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In case no. 6102-19, **Vallentuna municipality** (Appellant) v. **Svevia AB** (Respondent), the Supreme Administrative Court delivered the following judgment on 8 May 2020.

RULING OF THE SUPREME ADMINISTRATIVE COURT

The Supreme Administrative Court overturns the judgment of the administrative court of appeal and affirms the judgment of the administrative court.

BACKGROUND

1. In conjunction with a public procurement, the contracting authority routinely states that the economic operators must fulfil certain obligatory requirements. These may consist, for example, of purely formal requirements for the performance of the procurement, requirements related to the economic operator's qualifications and requirements linked to that which is being procured. The requirements must be formulated such that they do not conflict with the basic principles of public procurement, e.g. the principle of equal treatment, or with procurement legislation in general. In the event such obligatory requirements are not fulfilled, the tender is to be rejected.
2. It is further apparent from the legