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Unsound strategic bidding and the competition perspective

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Contents

SUMMARY	1
PREFACE	3
ABBREVIATIONS	4
1 INTRODUCTION	5
1.1 Background	5
1.2 Research questions	5
1.3 Relation EU / National Legislation	6
1.4 Definition of the concept: Strategic bidding	7
1.5 Method	8
1.6 Delimitations	9
1.7 Disposition	10
2 SOUND AND UNSOUND STRATEGIC BIDDING	11
2.1 General remarks	11
2.2 Sound Strategic bidding	11
2.3 Unsound strategic bidding	13
2.3.1 <i>Suppliers do not fulfill their obligations</i>	14
2.3.2 <i>Corporate strategic bidding</i>	15
2.3.3 <i>Manipulation of relative evaluation models</i>	16
2.3.4 <i>Abnormal low tenders</i>	19
2.3.5 <i>Undeclared work</i>	22
2.3.6 <i>Breach of health and safety regulations</i>	23
2.3.7 <i>Breach of Contract</i>	23
2.4 Competition aspect of UNSB	24
2.4.1 <i>General remarks</i>	24
2.4.2 <i>Anti-competitive agreements – ch. 2 § 1 KL</i>	24

2.4.3	<i>Abuse of Dominant position - ch. 2 § 7 KL</i>	27
2.5	Reflection	29
3	UNSOUND STRATEGIC BIDDING CASES	31
3.1	General remarks	31
3.2	Manipulation of relative evaluation model	31
3.3	Abnormal low tender	32
3.4	Abuse of Dominant position in public procurement – ch. 2 § 7 KL	34
3.5	Anti-competitive agreement in public procurement - ch. 2 § 1 KL	35
3.6	Reflection	37
4	REMEDIES	38
4.1	General remarks	38
4.2	Swedish Public Procurement Act	38
4.2.1	<i>Appeal and Damages</i>	38
4.2.2	<i>Exclusion of supplier</i>	39
4.2.3	<i>Rejection of abnormal low tender</i>	40
4.2.4	<i>Termination of a procurement</i>	41
4.2.5	<i>Reflection</i>	42
4.3	Swedish Competition Act	43
4.3.1	<i>Obligations and Commitments</i>	44
4.3.2	<i>Competition Fine</i>	45
4.3.3	<i>Damages</i>	45
4.3.4	<i>Trading prohibition</i>	46
4.3.5	<i>Leniency programme</i>	47
4.3.6	<i>Reflection</i>	48
5	THE INTERACTION BETWEEN COMPETITION AND PUBLIC PROCUREMENT	50
5.1	Reflection	54
6	ANALYSIS	55

6.1	Introduction	55
6.2	How can the legislator prevent UNSB?	56
6.3	Could coordination between public procurement and competition prevent UNSB?	61
6.4	Conclusion	62
	BIBLIOGRAPHY	65
	TABLE OF CASES	68

Summary

Public procurement represents almost 17 % of the EU's gross domestic product (GDP) which is why it is important to understand what unsound strategic bidding (UNSB) is and what the consequences could be if not prevented. Furthermore, it is often bigger companies that are willing to take the risk that comes with utilizing UNSB. If such UNSB is not prevented it will probably distort competition in the long run. At first it will probably cause the prices to get lower on the market for the contracting authorities; but, later on it will enable bigger companies to expand and acquire larger market shares and finally cause fewer players in particular markets. So the question that arises is, how can this situation be prevented? UNSB isn't per se illegal, at the moment. But, as this thesis will argue, competition will be distorted if UNSB is not prevented and, therefore, the legislator should overlook the interaction between competition and public procurement.

The Swedish public procurement act (LOU) is a procedural law that explains how the contracting authorities should execute a procurement procedure and there are certain remedies in order to stop certain types of the UNSB behaviour, if they become noticed. But, how can the UNSB types that are not solved by LOU be prevented? In my opinion competition law could be a solution. Competition law will discourage companies from using bid rigging and all other sorts of anti-competitive agreements that could occur under a public procurement procedure.

My opinion is that these two systems should coordinate with each other to ensure effective competition. Furthermore, it should be noted that all UNSB problems cannot be prevented, currently, under LOU and therefore there is a need to educate the personnel at the contracting authorities so as they might detect such UNSB behaviours as well as to do competition assessments. These potential remedies would prevent the UNSB behaviours before they occur. Notably, the remedies that are under LOU, especially those for

exclusion of a supplier and rejection of abnormally low tenders, are needed to be coordinated with the provisions under competition law especially ch. 2 § 1 and 7 in the Swedish competition act in order for the prevention to be successful.

Preface

This paper marks the end of my law studies. It has been five fantastic years with of course some ups and downs. Now the real adventure begins. I want to thank my family and my better half for all the support through it all. I hope I can re-pay all of you somehow.

Last but not least, I would like to express my genuine appreciation to my supervisor Henrik Norinder for his expertise, open and timely advice, and constructive criticism without which this thesis could not have completed as is. Thank you again..

Abbreviations

UNSB	Unsound strategic bidding
SCA	Swedish Competition Authority
KL	Swedish Competition Act (2008:579)
LOU	Swedish Public Procurement Act (2007:1091)
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Background

The Swedish competition authority has acknowledged a problem concerning manipulation of public procurement procedures—that is, unsound strategic bidding (UNSB). UNSB occurs mostly in industries such as office materials, food and engineering. UNSB in public procurement procedures is not illegal but it might affect the outcome of public procurement procedures in a negative way. Companies/suppliers might very well win procurements, which they rightfully should not, and the consequences might be 1) the exclusion of other companies from the procurement procedures and 2) a subsequent distortion of competition. Further, such a procurement procedure will inevitably cost more for the taxpayers than if UNSB had not affected the procedure.¹

This essay will try to shed light on what UNSB is, and moreover, to analyze the UNSB through both public procurement and competition perspective. UNSB is a problem that affects the market negatively and that is why these two areas should be coordinated in order to prevent the behaviours. The competition perspective in public procurement procedures is important to consider because it is often bigger companies that have the resources to use UNSB, in the form of being a dominant company abusing its position to win public contracts by, for example, the submission of abnormally low tenders or through the existence of an anti-competitive agreement with a competitor about not interfering in the procedure.

1.2 Research questions

The questions that arise:

1. How can the legislator prevent unsound strategic bidding?

¹ <http://www.offentligaaffarer.se/2011/06/21/se-upp-med-osunda-strategiska-anbud/>, 2015-03-02.

2. Could coordination between public procurement and competition prevent unsound strategic bidding?

The main objective with the essay is, as stated above, to research UNSB and how it relates to public procurement and competition. Hence, UNSB is a problem that occurs in public procurement, but also affects competition.

Lundvall and Pedersen have acknowledged three different kinds of unsound strategic bidding, but the differentiation between them is a little ambiguous because there are behaviours that overlap with each other; for example, corporate strategic bidding could be something that is attempted in order to manipulate relative evaluation models. The three different categories are:

1. Suppliers do not fulfil their obligations
2. Corporate strategic bidding
3. Manipulation of relative evaluation models

UNSB includes also the problem with abnormal low tenders, which will be addressed subsequently in this thesis.

1.3 Relation EU / National Legislation

In some competition cases there are some forms of anti-competitive behaviours in procurement procedures which could fall under the definitions for UNSB, as for example corporate strategic bidding could be something that a dominant firm does in order to exclude a competitor from the market, which therefore could be a problem under ch. 2 § 7 KL, known as predatory pricing. It might also be seen as an anti-competitive agreement, or “cartel”. A cartel can exist where a company has concluded an agreement with its parent company in order to give an abnormally low tender in the procurement. The UNSB could have the same negative outcome whether it is seen through competition law as an anti-competitive agreement, or public procurement as corporate strategic bidding. I do not agree with Lundvall and Pedersen that UNSB does not have any withstanding effects on the market

and will demonstrate the need to coordinate competition and public procurement through the concept of UNSB. The concept shows the collision between public procurement and competition where the interaction does not function in its full extent.

The essay will be based on material from the EU, such as public procurement directive, articles 101 and 102 TFEU and certain case law. The aim is not to answer the questions from a different perspective than the Swedish. The case law has been used to strengthen the discussion about the interaction between public procurement and competition. This case law highlights the current state of the interaction between public procurement law and competition law. I am also aware of that a large part of the essay depends on Swedish legal sources, which will cause problem for non-Swedish speaking people to check the sources. This is the case because a large part of my essay centers on Swedish law.

Swedish legislation, such as LOU and KL, is mostly used throughout this essay but both regulations are based on the requirements of EU law. The paper is therefore based on overarching EU law but the concept and the criticism against the two systems were more effectively presented, as well as more interesting for me as a Swedish practitioner, under national legislation.

The Swedish public procurement act is based on the classical directive 2014/24/EU and the Swedish competition act is based on art. 101 and 102 TFEU.

1.4 Definition of the concept: Strategic bidding

Unsound strategic bidding will be defined as situations where tenderers alone or together with others breach a condition, or have the intention to do so, and that breach is contrary to the opinion of the contracting authority as

to how a supplier should act. UNSB leads unambiguously to a poorer outcome in the procurement procedure because competition is distorted if it occurs.

Sound strategic bidding is a situation where one utilizes knowledge of the market to obtain or create an advantage over the contracting authority and other bidders. This is a situation where one might bend the laws and regulations but do not breach them. More examples will follow.

1.5 Method

This thesis utilizes the traditional judicial method, which entails the research and analysis of traditional legal sources with a focus on laws, preparatory works and case law. The method includes a requirement to master legal source doctrine, the legal argumentation, the judicial concept formation and structure, etc.² Almost immediately, however, I realized that even though there is much material on public procurement in the form of directives, preparatory works and case law, the question of UNSB and how to prevent it is not fully explored. An overview comparison with both legal areas was needed in order to make the reader aware of how the two systems interacted and worked. To be able to discuss a possible solution, much of the essay is descriptive. This essay should be seen as an enlightenment to the legislator and practitioners that the interaction is needed in order to prevent UNSB and the competition assessment is the solution in my opinion. But, possible solutions as to how UNSB should be regulated in detail is something this short essay cannot address. This essay aims to be accessible to readers who do not have much familiarity with Swedish law and therefore in most parts is a descriptive view of the two systems. Otherwise, it would have been difficult to discuss, and for the reader to understand, the solutions and the importance of the interaction between public procurement and competition—hence, also, the need for changes. There are several other regulations that could be affected by my solutions, which could not be

² Jareborg, *Rättsdogmatik som vetenskap*, SvJT 2004 p. 4.

analysed in this essay, due to the space, but is of importance if or when legislation attempts to solve the problem of the interaction between public procurement and competition, in detail. They would then need more indepth analysis of the systems and provisions that will be affected, in other words a preparatory work.

1.6 Delimitations

This essay does not have the ambition to cover the interaction between public procurement and competition in detail. Instead the essay is more of an overview in order for a reader to see the problems that are created by the non-existence of interaction between public procurement and competition law. Hence, the focus will be on the issue of UNSB. There are two sides of a public procurement transaction, and anti-competitive behaviour can occur on both sides of this transaction. However, the thesis is only going to cover restraint of competition created by the tenderers and not by the procurers. A selection of particularly interesting judgments will be utilized to serve as a background for the question about the coordination between competition and public procurement. The analysis will contain a discussion whether LOU could prevent UNSB and/or if coordination between competition and public procurement could otherwise be a solution. The reader should be aware that this essay requires the reader to have basic knowledge of public procurement law and competition law, because it will start by explaining the issue of unsound strategic bidding under the two legal areas. The essay will focus on the Swedish laws, LOU and KL but the Swedish laws are of course based on EU directives and regulations. The issue as such, UNSB, is relatively new which has made the research more interesting because there are not that many relevant articles or literature. Nonetheless, the subject is of major importance and both practitioners and legislators should be made aware of the corresponding legal issues so as to prevent or avoid said issue in the future.

The essay has the point of view that UNSB has a negative outcome because it distorts competition and therefore needs to be prevented.

1.7 Disposition

The essay begins by outlining the concept of sound and unsound strategic bidding. The object is to show unsound strategic bidding through a public procurement perspective as well as the competition aspect. As stated before, UNSB is a problem in public procurement and mostly the same problem could fall under competition law. Moreover, chapter 3 will deal with important cases on the area that will exemplify the non-existing coordination between the regulations. Chapter 4 will go through different remedies that are available. In chapter 5, there will be some arguments to shed light on the problem with non-existing coordination between the two legal areas. Lastly, in chapter 6 the questions should be discussed and a conclusion will be made.

2 Sound and unsound strategic bidding

2.1 General remarks

In this chapter I will try to explain sound and unsound strategic bidding. Firstly, a distinction will be made between UNSB under public procurement and what the problems are and how the problems could occur under competition law. The behaviour could have the same consequences but be dealt differently depending on which law is applicable. I remind the reader that the focus is on the behaviour and how the behaviour in public procurement procedures can be prevented. There are cases that will be analysed in the next chapter, where UNSB has occurred in public procurement procedures but has not been dealt with through Swedish public procurement act (LOU) but where the Swedish competition act (KL) is applicable.

2.2 Sound Strategic bidding

Sound strategic bidding does not necessarily lead to a poorer outcome. For example, “sound”, or only strategic bidding could occur where a tenderer has better information about the upcoming actual sales volume that is needed than the contracting authority. The tenderer could use that knowledge advantage to increase his chances to win the procurement.³

In this way, the company can submit a bid in which the authority has overestimated the need in a category, why the price is set low, and in other categories where the prices are increased slightly. For example, if a municipality for a building project believes that it needs to dispose of four tons of mud and buy one ton of gravel, this would be stated in the tender document. Think now of the situation that the municipality, in reality, only

³ Lundvall and Pedersen, *Osund strategisk anbudsgivning i offentlig upphandling*, p. 8.

disposes of two tons of mud but needs to buy six tons of gravel. A construction company with local knowledge that knows the proportions that will actually be needed could use this knowledge and submit a bid with a low price to ship the mud and a high price on gravel, without partaking in UNSB.⁴

There are several other situations where a tenderer can exploit weaknesses or ambiguities in a tender document or in an evaluation model without being considered to have partaken in unsound or reprehensible behaviour. On the contrary, it is a natural commercial behaviour when the tenderer attempts to make the bid as competitive as possible on the conditions that the contracting authority has set in the tender document.⁵

An example of strategic bidding, that is not unsound, is a situation where the contracting authority has requested products that are incomplete. If the supplier knows that the contracting authority will have to make additional purchases in order to get a working product but these enhancements are not evaluated in the procurement, then it is likely that the bidder shall lower their prices on the products which are being evaluated and raise their prices on the parts of the product that are not evaluated. This may not, in itself, be said to be UNSB.⁶

There may also be economic or business reasons for having abnormally low prices, for example if there is an economic recession, the demand from the market will reduce and that will increase competition for the public contracts. Expensive warehousing and goods with a short lasting time can also be a reason for an abnormally low bid. The products can already have been produced and just take up storage space and therefore the company can make an abnormally low bid. Moreover, it could be the best way to for new market entrant to penetrate into a untapped market and/or provides a

⁴ Lundvall and Pedersen, *Osund strategisk anbudsgivning i offentlig upphandling*, p. 45.

⁵ Lundvall and Pedersen, p. 27.

⁶ Lundvall and Pedersen, p. 45-46.

good customer reference for future business. These are just some reasons and explanations why a company might want to submit a tender which will inevitably prove to be a loss for the company.⁷

If the abnormally low tender could be a loss seen in isolation, but there could be other benefits that the supplier value higher, then there isn't any rational basis for the contracting authority to reject such an abnormal low offer under the provision ch. 12 § 3 LOU. Simply, whether a bid might potentially be abnormally low and be subject to rejection is difficult determination for a contracting authority to make.⁸

2.3 Unsound strategic bidding

Lundvall and Pedersen have recognised three types of different unsound strategic biddings in public procurement procedures:

“1. Suppliers do not fulfill their obligations

For example, they do not to supply low-priced goods/services, or substitute these items for a more expensive option.

2. Corporate strategic bidding

Two or more firms, typically in the same group, adjust their bids so that they in a framework agreement are ranked better. Then, when it is time to deliver, they only offer the "normal" priced products, and send the other deliveries for low-priced products on to a group colleague.

3. Manipulation of relative evaluation models

A company sends in a "dummy" bid to make it easier for another company to win a contract in which a relative evaluation model is used.”⁹

The general finding of Lundvall and Pedersen is that the costs of UNSB is not equivalent to higher prices for the goods and services that contracting

⁷ Lundvall and Pedersen, p. 27 ff.

⁸ Lundvall and Pedersen, p. 28-29.

⁹ Lundvall and Pedersen, p. 10.

authorities buy. Instead, UNSB seems only to have increased the administrative costs, such as managing the trials, cancellation of contracts and lack of delivery. These costs are difficult to measure, but Lundvall and Pedersen's conclusion is that said costs are huge. Low bids from especially large suppliers thus risk the eventual elimination of smaller players on the market who do not have the resources to be able to take the risks that are associated with abnormally low bids.¹⁰ On the other hand, it appears evident that a certain danger exists in that competition might not only be reduced but also completely eliminated by the UNSB and, thus, it is important to coordinate competition with public procurement.

So what are the remedies that are applicable in order to prevent these UNSB behaviours? In LOU there is exclusion of a supplier, damages, fines or rejection of tender. The question still remains, are these remedies sufficient in order to prevent UNSB in public procurement procedures? This will be examined more in-depth later on in the essay. When it comes to the competition aspect of UNSB, the remedies are damages, fines, prohibition to engage in commercial activities, and interim measures with or without penalty payment. More about the remedies and case law can be found in the chapters 3 and 4.

2.3.1 Suppliers do not fulfill their obligations

The first type of UNSB is where tenderers submitting tenders with prices and other conditions that the bidder does not intend to comply with during the contract period. They offer favourable terms, which the tenderer does not intend to apply, which increases the bidders chances of being awarded the framework agreement in the procurement procedure. The conduct means that other bidders, which expect to meet its obligations and therefore calculate with higher costs, do not get the chance to be awarded the framework agreement. This conduct might also result in higher overall costs for the contracting authority. This type of problem mostly occurs with

¹⁰ Lundvall and Pedersen, *Osund strategisk anbudsgivning i offentlig upphandling*, p. 48.

regard to framework agreements with a tenderer but should be able to occur with framework agreements that require renewed competition as well.¹¹

2.3.2 Corporate strategic bidding

The second category of UNSB is corporate strategic bidding. This is where several tenderers that usually, but not necessarily, belong to the same group of corporations, coordinate their bidding in the procurement process. Each tenderer submits tenders with more favourable terms in one category each—for example, a price of zero kronor—but less favourable conditions in the other categories. The more favourable conditions in one category result in all the tenderers obtaining a good average score and therefore inclusion in the framework agreement and, in cases where ranking is applied, potentially a higher ranking in the framework agreement. During the suborder or renewed competition, however, the primary supplier declines to deliver in the category which he gave the most favourable terms in and to submit a new bid for the benefit of another interested tenderer (belonging to same corporate group) with a higher price and a higher price ceiling (or otherwise more favourable terms). This type of problem can only occur in agreements with several tenderers.¹²

Supplier	Service A SEK/hour	Service B SEK/hour	Average Price SEK/hour
A	4	0	2
B	0	6	3
C	6	2	4

In the table above, two companies that coordinate their bidding can manipulate so as to win a procurement by giving an abnormally low bid in one category and standard bids in the other. As one can observe, the average

¹¹ Lundvall and Pedersen, p. 40; SOU 2013:12, p. 153-154.

¹² Lundvall and Pedersen, *Osund strategisk anbudsgivning i offentlig upphandling*, p. 40-41.

price is lower for companies A and B, because of the abnormally low bid in one category each. As stated earlier, where the suborder or renewed competition is at hand, then the primary supplier, company A, might decline to deliver in for example (service B) because then the other company B will take over the assignment to supply and the cost for the contracting authority will be much higher than if company C would have been included in the framework agreement. This is a behaviour that might fall under competition law as well and might be prevented if competition assessments are undertaken on a regular basis. More about this problem can be found within chapter 2.4.

2.3.3 Manipulation of relative evaluation models

The basis for the award of a contract at the assessment stage is separated between two distinct types—the lowest price and what is economically most advantageous. Lowest price allocation means that the purchaser chooses the tenders, which meet all requirements, and has the lowest tender price. When selecting the lowest price, the tenders shall not be compared in any other way than the price. This award decision is suitable if the contracting authority has insight on what kind of quality is required or available on the market. Thus, the quality requirements can be set high and must be met by all the tenders before the evaluation. It must be clearly stated in the tender documents what is considered to be included in the total price and how the price is evaluated.¹³

The most economically advantageous tender is determined on the basis of both the quality aspects of the tender as well as the overall price. Again, it is important that the award criteria and the valuation of said criteria are described in the tender document prior to any tender. The award criteria are what make a bid more beneficial than another, in both quality aspects but also in price. It should also be the same requirements for the tenderers

¹³ Molander, Per (2009). *Regelverk och praxis I offentlig upphandling*. p. 37-39; Upphandlingsstöd (2010), *Anbudsutvärdering vid offentlig upphandling och tjänster*, p.6-8.

on how they can achieve the given criteria. Normally, evaluation criteria are based on the use of scales that are either set in points or in monetary values. There are several requirements upon award criteria. The criteria must address the product / service and not the supplier or its ability to deliver a given product / service. They must be measurable and verifiable. They should not give the contracting authority unrestricted freedom of assessment and they must comply with EU law principles including, but not limited to, transparency and non-discrimination.¹⁴

The most common way to evaluate differing tenders is through a relative evaluation model that puts points on the submitted tender that weighs both quality and price. Then the contracting authority evaluates and awards the tenderer a score. For example, a contracting authority that uses the award criterion of the most economically advantageous tender, states in the tender documents that the tenders will be evaluated in terms of price and quality, each of which will carry equal weight in the evaluation. This opens up opportunities for bidders to bid with strategic attempt to influence the outcome of the procurement.¹⁵

For example, company A and B has submitted tenders that are shown in Table 1 below. A's tender implies a lower price but also a lower quality than the supplier B's tender. In order to balance the quality and price so that the offers can be compared, the following formulas below are used to transform the tender price and quality to a price and quality score in points.¹⁶

The formulas:

Price Score = (lowest price / bid price) x100x0.5, where 0.5 indicates the importance the contracting authorities said they attach to the evaluation criterion of price.

¹⁴ Upphandlingsstöd (2010). *Anbudsutvärdering vid offentlig upphandling och tjänster*, p. 6-8.

¹⁵ Lunander. A & Andersson A., p. 6.

¹⁶ SOU 2013:12, p. 152.

$Quality\ Score = (bid\text{-}quality / high\ quality) \times 100 \times 0.5$ where 0.5 indicates the importance the contracting authorities attach to the evaluation criterion of quality.¹⁷

Table 1 – Relative Evaluation model which is NOT manipulated¹⁸

Supplier	Price	Quality	Price Score	Quality Score	Total Score
A	10	6	50	30	80
B	15	10	33	50	83

Table 2 - Relative Evaluation Model which is manipulated¹⁹

Supplier	Price	Quality	Price Score	Quality Score	Total Score
A	10	6	50	23	73
B	15	10	33	38	72
C	40	13	13	50	63

Column three and four in the tables shows the price and quality scores which have been calculated with the above formulas. Now, when the evaluation criteria are expressed in the same unit, points, they can easily be compared with each other. The relative evaluation model, however, has several basic inherent weaknesses (shown with table 2), which makes it, according to SCA, open for manipulation, so-called UNSB.²⁰

The first criticism against the model is that the contracting authority or entity does not need to consider how the different evaluation criterias relate to each other. The fundamental question that the contracting authority needs to consider is if the difference in price between the two bids (see table 1), 5 kronor, is worth more than the difference in quality, equivalent to 4 points. If so, then supplier A's bid is economically more advantageous than the competitor's bid. If this is not the case, but the contracting authority considers that the difference in quality is more important or more valuable

¹⁷ Lundvall and Pedersen, *Osund strategisk anbudsgivning i offentlig upphandling*, p. 42.

¹⁸ SOU 2013:12, p. 153.

¹⁹ Lundvall and Pedersen, *Osund strategisk anbudsgivning i offentlig upphandling*, p. 43-44.

²⁰ SOU 2013:12, p. 154.

than the price difference, then supplier B's offer should or must be accepted. Therefore, there is a clear risk that the contracting authorities or entities using this model do not choose tenders which are in actuality the most economically advantageous.²¹ The second criticism concerns the evaluation model's sensitivity to the tenders that are received. Suppose in the above example that a third supplier C submits a tender whose price is 40 and whose quality aspect is estimated at 13 points (see table 2). What happens when applying the formulas for price and quality score is that the ranking between the first two tenders A and B are reversed. When only A and B were compared through the relative tender evaluation model as the basis, the supplier B's bid appeared as the most favourable. When supplier A and B are compared with another tenderer, C, the result is rather that A's bid appears to be the most economically advantageous. The contracting authority's evaluation of A's and B's tender is thus affected by the presence of a third tenderer, C, which is not particularly attractive.²² The example illustrates thus a situation where a dummy bid can contribute to enable another bidder to win, than what otherwise would have occurred.

2.3.4 Abnormal low tenders

There are situations where a tender is so low that there may be reason to suspect that some misunderstanding has arisen, that the tender was based on incorrect assumptions, or that the tenderer is not serious in its commitment to deliver according to what is proposed in the tender. Contracting authorities may experience difficulties in making a fair and objective examination of the bids because of the legitimate difficulty, on the basis of the bids, to assess the quality of the offered product or service. Furthermore, many times the price determines which tenderer will be awarded the procurement contract which inevitably means that the pricing will be of primary importance. Too low tenders are likely to result in the bidder's

²¹ SOU 2013:12, p. 154-155.

²² Lundvall and Pedersen, *Osund strategisk anbudsgivning i offentlig upphandling*, p. 43.

inability to deliver on the tender or deliver a bid of sufficiently lower quality.²³

Ch. 12 § 3 & art 69 “Classical” Procurement directive²⁴ states:

A contracting authority that finds a tender abnormally low shall demand an explanation for it. The tender can be disqualified but only after the contracting authority has demanded in writing an explanation for the abnormal low bid and that they haven't got a satisfying answer.

Failure to deliver in accordance with the bid may, as mentioned earlier, oblige the contracting authority to implement a new procurement, which could mean higher costs for both the contracting authority and for taxpayers.²⁵ To ensure that abnormally low tenders do not prevent other bids from being evaluated in genuine competition with each other and that the most economically advantageous tender wins, the contracting authorities have the opportunity to reject abnormally low tenders.²⁶

Provisions relating to abnormally low tenders are found, for contracts above the thresholds, in ch. 12 § 3 LOU. The provision is based on Article 69 of the classical directive, and has according to the EU Court of Justice two purposes. Firstly, it aims to ensure that the most economically advantageous tender can be identified and shall protect tenderers against arbitrariness on the part of the contracting authority. The provision contains a list of information that a tenderer's declaration may apply. For procurements outside the Directive controlled area contains a similar provision in ch. 15 § 17 LOU.²⁷

As already mentioned, there are suppliers that submit tenders that appear to be abnormally low at first glance, maybe because it's set to zero SEK. A

²³ Rosén Andersson m.fl., Lagen om offentlig upphandling – En kommentar, p. 42.

²⁴ Dir. 2014/24/EU.

²⁵ Alexandersson och Hultén, *Orimligt låga bud vid upphandlingar*, p. 7.

²⁶ Lundvall and Pedersen, *Osund strategisk anbudsgivning i offentlig upphandling*, p. 29.

²⁷ Lundvall and Pedersen, *Osund strategisk anbudsgivning i offentlig upphandling*, p. 32.

zero bid is to be considered abnormally low, but there is no automatic rejection due to zero bids. It will then fall under ch. 12. 3 or 4 § LOU and must be investigated by the contracting authority.²⁸

The European Court of Justice has not had to consider such an extreme case of zero bids. But, the court has ruled that the adversarial procedure should be seen as a standpoint for when tenders are considered abnormally low. The Court has observed that the provision that gives the contracting authority a right to require explanations for tenders that are abnormally low is not an exhaustive list. The Court further has stated in that paragraph that the explanations are only examples of explanations that the tenderer may submit to show that the proposed price is seriously meant.²⁹

Tenderers, who intend to submit a tender that may be suspected as abnormally low, have rules other than LOU and the public procurement directive to take into account. Should a bidder put an abnormally low tender and at the same time hold a dominant position, said behavior may be considered an abuse of a dominant position.³⁰ The SCA thus considers that the burden of proving the seriousness of an abnormally low tender should be on the tenderer. This position is thus justified by the purpose behind the regulation concerning abnormally low tenders that would otherwise be difficult to achieve. The SCA claims in correspondingly that the purpose behind the regulation concerning abnormally low tenders, which is to save the contracting authority from having to enter unserious agreements, indicates that the burden of proof should lie with the tenderer. Arrowsmith believes, like the SCA, that the idea behind the regulation concerning abnormally low tenders aims to protect the contracting authorities from being forced to accept tenders from suppliers who will not fulfill their commitments.³¹

²⁸ C-76/81, *Transporoute*; Nord, Lag (2007:1091) om offentlig upphandling 12 kap. 3 §, Lexino 2012-07-01.

²⁹ Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani*, p. 83.

³⁰ Falk, p. 404.

³¹ Arrowsmith p. 536-538.

Falk and SCA are unanimous in the view that the contracting authority has no option to reject a tender on the ground that it is abnormally low when a bidder has provided an adequate explanation.³² Arrowsmith argues that the contracting authority cannot reject an abnormally low tender until it carries a risk of non-delivery.³³ This makes it more difficult for contracting authorities to reject such tenders and, in the end, to prevent UNSB.

2.3.5 Undeclared work

UNSB could include violations of laws and agreements of suppliers that provide competitive advantages in public procurements. It is concerning that public procurement is associated with the problem of undeclared work in forums and contexts in which fair competition and conditions are discussed. The distortion of competition is currently described as one of the most harmful consequences of undeclared work. No statistics or studies have been produced on the extent of undeclared work relating to the execution of public contracts. The available statistics do not show the extent to which the customer is public or private. SCA states that undeclared work is most common through subcontractors.³⁴

In several articles and reports about undeclared work it is stated that some industries have emerged as particularly vulnerable. The sectors that stand out in terms of problems with undeclared work are building and construction, cleaning services, employment agencies, and transportation and moving services.³⁵ The problem can generally be described as firms operating in industries with extensive undeclared work that are often forced to cheat themselves or to lose the procurement.³⁶

³² Falk p. 405; Lundvall and Pedersen, *osund strategisk anbudsgivning* p. 29-30.

³³ Arrowsmith, p. 534-536.

³⁴ Swedish Competition Authority report, *Osund konkurrens i offentlig upphandling - Om lagöverträdelser som konkurrensmedel*, p. 20.

³⁵ Almega, *Svart och vitt – Hur upptäcker jag ett oseriöst företag* (2008) p. 5; LO, *Handbok för ordning och reda på arbetsmarknaden* (2012) p. 30.

³⁶ Swedish Competition Authority report, *Osund konkurrens i offentlig upphandling - Om lagöverträdelser som konkurrensmedel*, p. 23.

2.3.6 Breach of health and safety regulations

Although undeclared work appears to be the biggest problem in public procurement, there are other offenses, which are just as harmful for the competition neutrality in public procurement such as breaches of health and safety legislation, other legislations, or simple breach of contract. The Swedish Work Environment Authority said in a report in 2012 that with an increasing number of contracts and long construction chains in combination with the difficult application of the rules on public procurement there is a risk of occupational responsibility to be unclear.³⁷

2.3.7 Breach of Contract

An additional form of UNSB is where bidders structure the bid and price on the basis that they do not intend to fulfil all obligations under the terms of the relevant agreement. This rarely becomes a violation of the law but instead is seen as a civil breach of contract. It is very important that contracting authorities writes a clear agreement that includes sanctions for breach of contract. Penalties should also be adapted to the nature and extent of various breaches of contract: that only reserve the right to cancel the contract irrespective of the manner in which the supplier breaches it. Lack of follow-up by the authority may increase the risk of unserious tenders. In a survey for suppliers, it became evident that only a quarter of the contracting authorities that award contracts regularly monitored them.³⁸ It may be related to the SCA's own inquiry, where three-quarters of the purchasers completely agreed with the statement, that increased monitoring of public contracts could reduce the risk of unsound strategic bidding. Because then the tenderers would not calculate, before submitting their tender, with that you do not need to meet all contractual obligations.³⁹

³⁷ Arbetsmiljöverket, *Förstudie kring det fortsatta arbetet med utländska företag och arbetstagare* (2012)

³⁸ Upphandlingsutredningen 2010, *Goda affärer – en strategi för hållbar offentlig upphandling*, SOU 2013:12, p. 155f.

³⁹ Swedish Competition Authority report, *Osund konkurrens i offentlig upphandling - Om lagöverträdelser som konkurrensmedel*, p. 27-28.

2.4 Competition aspect of UNSB

2.4.1 General remarks

In this section, I intend to go through the UNSB problems that may fall under competition law. As seen above, the different types of UNSB that exist might also fall under competition law. In this chapter, I will try to discuss what types of the UNSB that could fall, and be caught, under competition law, in order for us to later discuss the prevention of UNSB.

The Swedish competition act (KL) seeks primarily to protect the economy and consumers, but competitors are also protected against a company who willfully or negligently violates the regulation, which will, if caught, be ordered to pay the damages caused by its action. In other words, it can be said that the purpose of KL is to limit the negative consequences of market power, which is achieved through three main categories; prohibiting anti-competitive agreements, prohibition of abuse of dominant position and by associations of undertakings that create or strengthen a dominant position.⁴⁰ The first two categories above are the most common under public procurement.

2.4.2 Anti-competitive agreements – ch. 2 § 1 KL

Ch. 2 § 1 KL addresses the rules regarding anti-competitive cooperation, which is defined as: Agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition on the market in a significant way, are prohibited. Under this paragraph there are several forms of agreements that could fall under the concept of UNSB.

For example, collusive tendering (a.k.a. cartel bidding) occurs when tenderers/suppliers, secretly collude to raise prices or lower the quality of

⁴⁰ Nilsson, J-E. Bergman, M. & Pyddoke, R. (2005) *Den svåra beställarrollen – Om konkurrensutsättning och upphandling i offentlig upphandling*, p. 59.

goods or services in order to win a public contract. Bid rigging is illegal and can be sanctioned through competition law.⁴¹

There are many forms of bid rigging. It could be that one competitor stays out of the procurement in order for the other one to win. It could be that the competitor agrees on submitting a bid, which is higher in order for the other competitor to win the contract. Furthermore, it could be that competitors divide the market between themselves where they will not intervene in their separate procurement procedures.⁴²

Heimler elucidates the different forms of anti-competitive agreements in public procurement procedures and stresses that said forms are hard to detect because the leading companies create an artificial environment that looks competitive from the outside.⁴³

“Bid rigging agreements generally fall into the following categories:

Bid suppression. One or more competitors agree to refrain from tendering or to withdraw a previously submitted tender so that another company can win the tender. The parties to the agreement may administratively or judicially challenge the tenders of companies that are not party to the agreement or otherwise seek to prevent them from tendering, for example, by refusing to supply materials or quotes for subcontracts.

Complementary bidding. The competing companies agree among themselves who should win a tender, and then agree that the others will submit artificially high bids to create the appearance of vigorous competition. Or, the losing companies may submit competitive prices, but along with other unacceptable terms.

Bid rotation. The competitors take turns being the winning tender, with the others submitting high bids. The companies

⁴¹ OECD, *Guidelines for fighting bid rigging in public procurement*, p. 1.

⁴² OECD, *Guidelines for fighting bid rigging in public procurement*, p. 2-3.

⁴³ Alberto Heimler, *Cartels in Public Procurement*, *Journal of Competition Law & Economics*, Vol. 8, No. 4 (2012), p. 853.

agreeing will generally try to equalize the tenders won by each over time. A strict pattern of rotation is often a clue that collusion is present.”⁴⁴

These different categories of bid rigging are what could fall under the concept of UNSB and, furthermore, manipulation of relative evaluation models and corporate strategic bidding.

Cartels are more likely to be found in public procurement, because the numbers of participants are limited. It could be defined as secret agreements that are established between potential market rivals with the sole scope of not competing with each other. Bid rigging is the cartel practice mostly used in public procurement.⁴⁵ The SCA has interviewed practitioners which have stated that, where there are suspiciously high prices, big differences, too much similarity between the tenders, constantly winning firms, questionable subcontract practices or suspect joint tenders, then public authorities might be facing bid rigging practices.⁴⁶

The prohibition for anti-competitive agreements relates not only to the contracts involving an actual distortion of competition but the law also covers the intention. This means that an agreement that has the intent or purpose to prevent, restrict or distort competition, but in itself is not a restrictive effect on the market, is to be considered prohibitive of competition and may result in sanctions.⁴⁷ In recent years, infringements of the competition rules and the penalties for these offenses have become tougher. One of Sweden's highest fines ever imposed amounted to 1 700 million SEK in the so-called “asphalt” cartel, where the SCA found that the companies cooperated regarding paving work in major parts of Sweden.

⁴⁴ Alberto Heimler, *Cartels in Public Procurement*, Journal of Competition Law & Economics, Vol. 8, No. 4 (2012), p. 853-854.

⁴⁵ Alberto Heimler, *Cartels in Public Procurement*, Journal of Competition Law & Economics, Vol. 8, No. 4 (2012), p. 849.

⁴⁶ Swedish Competition Authority, *Twelve ways to detect bid-rigging cartels*, seen on Konkurrensverket's webpage on 2015.04.06.

⁴⁷ Nilsson, J-E. Bergman, M. & Pyddoke, R. (2005) *Den svåra beställarrollen – Om konkurrensutsättning och upphandling i offentlig upphandling*, p. 59.

Tenderers were found to have coordinated their bids in advance and also to agree on a strategy for bidding. Four of the cartel members were major players in the market; NCC, Skanska, the Swedish Road Administration Production and Peab; moreover, there were a few other small businesses with the cartel.⁴⁸

2.4.3 Abuse of Dominant position - ch. 2 § 7 KL

The rules regarding abuse of dominant position are found in ch. 2 § 7 KL. What constitutes as an abuse is summarized in KL in four points:

1. Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
2. Limiting production, markets or technical development to the prejudice of consumers;
3. Applying dissimilar conditions to equivalent transactions, thereby trading parties at a competitive disadvantage;
4. Pushing to conclude an agreement by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of the agreement.

For a company to be presumed to be dominant, it requires a market share of approximately 40 to 50 percent. Similar to EU law, it is not forbidden for one or more companies to hold a dominant position but if companies are abusing and exploiting their market position it is contrary to the law. This means that the behaviour of an undertaking in a non-dominant position is allowed while the same behaviour of an undertaking in a dominant position could be prohibited. In procurement procedures, predatory pricing and the multiple discount offers are two behaviours that are to be considered as an abuse of dominant position. Predatory pricing is where a dominant firm chooses to charge a price that is below the business variable costs. There may also be a case of predatory pricing when the price is in the range

⁴⁸ Nilsson, J-E. Bergman, M. & Pyddoke, R. (2005) *Den svåra beställarrollen – Om konkurrensutsättning och upphandling i offentlig upphandling*, p. 98-99.

between the company's average variable and average total costs. Normally, it must be demonstrated that the price is set to consciously try to exclude a competitor.⁴⁹ Predatory pricing is something that could fall under the concept of UNSB. It could both be corporate strategic bidding and manipulation of relative evaluation model. In other words the company is directly or indirectly imposing unfair selling prices or other trading conditions.

The difference between low tenders founded in a market under price pressure and low bids based on a strategic predatory pricing may be difficult to detect for competition authorities in the Member States.⁵⁰ A predatory pricing strategy involves a dominant player that lowers its prices in order to close out competitors from the relevant market. Once this objective is fulfilled, then the prices will increase in order to compensate for those costs that the predatory pricing resulted in.⁵¹

In the Market Court, for a finding of predatory pricing, they used a comparison between the tender price and the costs, variable as well as total, which the tenderer had. The court has also hinted that there is possibilities for a dominant player to defend a tender lower than the variable costs. To reverse that presumption requires clarification with regard to the purpose of the tender, which may not be anti-competitive. The dominant tenderer in the SJ-case argued that the abuse did not exist when there was no opportunity to retrieve the costs. The argument was that if the dominant tenderer (SJ) raises the prices at a future procurement then someone else would have won that procurement.⁵²

Another behaviour that dominant firms should be aware of in public procurements is cross-subsidies. That companies transfer resources to its

⁴⁹ Nilsson, J-E. Bergman, M. & Pyddoke, R. (2005) *Den svåra beställarrollen – Om konkurrensutsättning och upphandling i offentlig upphandling*, p. 60-61.

⁵⁰ Jones & Sufrin p. 392.

⁵¹ Wetter m.fl. p. 594.

⁵² MD 2000:2.

different group companies is something that occurs daily and is usually not something reprehensible behaviour. It may for a dominant player, however, imply an abuse to use cross-subsidies to impede competition in a market, especially in a public procurement procedure. Cross-subsidies can be used to finance predatory pricing as the low price level imbedded in predatory pricing makes possible potential domestic support measures within the company group.

2.5 Reflection

The different forms of UNSB can be viewed through both competition and public procurement. As mentioned above, the corporate strategic bidding under public procurement could be viewed as an anti-competitive agreement under competition law but also, if there is few market players, as an abuse of dominant position. LOU potentially can prevent some types of UNSB such as abnormally low tender. In LOU, there are remedies in order to prevent such behaviour as is evidenced by the case law in the following chapter. LOU does not actually prevent all types of UNSB and this is why I ventured to examine the possibility of utilizing competition law to be able to prevent UNSB. Could competition law ch. 2 § 1 and 7 be a solution? Is this a sufficient deterrent? Lundvall and Pedersen have acknowledged that there is a problem with UNSB but in my opinion they are overly focused on LOU and have not actually considered the practical consequences—which is distortion of competition. A solution could be to have an obligation to do a competition assessment in procurements. In the preamble to the procurement directive, it is stated that competition should be considered in a public procurement procedure; but, the assessment hasn't been applied in reality.

For example, some of the other unsound strategic forms such as undeclared work and breach of safety regulation will not actually be analysed in-depth because they are violations of other regulations, which my essay won't examine further. Instead, the focus is on the concept of UNSB, which is not

illegal but very well should be on multiple levels. Moreover, it is important to know that companies could use undeclared work, in order to give an abnormally low tender and therefore also fall under the concept of UNSB. In my opinion, which is contrary to Lundvall and Pedersen, UNSB distorts competition and prevents the full functioning of the internal market and not just higher administrative costs. I am afraid that if UNSB is not prevented, the fact that the major suppliers are more likely to identify loopholes within the regulatory framework for UNSB and thus utilize these opportunities might result in suppliers' strengthening of market position in relation to smaller or newly established providers/tenderers. It is therefore possible that UNSB in the long run can lead to entry barriers on the market and contribute to fewer new companies that can manage to establish themselves as suppliers for the public sector.

3 Unsound strategic bidding cases

3.1 General remarks

In this chapter, the purpose is to explain some of the most important cases in the area of UNSB that could shed some light on the non-existing interaction between competition and public procurement. Some of the UNSB problems could not be found in the case law but are still relevant for the essay as such. In the preamble to the public procurement directive it is stated that competition law considerations should be regarded in the procedure but all cases in Sweden have only considered LOU or KL separately.

3.2 Manipulation of relative evaluation model

In Administrative Court of Appeal 471-14, Leksand Bostäder AB and Leksand Municipality (the municipality) carried out the public procurement for ventilation equipment. Belab Ventilation AB won the contract but then then municipality canceled the contract in that Belab had manipulated the evaluation model in order to win. Belab had offered 0 per hour for the work to be performed outside normal working hours, which meant that Belab would reject the work to be performed outside normal working hours. Belab had also left numerous varying discounts that made it harder to evaluate the tender in comparison to the other bidders. The court stated that the evaluation model could be manipulated in the way that it could not secure that the most economically advantageous tender wins. This is against the purpose of LOU and the decision to cancel the contract thus rested on objectively acceptable reasons.⁵³

⁵³ Administrative Court of Appeal 471-14, p. 4-5.

3.3 Abnormal low tender

The purpose of the provision in ch. 12 § 3 LOU is to protect the contracting authorities so that they can reject tenders that are not reputable. The assessment of whether the tender prices shall be deemed low should be made in relation to the procurement object. The contracting authority has the burden of proving that the circumstances are such that the tender price itself is so low that there are grounds for doubting its seriousness. The burden of proof that the tender is serious is then transferred to the tenderer. The provision of the directive, which is the basis for ch. 12 § 3 LOU gives the contracting authorities broad discretion to determine whether a tenderer's explanations for his tender shall be deemed sufficient for the tender to be evaluated or in spite of the explanations, should be rejected.⁵⁴

One case concerning abnormal low tenders that has been sent to the Supreme Administrative Court is the Rexab Flytt and Flyttningsbyrå case. It was a procurement procedure between Eskilstuna municipality and two moving services companies. Here the contracting authority wanted an explanation of the price list that Rexab Flytt AB ("Rexab") and Flyttningsbyrå had sent in. The explanation were that they looked at the procurement contract as a whole, and decided that the contract weighed in total would have positive effects for Rexab and Flyttningsbyrå in spite of that some posts would be done at loss. They also stated that the contract in total would not jeopardise the companies in regards of risking bankruptcy. The municipality stated that they were afraid that the suppliers would not deliver and also that the companies (Rexab and Flyttningsbyrå) prices were only half of the other suppliers. Here the court took into consideration the companies' annual turnover in relation to the contracts' total worth which was only 4 % of the turnover for Rexab. This was an indication that the company has other customers that can be relied upon and that this contract in spite of being done at loss would not jeopardise bankruptcy. The court

⁵⁴ Swedish Competition Authority report, *Osund konkurrens i offentlig upphandling - Om lagöverträdelser som konkurrensmedel*, p. 59-60.

also recognised that a parent company with good financial status could be a reason to be considered when looking at the explanation of abnormal low tenders from subsidiaries, especially since Flyttningsbyrån was a relatively new founded subsidiary but had a parent company with good financial status. The conclusion was that the companies' tenders should not have been rejected from the procedure, because they had sent legitimate explanations for the low tenders and shown the seriousness of the tender. The highest court in Sweden, in these matters, are now yet to decide if the judgment have been done right.⁵⁵ The ECJ has ruled that the burden is on the tenderer to prove that the tender is meant seriously and therefore does not put the burden on the contracting authority to first prove the tenders' unseriousness.⁵⁶

The tenderer's right to clarify its tender, is important so that the contracting authority shall not be able to make arbitrary decisions. In order for this requirement to be met, the contracting authority's request has to be clearly expressed in order for the bidder to understand how the authority perceives the tender as abnormally low. If a bid, after a left explanation, cannot be considered abnormally low then the tender may not be rejected on the basis of the provision in the procurement directive, art 69, or ch. 12 § 3 LOU.⁵⁷

In Administrative Court of Appeal 6230-13, the court states that there is no definition in LOU or the EU directive on what is an abnormally low tender. Nether is it defined in the case law. The SCA defines it as a tender which the contracting authority could reject after have followed the procedure in LOU. Furthermore the court has established that the burden of proof is the contracting authoritys', in regards to show that there are reasons to question the seriousness of the tender because of the abnormal low price. If they have

⁵⁵ Administrative Court of Appeal 1165-1166-14, announced on 2014-10-29 in Jönköping, p. 5-6.

