes it possible for the end users to chose suppliers themselves, such as social and health care.
- Swedish Goverment is saying that the contracts are service concessions.



# Supervision of PP

## From 1 Sept. 2007 – Swedish Competition Authority

- large or principally interesting cases
- monitor the development in law and praxis
- supervise those c.a. that don't follow the law
- wants the possibility to take violaters to court.
- has just receiver 33 million SEK.



# News in 2010

- Non-obligatory parts of the directives
- New remedies
- New rules below the thresholds
  - 10 % limit for direct purchases?
  - weighting of award criteria?
  - generally simpler regulation?



# Not a full implementation

Sweden will (probably) not implement the provisions on

- dynamic purchasing systems or
- central purchasing agencies.

These rules are regarded as too complicated or not useful enough.



# Remedies in LOU/LUF

- Sweden had earlier decided not to make it possible to annul or make legally binding contracts lose their legal status.
- With the new remedies, Sweden has to make it possible for suppliers to go to court and annul or cancel certain illegal contracts.



# "Jäv" - inhabilitet

- LOU and LUF do not contain provisions on "jäv", since we decided that the regulations we already had was enough.
- These can be found in the 11 and 12 §§ in the Swedish administrative code.
- Jäv in public procurement is treated the same way as in other parts of the Swedish administrative organisation.





# Courtcases on jäv in pp

There are only two cases on jäv in public procurement in Sweden.

- an advisor at the award phase had had one of the bidders as a client (KamR Gothenburg no 2365-1999),
- the winning supplier had help in writing the contract documents (KamR Stockholm no 7876-04).



# Damages I

The purpose behind the provision on damages in LOU is both preventive and reparative. The formulations in the law do not make it possible to take any consideration to the kind of breach that has been made, either in awarding more or less damages, since damages are to be awarded if a court decides that there has been a breach.

It is enough that the supplier can show that he probably lost the contract because of the breach of the LOU, for him to receive full damages for lost profit.

**Ishavet, NJA 2007 s. 349**



# Damages II

If there has been an illegal direct procurement, a supplier that can make it probable that he would have made an offer if he had been given the chance, and also would have had a realistic chance of getting the contract, can get damages exceeding his costs.

There is no demand that he can show that it would have been probable that he would have been given the contract, if a proper procurement would have been made.

**Ishavet, NJA 2007 s. 349**