⁵⁶ C-599/10, para. 29.

⁵⁷ C-599/10 para. 31.

reasons for questioning the seriousness then it is up to the tenderer to show the court that it is serious.⁵⁸

3.4 Abuse of Dominant position in public procurement – ch. 2 § 7 KL

An individual has in a letter to SCA questioned whether Samhall AVEBE AB competes on equal terms regarding the operation and maintenance of the park and streets. In the letter, the complainant stated that the company has used predatory pricing in a procurement procedure conducted by the City of Stockholm in spring 1994. The Competition Authority stated that Samhall does not appear to be dominant, why the prohibition of abuse of dominant position, ch. 2 § 7 in KL was not applicable in this case. The competition authority acknowledged that the calculation of a company's market share assumes that the relevant market is defined. The relevant market is defined through determining both product market and the geographic market.

The relevant product market is where the buyers consider the products interchangeable. The relevant geographic market was determined to Sweden or part thereof. For the determination of the relevant geographic market, transportation facilities and transportation possibilities have significance. According to the SCA, the relevant product market in this case was the operation and maintenance of the park and streets, so-called road construction, and the geographic market was the Stockholm area. Road works is a new business area for Samhall. There are several major construction and real estate companies that compete with Samhall in the relevant market. Samhall can't therefore be able to act independently of its competitors and in conclusion not fall under ch. 2 § 7 KL.⁵⁹

Another case regarding predatory pricing, which is when a dominant company sends in a tender that is below the company's variable costs. This

⁵⁸ Administrative Court of Appeal 6230-13; Swedish Competition Authority report, *Osund konkurrens i offentlig upphandling - Om lagöverträdelser som konkurrensmedel*, p 60.

⁵⁹ SCA dnr 1250/94, *ifrågasatt underprissättning - drift och underhåll av park och gator*, 1995-04-20.

happened in the case between SJ and BK Tåg. Regarding regional train traffic in Småland and Halland. The competition authority could show that the intention with the predatory pricing was that they wanted to eliminate a competitor. SJ had to pay a competition damage fine for 8 Million SEK.⁶⁰ This remedy and its meaning will be discussed more in the next chapter.

3.5 Anti-competitive agreement in public procurement - ch. 2 § 1 KL

The Asphalt case of 2009, concerns bid rigging and is the most known bid rigging case in Sweden. The involved undertakings were obliged to pay the highest cartel fine in Sweden, of approximately 1 700 million SEK. The Swedish Market Court found the undertakings had secretly made an anti-competitive agreement where they divided the market and agreed on the prices for asphalt services in public procurement procedures.⁶¹ The court stated the following:

“The present case concerns cooperation related to public procurement. The essence of a public procurement proceeding is that the contracting authority, in reply to its contract specifications, expects offers from a number of tenderers, which are independent from each other. The intention is thus that the tenderers submit offers that are not the result of any cooperation with competitors in order to enable the contracting authority to choose a so cost-effective tender as possible. To the extent that tenders have been preceded by contacts between competitors, the competitive situation will be affected compared to the situation which otherwise would have been at hand. A public procurement proceeding is supposed to lead to competition between the tenderers. That potential tenderers prepare and

⁶⁰ SCA, dnr 125/96, SJ-BK Tåg; Nilsson, p. 61.

⁶¹ Moldén, *Public procurement and competition law from a Swedish perspective – Some proposals for better interaction*, p. 564; Judgment of the Swedish Market Court in Case MD 2009:11 of 28 May 2009, para. 87.

submit tenders independently of each other is thus an important part of the system. Tenders which are submitted as a result of cooperation reduces uncertainty of the outcome and will probably affect the competitive situation ... Agreements made by market participants in view of a public procurement proceeding as to who shall win the contract and as to the level of the tenders to be submitted, must be regarded as having the object to prevent, limit or distort competition. The same applies to agreements concerning market partition or limitation of production.”⁶²

Däckia and Euromaster AB did not, as opposed to the asphalt case, involve secret bid rigging. They had openly supplied joint tenders in two public procurement proceedings in 2005. The SCA filed a complaint against the two tyre companies for bid rigging in 2010.⁶³ Interesting in this case was, the attitude taken by SCA:

“Däckia and Euromaster have stated that they lacked capacity to submit own tenders in public procurement proceedings as they did not have service stations in all those places where participating contracting authorities had activities. Horizontal cooperation between undertakings that cannot carry out the project or activity related to the agreement on their own is outside of the scope of Chapter 2, Article 1 of the Swedish Competition Act. A condition for such an agreement to be outside the scope of Chapter 2, Article 1 of the Swedish Competition Act is that the undertakings do not have the possibility to submit tenders on parts of the procurement and that the cooperation does not extend to more undertakings than is necessary for the provision of services to be possible.”⁶⁴

⁶² Judgment of the Swedish Market Court in Case MD 2009:11 of 28 May 2009, p. 87–88.

⁶³ Complaint filed by the Swedish Competition Authority in Case 605/2010 on 24 November 2010.

⁶⁴ Complaint to the Stockholm District Court submitted by the Swedish Competition Authority in Case 605/2010 on 24 November 2010.

The SCA concluded that in spite of that both companies had capacity to execute the contract independently and were open about the joint tenders, it still constituted a bid rigging cartel. In January 2014, the Stockholm City Court fined the two tyre retailers, Däckia and Euromaster, 1.2 million kronor each for bid rigging public contracts in 2005 through the Swedish tyre association.⁶⁵

3.6 Reflection

As showed above, the Swedish case law separates competition from public procurement. They do not necessarily interact in the way it should be in regards to the preamble of public procurement “classical” directive. As stated before it is mostly bigger companies that have the resources to use the UNSB. As could be seen in the Asphalt case, corporate strategic bidding could be prevented by the anti-competitive agreement provision ch. 2 § 1 KL. It might also prevent manipulation of relative evaluation models. LOU could prevent UNSB problem concerning abnormal low tender, because the court has opened up the option for contracting authorities to reject tenders that utilize manipulation of relative evaluation models and abnormal low tender with no business aspects. In conclusion, LOU ch. 12 § 3 might prevent some types of UNSB but in order to prevent, for example corporate strategic bidding, competition law is needed. The last type of UNSB, which can’t be solved by the coordination of competition and public procurement is, how to prevent that the supplier rejects to supply?

⁶⁵ Judgment by the Stockholm City Court on 2014-01-21., T 18896-10.

4 Remedies

4.1 General remarks

This chapter will examine the different remedies under LOU and KL. The question that arises is which remedy is most efficient in order to prevent UNSB. Furthermore I will try to shed light on if the remedies are enough or if a legislative change is needed perhaps.

4.2 Swedish Public Procurement Act

4.2.1 Appeal and Damages

Ch. 16 § 1 LOU states that a supplier who claims to have suffered or could suffer damage may apply for appeals before the administrative court. If the contracting authority has violated the basic principles or any other provision of the act and this breach led to the supplier has suffered or may suffer damage, then the court shall decide that the procurement shall be made again, or it may be terminated, but only after correction has been made. The Court's power to decide that an award will be re-made or corrected is limited to situations where the contract is not concluded. If an agreement is concluded, then a supplier may instead appeal the concluded contracts validity, a so-called annulment.⁶⁶ Through the rules concerning appeals, could suppliers who believe they have suffered damage because of a breach of procurement law, have their objections assessed in the Court. This means that a contracting authority, and especially the people who have been involved in the procurement, must expect to be reviewed by an outside party.⁶⁷

⁶⁶ Lundvall and Pedersen, *Osund strategisk anbudsgivning i offentlig upphandling*, p. 22.

⁶⁷ Swedish Competition Authority report, *Osund konkurrens i offentlig upphandling - Om lagöverträdelser som konkurrensmedel*, p. 97.

Ch. 16 § 20 LOU states that a contracting authority, which has not complied with the provisions, could be liable for the damages occurred for the supplier. The contracting authority's liability under this provision may cover both lost profits (the so-called positive contract interest) and unnecessary costs (the so-called negative contractual interest). Additionally, in some cases, a supplier who suffers from an annulment may receive compensation for the damage. Such a claim for damage is made to the court. The provisions in LOU are addressed to contracting authorities, meaning it is the contracting authorities obligation to apply LOU. Furthermore LOU does not contain a remedy that can be used to target sanctions against another supplier.⁶⁸

4.2.2 Exclusion of supplier

Under ch. 10, 1 and 2 §§ LOU it appears that a contracting authority under certain conditions is obliged to exclude a supplier from participating in a public contract. There is no provision in LOU that expressly regulates the contracting authorities' ability to exclude tenderers that have indulged in UNSB. The only exclusion that might be applicable is ch. 10, 2 § 1 pc. 4 p. LOU, which provides that a contracting authority may exclude a tenderer who has been guilty of grave professional misconduct, provided that the contracting authority can demonstrate this.⁶⁹ In the law comments to LOU, anti-competitive agreements between bidders could pose as grave professional misconduct.⁷⁰ Meaning that manipulation of relative evaluation models might fall under this provision and also agreements in order for suppliers to make abnormal low tender without business aspects.

UNSB is not something that is prohibited, and hardly something that in itself can be regarded to be grave professional misconduct. However, repeated breaches of contract can be regarded as grave professional misconduct. A tenderer who repeatedly leaves unsound strategic bids with a

⁶⁸ Lundvall and Pedersen, *Osund strategisk anbudsgivning i offentlig upphandling*, p. 22-23.

⁶⁹ Lundvall and Pedersen, *Osund strategisk anbudsgivning i offentlig upphandling*, p. 26.

⁷⁰ Prop. 2006/07:128 p. 390.

condition, which the bidder do not uphold during the term of the agreement, could possibly be excluded on the grounds of grave professional misconduct. The burden of proof for grave professional misconduct rests with the contracting authority. In addition, it should be noted that there are some forms of UNSB that does not mean that the tenderer is in breach of contract or breaching competition aspects and that in such cases it may be difficult to detect grave professional misconduct.⁷¹ Exclusion of supplier could be used in order to stop suppliers, which do not uphold the condition in an agreement to supply the product/service, but then there is a need for contractual obligation that states that.

4.2.3 Rejection of abnormal low tender

To ensure that abnormally low tenders does not prevent other bids to be assessed in real competition with each other and that the most economically advantageous tender or the actual lowest price can be identified, has the contracting authorities in some cases the opportunity to reject abnormally low tenders. Provisions relating to abnormally low tenders are found, for contracts above the thresholds, ch. 12 § 3 LOU. The provision is based on Article 69 of the classic Directive and, has according to the EU Court of Justice two purposes. Firstly, it aims to ensure that the most economically advantageous tender can be identified, and shall protect tenderers against arbitrariness on the part of the contracting authority. The provision contains a list of information that a tender should contain. For procurements outside the directive controlled area there is a similar provision in ch. 15 § 17 LOU.⁷² It is allowed for bidders to squeeze their profit margins or even make losses, as part of a deliberate strategy to gain market shares.⁷³ This does not pose grounds to reject the tender. However, such procedures could

⁷¹ Administrative Court of Appeal in Jönköping announced on 9 June 2009 in case nr 4211-08 and Administrative Court of Appeal in Göteborg announced on 15 April 2011 in case nr 2090-11; Lundvall and Pedersen, *Osund strategisk anbudsgivning i offentlig upphandling*, p. 26.

⁷² C-76/81 Transporoute mot Ministère des travaux publics p. 17, mål C-147/06 and case C-148/06 p. 6; Lundvall and Pedersen, *Osund strategisk anbudsgivning i offentlig upphandling*, p. 27.

⁷³ Joined cases 147/06 och 148/06 *SECAP* och *Santorso*, para. 26.

conflict with other rules, such as competition law, so called abuse of a dominant position.⁷⁴

The Competition Authority considers that a tender whose pricing can be explained by violations of various regulations can be rejected with ch. 12 § 3 LOU. The provision does not foresee a situation where the bidder will not be able to perform the contract.⁷⁵ A supplier who does not fulfill its obligations with respect to taxation, environmental protection, worker protection and working conditions may indeed offer lower prices without affecting the ability to perform the contract in question. The SCA believes that contracting authorities should not have to enter into agreements with bidders who intend to violate these rules to carry out the assignment in accordance with agreed terms. It is often difficult for the authority to investigate whether this is the case.⁷⁶

The SCA considers that the tenderer should have the burden of proving that a low offer is legitimate, in respect to the confidentiality of trade secrets relating to the company's cost structure, pricing strategies or similar. Meaning it would be more efficient if the tenderer has the burden, because the contracting authority might not get certain documents in order to do a justified assessment. It should be noted that the Swedish courts have held that the burden is contrary to the above and therefore lays on the contracting authorities.⁷⁷

4.2.4 Termination of a procurement

Another question is if the contracting authority which realizes that the tenders received in a procurement procedure are due to UNSB, can cancel the contract? This since an interruption would give the contracting authority

⁷⁴ Swedish Competition Authority report, *Osund konkurrens i offentlig upphandling - Om lagöverträdelser som konkurrensmedel*, p. 72.

⁷⁵ Arrowsmith (2005) p. 535–536.

⁷⁶ Swedish Competition Authority report, *Osund konkurrens i offentlig upphandling - Om lagöverträdelser som konkurrensmedel*, p. 78-79.

⁷⁷ Swedish Competition Authority report, *Osund konkurrens i offentlig upphandling - Om lagöverträdelser som konkurrensmedel*, p. 82-83.

the opportunity to carry out a new procurement with a new request for tenders adapted to prevent the kind of UNSB identified by the contracting authority. When UNSB has been made possible by a deficiency in the tender documents and a contracting authority intends to correct that deficiency in a renewed procurement then they need to have objective reasons to cancel the contract. The European Court of Justice in Case C-244/02 Kauppatalo Hansel, has stated that the contracting authority has objective grounds for termination when the reason for termination is that the contracting authority realizes that given to the content of the tender documents they do not have the option of choosing the economically most advantageous tender. In some cases, therefore, the existence of UNSB is likely to constitute an objective reason for the termination of procurement.⁷⁸

4.2.5 Reflection

First it must be noted that no economic sanctions for tenderers seems to exist in LOU. It should be specifically noted that there is no explicit prohibition for UNSB. A tenderer who engage in UNSB does therefore not normally commit any breach of any law or other regulations.

LOU could prevent certain UNSB, if reading the preparatory works to the provisions concerning the remedies. As for example the abnormal low tender is only a problem when there are no commercial reasons, such as the intention to eliminate competition. LOU will prevent that behaviour because if there is a breach of other laws a rejection of abnormal low tender is accepted in the case law. The contracting authority could also cancel the procurement and make the procurement all over again with the exclusion of the misbehaving supplier. The rejection and termination of procurement does also prevent UNSB in regards to manipulation of relative evaluation models. The major issue here is that contracting authorities does not really have the knowledge to conclude when there is a breach of competition law why the supervisory authority of SCA should be more included in

⁷⁸ Lundvall and Pedersen, *Osund strategisk anbudsgivning i offentlig upphandling*, p. 34.

procurements to make such decisions. This because only 14 % of the people from contracting authorities seem to have good knowledge concerning factors and indicators for what is anti-competitive agreements/behaviours.⁷⁹

There are still certain UNSB problems that could not be prevented under LOU, such as suppliers that do not deliver and corporate strategic bidding. Could KL prevent these behaviours?

4.3 Swedish Competition Act

The Swedish Competition Act (KL) is based on the competition law principle of prohibition. This principle means that certain restrictions on competition in itself is harmful and therefore should be prohibited. The acts substantive provisions are designed with EU law as a model. The intention is that KL in any material respect should resemble the EU competition rules as much as possible. The Swedish competition rules are currently contained in the Swedish Competition Act (2008:579), which entered into force on 1 November 2008. The Act targets three types of action that may distort efficient competition: anti-competitive cooperation, unilateral conduct constituting abuse of a dominant position, and structural changes (mergers and other types of concentrations). If a practice also affects trade between EU member states, the Swedish Competition Authority will apply articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).⁸⁰ The OECD recommends that contracting authorities require bidders to sign a "Certificate of Independent Bidding" (certificate of independent tendering). Such certificate requires a tenderer to sign a written confirmation that the tender has been submitted independently of competitors, and that no consultation, communication, contract, agreement or arrangement with any competitor has occurred. The certificate is aimed at deterring bid rigging. One advantage is that it is easier to prove that a tenderer has had contact with a competitor than to prove the existence of a

⁷⁹ Swedish Competition Authority report, *Osund konkurrens i offentlig upphandling - Om lagöverträdelser som konkurrensmedel*, p. 140.

⁸⁰ Prop. 2009/10:196 p. 20, 3 kap. 5 § KL.

cartel. If it turns out that the bidder has certified unjust conditions, it may have been guilty of misrepresentation or any other violation, which could lead to criminal sanctions.⁸¹

The SCA believes that contracting authorities should take in a contractual possibility to withdraw from the contract in the event that the supplier is guilty of infringement of competition law. Such a term should make the supplier pay attention to the fact that KL prohibits unauthorized restrictive practices and should also have a deterrent effect.⁸²

4.3.1 Obligations and Commitments

The SCA can oblige the companies to stop their anti-competitive practices that could constitute an illegal agreement, discriminated prices or any other procedure that is not allowed, a so called cease-and-desist order. Under Swedish law, cease-and-desist orders must be more precisely worded than corresponding decisions taken by the European Commission: it is not sufficient merely to state that the infringement should cease; the SCA must clarify how such an interim measure should be carried out (the SCA can only impose behavioural remedies that are proportionate and necessary to bring the infringement to an end – structural remedies may not be imposed). The SCA may accept commitments, except for where there are serious infringements. In such commitment decisions, the SCA does not hold that an infringement has been committed but only that there is no ground for action. There may also be a price injunction that means they have to sell their goods or services at an acceptable price. A sales injunction means that they sell their goods without any discrimination among buyers. Competitors may bring an action against a company and examine whether it can be imposed interim measures.⁸³

⁸¹ OECD, Guidelines for fighting bid rigging in public procurement – Helping governments to obtain best value for money (2009), p. 8; Swedish Competition Authority report, *Osund konkurrens i offentlig upphandling - Om lagöverträdelser som konkurrensmedel*, p. 147.

⁸² Swedish Competition Authority report, *Osund konkurrens i offentlig upphandling - Om lagöverträdelser som konkurrensmedel*, p. 147.

⁸³ Carlsson commentary to Swedish competition act (2008:579) 3 kap. 1-4 §§, Lexino 2014-03-31.

4.3.2 Competition Fine

In order to ensure that the competition rules have full effect, there are sanctions in order to scare the companies. UNSB practices in the market can result in big profits for companies. A major violation may lead to huge costs for the company or companies who have been convicted. If you break the rules on competition, it is quite common to be imposed to pay a so-called competition fine to the state. For example, in competition cases, the SCA may not impose fines itself; it must file a summons application and then it is the City Court of Stockholm (subject to appeal to the Market Court) that imposes the fine.⁸⁴ However, there is a ten percent ceiling, which says that the fine shall not exceed ten percent of the previous year's turnover. The fine is set individually for those companies involved in breaking competition rules. The minimum fee to be imposed is SEK 5,000 and the maximum is as said 10 percent of last year's sales. It means, in other words, the fine varies according to the company's success.⁸⁵

The SCA may, however, decide on a fine order in cases where parties agree on substance. So far, the SCA has rendered fine orders in three cases, all of which concerned bid rigging in public tenders.⁸⁶

4.3.3 Damages

In connection with the competition court cases, there is also a chance to claim damages. The possibility to claim damages is a right for legal entities as well as for individuals and therefore important for competitors and customers who may have been harmed by the company's anti-competitive behaviour to claim that right. In principle this means that everyone who has somehow been damaged by the company's conduct can claim damages as compensation. However, one must prove that the breach actually led to the

⁸⁴ Prop. 2009/10:196 p. 21-22; Carlsson commentary, konkurrenslag (2008:579) 3 ch. 5 §, Lexino 2014-03-31

⁸⁵ Carlsson commentary to Swedish competition act (2008:579) 3 ch. 6 §, Lexino 2014-03-31

⁸⁶ Carlsson commentary to Swedish competition act (2008:579) 3 ch. 16-19 §§, Lexino 2014-03-31.

injury, so-called causal link. Action for damages shall be instituted at Stockholm District Court. The right for damages is seen as having a preventive function. Not only is it an economic point of view for the company, but it is also a triggering factor for getting other companies or whistleblowers to specify the companies that violate competition rules.⁸⁷

When calculating the amount of damages the starting point is how much damage the restriction of competition has led to. For example, if a competitor argues that the distortion of competition have resulted in loss of profit, then the court may try to estimate how much that is and replace the party with that amount.⁸⁸

4.3.4 Trading prohibition

The trading prohibition, as opposed to other sanctions under competition law, is imposed on a physical person, which is the same in the EU rules. However, other EU countries have criminal liability in connection with competition infringements. The rules that the EU has developed are so called minimum rules. This means that Member States have the right to have stricter rules, but not gentler ones. Sweden has, however, chosen to keep the criminal liability outside of competition law and has chosen a different path in terms of sanctions on individuals. One can be imposed with so-called trading prohibition, if it has been a very severe and prolonged violation. The provision has so far never been applied to competition law infringements. Anyone, physical person, that through gross negligence have ensured that the company joined a cartel may be sentenced to trading prohibition. This means that those who have been managing, for example, the Executive Director, might be sentenced. Trading prohibition may apply from 3 up to 10 years. It means that those responsible may not run a business, be the majority of a board, remain in the management of the company, which was sentenced for cartel activity. If the company however

⁸⁷ Carlsson commentary, to Swedish competition act (2008:579) 3 ch. 25-26 §§, Lexino 2014-03-31; Prop. 2009/10:196 p.21.

⁸⁸ <http://ec.europa.eu/competition/antitrust/actionsdamages/>, last seen 2015-04-22.

has chosen to cooperate through the entire competition procedure they will not get trading prohibition.⁸⁹

4.3.5 Leniency programme

A remedy in order to prevent UNSB in procurement process could be the leniency programme, which encourages members of a cartel to come forward with their unlawful behaviour and be rewarded lenience. Meaning the first that comes forward and reports the cartel gets full immunity.⁹⁰ It seems thus that collusion in public procurement markets have not really been affected by the leniency programme.⁹¹ One reason could be that bid rigging seldom falls under EU law instead it is a member state issue. Sweden for example has a leniency programme.⁹² Cartels on public market are more stable than on the private market and therefore they tend to have much more members, which makes it more problematic to discover. One discovered cartel in the construction industry constituted about 100 members.⁹³

Because the public market is stable, the members of the cartel has a low incentive to expose each other, therefore the leniency programme cannot really reach its full potential to prevent a bid rigging scheme. The leniency programme isn't the remedy to prevent bid rigging and instead focus should be more on what contracting authorities could do to prevent and detect bid rigging. OECD has in order to help contracting authorities to reduce bid rigging, introduced a guideline.⁹⁴

⁸⁹ Carlsson commentary to Swedish competition act (2008:579) 3 ch. 24 §, Lexino 2014-03-31.

⁹⁰ Kovacic, William E. and Anderson Robert D, P.P.L.R. 2009, p 83.

⁹¹ Heimler, Alberto, Journal of Competition Law and Economics 2012, p 3.

⁹² The current programme is set out in sections 3:12-15 of the Swedish Competition Act

⁹³ Heimler, Alberto, Journal of Competition Law and Economics 2012, p 3.

⁹⁴ OECD, Designing tenders to reduce Bid Rigging, Citation by John Fingleton, p 2.

4.3.6 Reflection

Corporate strategic bidding could be seen as anti-competitive agreement that therefore would fall under the provision ch. 2 § 1 KL. The companies that could be caught by the provision will have to pay a competition fine and stop the behaviour. This will then affect the public procurement procedure in the way that the procurement will be terminated and then done again. The problems here as I see it, is firstly that the contracting authorities need better knowledge to detect corporate strategic bidding, why SCAs involvement should be overlooked. Secondly, the competition fine will be given to the state and not the other tenderers that are affected, by not winning the procurement and therefore are the tenderers in need to sue the companies that utilized the UNSB in order to get some economic compensation. This will be a problem, because the wrongdoing company have already payed a large competition fine and risks therefore bankruptcy if getting sued by other tenderers for the economic loss they had. Meaning the total worth of the procurement contract as if they had won it.

Abnormal low tender, corporate strategic bidding and manipulation of relative evaluation models are behaviours that also could be prevented or caught by the competition provisions. They could be seen as anti-competitive agreements that distorts competition and/or be a exclusionary behaviour by the dominant company that wants to eliminate competitors, were the competitors sole survival lies in winning the public contract, perhaps.

There is still a problem with tenderers that does not have the intention to deliver, problem type 1 of UNSB. To prevent that, there is a need for some form of rules to handle suppliers that participated in procurement procedures without honest intentions or intent to deliver, thereby causing the other party damage. There are no rules that could be used by the damaged tenderer in this situation. For similar situations in civil law, there are rules on culpa in contrahendo where a commercial unethical behaviour in some

cases can lead to liability even if no contractual obligation occurred. Another way to solve it could be a statement/provision in the agreement about penalty fines, meaning if the intent and consequence is to use UNSB, there is a breach and penalty fine will be applicable.

5 The Interaction between competition and public procurement

As I have tried to show, there is a problem with UNSB in public procurement procedures and it's not illegal per se, but could be prevented if competition assessments would be obligated in the procurement procedures. Some remarks about the interaction between the two regulations is needed before I will try to analyse and summarise the outcome on how to prevent UNSB.

First its needed to point out that competition rules are not applicable to contracting authorities.⁹⁵ However, that does not mean that competition is not important in a public procurement procedure. Competition law regulates the behaviour of the tenderers and the public procurement rules regulate the behaviour of the purchaser.⁹⁶

The competition and public procurement rules regulate two sides of the same transaction and therefore it should not be any conflict or overlap between them. Therefore it's important to reach coherence between the two. Otherwise we will not reach effective competition between tenderers in the procedure.⁹⁷ Effective competition and the prevention of collusion amongst tenderers are needed in order to ensure effective functioning of public procurement and reaching the objective of "best value for money".⁹⁸

⁹⁵ Case C-205/03 P FENIN v Commission [2006] ECR I-6295, para 26., Case C-113/07 P Selex Sistemi SpA v Commission [2009] ECR I-2207, para 102., Referred to in Ølykke, Grith, How does the Court of Justice of the European Union Pursue Competition Concerns in a Public Procurement Context?, P.P.L.R. 2011, No 6, p 180-181.

⁹⁶ Ølykke, Grith, P.P.L.R. 2011, p 179.

⁹⁷ Ølykke, Grith, P.P.L.R. 2011, p 181.

⁹⁸ Kovacic, William E. and Anderson Robert D, Competition policy and international trade liberalisation: essential complements to ensure good performance in public procurement markets, P.P.L.R. 2009, p 68.

Albert Sánchez Graells has written the following on the role of the competition principle embodied in EU Public Procurement law:

“The inquiry has shown – after reviewing current EU legislation and its interpretative case law – how the EU public procurement directives have an embedded competition principle that constitutes a specification and makes direct reference to competition as a general principle of EU law – which serves the fundamental purpose of establishing the fundamental link between EU competition law and EU public procurement law (which are to be seen as complementary sets of regulation that do not hold a special relationship *stricto sensu*). The competition principles offers the formal legal basis for the introduction and full enforcement of competition considerations in the public procurement setting, but the substance or content of that principles (i.e. its requirements and implications) need to be determined according to the general principles and criteria of EU competition law. In this regard, it has been submitted, that, according to this principle of competition, *EU public procurement rules have to be interpreted and applied in a pro-competitive way, so that they do not hinder, limit or distort competition – and contracting entities must refrain from implementing any procurement practices that prevent, restrict or distort competition.*”⁹⁹

In the classical Sector Directive the principle of competition is embodied and it imposes an active obligation on contracting authorities to ensure that they conduct public procurement proceedings in a pro-competitive way. Swedish administrative courts should therefore treat the pro-competition provisions as hard law, meaning that infringements of competition law should be considered as infringements of the Swedish public procurement

⁹⁹ Albert Sánchez Graells, *Public procurement and the EU competition rules* (Hart Publishing, 2011), p. 396–397.

act.¹⁰⁰ The Danish Associate Professor in Competition law, Grith Skovgaard, stated that:

“[W]hen the Commission has finally explicitly acknowledged the importance of undistorted competition between tenderers for the efficiency of public procurement procedures, it is necessary to go all the way and institutionalise competition law assessments in public procurement procedures. This institutionalisation could be through the oversight body or through increasing the role of National Competition Authorities in public procurement procedures; however, it is submitted that the most optimal solution would be to integrate the oversight bodies and the National Competition Authorities.”¹⁰¹

The reluctance of the Swedish Competition Authority to apply competition to public procurement is explained by Albert Sánchez Graells as follows:

“Public procurement is at the intersection of the two relatively unexplored fields of competition law, as it relates to the *demand-side* market behaviour of the *public sector*. Therefore, it should not be surprising to note that the enforcement of competition law in the public procurement environment has received much less attention than it deserves and, consequently, still remains largely underdeveloped. To be sure, competition restrictions generated by private entities participating in public procurement processes – mainly related to collusion and bid rigging – have so far attracted most of the attention as regards

¹⁰⁰ Moldén, p. 613.

¹⁰¹ Grith Skovgaard, Ølykke, “How Should the Relation between Public Procurement and Competition Law Be Addressed in the New Directive?”, p. 83–84. For an in-depth analysis of competition aspects of abnormally low tenders, see Grith Skovgaard Ølykke’s book on Abnormally low tenders with an emphasis on public tenderers (DJØF Publishing, 2010).

the intersection of competition law and the public procurement phenomenon.”¹⁰²

In order to declare agreements void a tenderer has to initiate legal proceeding before a Swedish administrative court. However, such action has a timelimit, according to LOU ch. 16 § 17, and should therefore be initiated within 6 months after the agreement has been concluded. Therefore, it might be a more efficient way to use the voidness provisions provided by KL and TFEU. Through them, agreements that are found anti-competitive without any justification exemption applicable are not only punishable with fines but are also void under ch. 2 § 6 KL and 101(3) TFEU. If there is on-going competition law infringements, then an action for injunction that is based on voidness could never be time-barred as long as the agreement still exists.¹⁰³ Tenderers that wants to attack the validity of a public contract under competition law, must file a complaint to the Swedish competition authority and only if they drop the complaint, can the tenderer use its subsidiary right and initiate an injunction procedure before the Swedish Market Court.¹⁰⁴ If a supplier finds the agreement breaching the competition act, then they can use that as a reason to stop honouring the agreement.¹⁰⁵

Recent case law from ECJ has shown the EU: s willingness to pursue competition concerns in public procurement procedures, such as bid rigging. Nonetheless, public procurement law has not really been interacting with competition law.¹⁰⁶ Even if they are linked, read the preamble of the procurement directive, they are not assessed together. One reason for that could be that they are enforced through separate systems.¹⁰⁷ Public procurement enforcement is under the remedies directive¹⁰⁸ and competition

¹⁰² Albert Sánchez Graells, *Public procurement and the EU competition rules* (Hart Publishing, 2011), p. 7–8.

¹⁰³ Moldén, p. 612.

¹⁰⁴ Moldén, p. 613; Chapter 3, Article 2 of the Swedish Competition Act.

¹⁰⁵ Moldén, p. 613.

¹⁰⁶ Ølykke, Grith, P.P.L.R. 2011, p 180.

¹⁰⁷ Ølykke, Grith, P.P.L.R. 2011, p 183.

¹⁰⁸ Directive 2007/66 amending Council Directives 89/665 and 92/13 with regard to improving the effectiveness of review procedures concerning the award of public contracts.

law under regulation 1/2003.¹⁰⁹ This applies also in the Swedish system that there are two separate systems of enforcement. Two different systems of enforcement makes the interaction much more difficult and what also complicates it, is the fact that public procurement are procedural rules whilst competition law regulates the tenderers behaviour on the market.¹¹⁰

Collusive agreements are a problem in public procurement procedures.¹¹¹ If a contracting authority suspects collusion between tenderers, then they should contact the SCA, which is responsible for the enforcement of competition law.¹¹² It is important to have that communication channel between contracting authorities and the competition authority to discuss bid rigging.¹¹³ In Sweden, many authorities do not often report suspicious behaviour from tenderers because they believe that they need to have full proof on the behaviour before reporting it.¹¹⁴ An important notion is that there is no provision in the public procurement directive that states any obligation to report suspicious competition violation to SCA.

5.1 Reflection

To sum up the chapter, the public procurement regime and competition law are instrumental to ensure that the internal market with efficient competition is upheld. Both systems are dependent on each other. Both systems share an objective of European integration but also removing barriers to free movement and the creation of effective competition. Therefore should UNSB be prevented.

¹⁰⁹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty.

¹¹⁰ Ølykke, Grith, P.P.L.R. 2011, p 181 and 183.

¹¹¹ Report from the Swedish Competition Authority, "Osund konkurrens i offentlig upphandling - Om lagöverträdelser som konkurrensmedel", 2013:6, p 138.

¹¹² OECD, Detecting Bid Rigging in Public Procurement, p 11.

¹¹³ Heimler, Alberto, Journal of Competition Law and Economics 2012, p 13.

¹¹⁴ Heimler, Alberto, Journal of Competition Law and Economics 2012, p 3.

6 Analysis

6.1 Introduction

Questions that will be discussed:

1. How can the legislator prevent UNSB?
2. Could coordination between public procurement and competition prevent UNSB?

Initially, it can be stated that no comprehensive approach to the problem of UNSB—in the form of, for example, legislative initiatives or actions from any of the central authorities in the field—has previously been taken. A few reports from SCA have acknowledged the problem with UNSB, but none have actually addressed the problem from the competition perspective. UNSB is not illegal as such but it could amount to a breach of competition law.

The provision on the rejection of abnormally low tenders is thus both difficult for a contracting authority to apply and in many cases a blunt or imprecise tool to deal with all types of UNSB. The focus of the work against UNSB should therefore in my opinion rather be spent on other types of action, such as to develop evaluation models and agreements that make it difficult and unrewarding for bidders to engage in UNSB. Moreover, to include the competition assessment in public procurement procedures might dissuade bigger companies from their manipulation of evaluation models because it could be seen as an exclusionary behaviour and therefore be caught by competition law.

To accomplish this dissuasion, better communication between contracting authorities and SCA is required as well as increased abilities for contracting authorities to discover anti-competitive behaviours. Another means might be to have restrictions for bigger companies in the procurement procedure—for

example, that said companies cannot submit tenders which are abnormally low if they are the biggest player on the market. One solution could actually be the one that OECD already has acknowledged in their guidance that all tenderers should sign a document which has as a consequence that companies applying anti-competitive behaviour of any kind will be required to pay a penalty fine as well as enable the contracting authority to exclude the tenderer from future tenders. I myself recommend that the SCA should always be involved in the procurement procedure in order to reach effective competition. Moreover, I believe that a legislative change is needed concerning a prohibition in the LOU for UNSB in that it will be more costly in the long run if there are less suppliers on the markets and thus inevitably higher costs for the taxpayers. If the public market does not have effective competition, the result could be that in the future there could be only a few players on each specific market that would be able to dictate prices and conditions.

6.2 How can the legislator prevent UNSB?

UNSB behaviours/problems that will be discussed:

- Manipulation of evaluation model
- Corporate strategic bidding
- Suppliers does not fulfil their obligations
- Abnormal low tender

Problem type 1: Manipulation of relative evaluation model

Manipulation of relative evaluation models could be seen as, for example, an anti-competitive agreement between two competitors. Lunander and others propose the use of so-called *absolute* evaluation models, i.e. models in which each tender is evaluated on the basis of objective values, rather than through the comparison with the other tenders (the *relative* model), as a way to deal with this problem. Use of absolute evaluation models can be perceived as complex and many contracting authorities prefer to evaluate tenders in comparison with each other. I think rather that to stop

manipulation of relative evaluation models is to detect these anti-competitive behaviours where the sole purpose is to manipulate the model and punish them by exclusion and a penalty fine due to breach of LOU provision. The penalty fine should be of 10 percent and some parts of it should be given to the tenderer that would have won the procurement if the breaching company had not manipulated the evaluation model.

In this regard, the Administrative Court in Stockholm judgments, February 18, 2011 in case No. 5913-5915-10 and 21 March 2011 in case No. 5603-10, should be mentioned. The court held that if a contracting authority's conduct breaches the principle of lowest price and it does not reflect in the specific case, than this constitutes in itself a violation of the fundamental principles found in ch. 1 § 9 LOU. The court gives in these judgments an expression that it is not sufficient that an evaluation model is applied in the manner indicated in the tender document. It requires also, according to the court, that the evaluation model has to lead to the tender, which is actually the most economically advantageous or has the lowest price.

Problem type 2: Corporate strategic bidding

This conduct means that other bidders who do not coordinate their offers with other bidders and expect to meet its commitments, will calculate with higher costs, impairing their ability to be awarded a framework agreement. The conduct also entails higher costs for the contracting authority. This issue is based on the framework agreement that is decided by hierarchy ranks between the suppliers' tenders, meaning that bidders are allowed to decline the suborder of goods or services for which they offered an unusually low price. In this case, a contractual obligation to deliver could be one solution to the problem.

In my opinion, the best solution here should be to forbid the behaviour because it is anti-competitive. Therefore, the obligation to do competition assessments in procurement procedures will discourage or cease this type of behaviour because, otherwise, the tenderers will be caught by ch. 2 § 1 KL.

It could basically be seen as anti-competitive agreement that is not written but distorts competition. The competition provision should then, if breached, have a direct channel to the remedy under LOU to exclude the supplier. If the supplier is a major player on the specific market, then it could also fall under ch. 2 § 7 KL as an abuse of dominant position because the exclusionary behaviour distorts competition in that it makes it harder for smaller companies to enter the public market. The exclusionary behaviour could perhaps be problematic to evidence which is why there is a need to lower the burden of proof with regard to said situation in public procurement procedures. It should be easier for contracting authorities to uphold effective competition in that when there is a suspicion that a company could fall under the competition provisions, the contracting authority should be able to exclude the supplier and/or require the tenderer to establish the propriety of the tender.

Problem type 3: Suppliers does not fulfil their obligations

This problem can be handled through contractual obligations in the agreement where the contracting authority requires that the supplier provide the goods/services at prices in accordance with the offered tender. With regard to framework contracts with one supplier in which the supplier deviates from the contract and its conditions—for example, by eventually claiming that a particular good or service is not available and thus suggesting a more expensive alternative supplier—the tenderer should be required to provide the replacement goods or service for the same price agreed upon for the original product or service.

Such contractual terms/obligations should in my opinion be able to reduce the supplier's incentive to engage in UNSB by quoting goods and services at low prices in order to be awarded a framework agreement, but without the intent to deliver in accordance with what was quoted. To handle this problem, it is important that the contracting authority regularly monitors the agreement and checks that the payment corresponds to the price offered by the supplier, and that it is delivered according to what was agreed. It is also

important that the contracting authority provides relevant personnel briefs and easy to understand instructions on how an order should be carried out for the agreement to be implemented properly.

An obligation to deliver, or similar contractual mechanism, also appears to be what the Appeal in Stockholm believed should have been included in the contracts.¹¹⁵ Another tool to deal with this type of UNSB are different forms of penalty clauses if the supplier does not deliver according to the terms in the agreement. These penalty fines should be so high that they will make up for the costs that the UNSB problem caused.

Problem type 4: Abnormal low tender

In LOU, the remedy which most contracting authorities use in order to prevent UNSB, is the opportunity to reject abnormally low tenders. This possibility, however, has certain fundamental limitations and is not always an effective remedy against UNSB. First and foremost, it is far from all the low tender prices that form part of UNSB. On the contrary, tender prices that at first sight seem remarkably low, can be commercially justified and a sign that the contracting authority has been successful in exposing the procurement to competition. The crucial factor here is whether the supplier not only *can* but also *will* deliver according to the winning (but low) tender price. This factor is important and hard for contracting authorities to investigate. It has also proven to be difficult for contracting authorities to uphold their arguments in regards to rejecting abnormal low tenders because of UNSB, in the appeal courts.

An investigation should be done about the possibility to amend the provisions of ch. 12 § 3 and ch. 15 § 17 LOU, so that the burden of proving that an abnormally low tender is legitimate or valid is a burden of the supplier. As mentioned above, the purpose of this option is to ensure that winning tenders actually are the most economically advantageous and that

¹¹⁵ Administrative court of Appeal in Stockholm judgment 18 february 2011 in case nr 5913–5915-10 and the 21 mars 2011 in case nr 5603-10.

the tender represents the lowest price assumed in the contract. In this regard, ch. 12 § 3 and ch. 15 § 17 LOU are seen as helpful framework to the more important rule in ch. 12 § 1 LOU, which states that a contracting authority shall accept the tender which is either the most economically advantageous or the tender that contains the lowest price.

The placement of the burden of proof applied by the Swedish courts have therefore, in my view and Pedersen's opinion, made it unnecessarily difficult for contracting authorities to reject abnormally low tenders. This means that there may be cases of UNSB where while the EU Court of Justice would have been justified to reject a tender, this would not possible in accordance with Swedish law. On this basis and in light of the provision on the rejection of abnormally low tenders, it is in my opinion that the shift of burden could serve as a tool to discourage UNSB and therefore there may be reasons for the Swedish government to investigate ways to modify the provisions of ch. 12 § 3 and ch. 15 § 17 LOU so that the placement of the burden of proof enshrined in EU law of the Court are more clearly demonstrated by the provisions. Increased requirements for tenderers in this regard would indirectly mean that tenderers would have to set out their reasoning for abnormally low tenders which, in turn in some cases, would reduce tenderers' propensity to engage in UNSB.

Arrowsmith has pointed out that the contracting authority's ability to suspect or detect UNSB should turn on whether the low level on the price risks the tenderer's ability to deliver. The reasoning is most likely correct, but it is likely not the only factor that can constitute a suspicious tender. To be able to prevent manipulation of relative evaluation models and abnormal low tender that are used in order to make "dummy" bids in corporate strategic bidding, there is a need to make it easier for contracting authorities to reject tenders. This situation is the result of the existence of a safety net for tenderers against the contracting authorities power to reject tenders in the form of the appeal remedy. All of the above makes evident that contracting contracting authorities should be able to reject tenders more easily,

especially if said authorities suspect breaches of other regulatory frameworks such as such competition law, coupled with longterm distortions of competition in the form of a decreased number of players in a given market.

6.3 Could coordination between public procurement and competition prevent UNSB?

As authors Sanchez and Moldén stated in ch. 5, the contracting authorities need to apply more competition in public procurement procedures in order to stop certain UNSB behaviours from companies. It is stated in the preamble to the procurement directive that competition law should be considered. Competition is an important aspect to consider in every public procurement case in order to have a preventative effect on the bigger companies and moreover on UNSB. I also think that the SCA should be involved in all major public contracts so as to conduct a competition assessment. The SCA's involvement could entail an expert group that is always available for contracting authorities if competition assessment is needed. In order for that to work, there is a need to educate the contracting authorities personnel to know when competition assessment should be done. In that way, the prevention of certain UNSB types, such as corporate strategic bidding and also manipulation of relative evaluation model, could be successful. Furthermore, such preventative measures would secure effective competition in public procurement procedures. It is my holding that competition law is more developed and has more clearly stated conditions in order to catch companies that are trying to distort competition. The utilization of competition law assessments would probably have a preventive effect on bigger companies' improper conduct in public procurement procedures. Another way to discourage companies from using UNSB might be to connect the LOU remedies such as exclusion of supplier and rejection of abnormal low tender to the competition provisions ch. 2 § 1 and 7; if within a public procurement procedure the company falls under

these provisions, then the contracting authority could execute the provisions under LOU to stop the supplier. A penalty fine of some sort should be inserted in LOU as well for when tenderers have used UNSB. Then the fine would partly compensate the other tenderer(s) for their losses and the other part of the fine could go to the SCA in order to spread the knowledge to other contracting authorities and their personnel about public procurement and competition aspects.

The two legal areas underlying purpose is partly coincident - both aim to preserve competition and to create an efficient market. There is therefore no question of any conflict between opposing interests. Competition law arises only insofar as competition issues occur in public procurement. Nor is there any question of a conflict between the legal areas. A provision to link both legal areas to each other and especially the competition provisions to the remedies of LOU would be a step to prevent UNSB.

Suppliers do not really have any option to prevent other suppliers from using UNSB except to file a suit because of damages or appeal the decision and try to get the tender rejected.

Lastly, I would recommend to have more remedies for tenderers against other tenderers that are using UNSB and to have an obligation for contracting authorities to communicate all suspicious bid rigging schemes to the SCA. A solution to UNSB might be to insert a rule that prohibits UNSB for companies. That might be harsh but it might be for the best because it is mostly bigger companies that take the risks involved with using UNSB.

6.4 Conclusion

- Having obligatory competition assessments in public procurement procedures and a direct link that if the company gets caught under ch. 2 § 1 or 7 the Swedish competition act, then the remedies concerning exclusion of

supplier of rejection of abnormal low tender would be applicable. These suggestions would solve problem type 1 and 2.

- Problem type 3 could be solved by contractual obligation, in the public contract, to supply. Otherwise will a penalty fine be imposed, which will be set as high as the competition fine, maximum 10 per cent of the annual turnover.

- Problem type 4 is a behaviour that could also be used in order to manipulate relative evaluation models and corporate strategic bidding why in order to stop this, there is a need for a legislative change that makes it easier to reject abnormal low tenders. Hence, it should be rejected not only if the tender might distort competition in the near future but also if it might do it in the future. Even if there is commercial business factors for the low bid it can be rejected because the contracting authority when looking at the market realizes that there are few players on the market and in the long run it will be fewer and therefore more likely to raise prices as such and distort competition.

I think that UNSB would in the long run lead to entry barriers on the market and contribute to fewer new companies manage to establish themselves as suppliers to the public sector. Hence, there is a need for a coordination between public procurement and competition law, otherwise couldn't UNSB be prevented. I believe therefore that companies with these capabilities to manipulate procurements with UNSB, can make use of this tool to impede competition in a market and that is not a desirable outcome.

These changes would result in a more extensive section of the law that may result in higher costs on the market. The costs will, however, never be as high as a contract which must be re-made or if contracting authorities are purchasing in a market without any competition. I therefore want the legislator to consider making legislative changes in order to coordinate the two legal systems, otherwise the public market will continue to cause distortion of competition and in the end there might only be minimal players on each specific market. Public procurement is consuming 17 per cent of the

Swedish gross domestic product (GDP) and in EU the percentage is just as high. This is why there is a need to protect the market from distorted competition and its effects on the internal market. Because non-existing interaction between these two systems in a Member state makes it more difficult to achieve an objective to have effective competition throughout the EU and to be able to uphold transparency in the public procurement procedures.

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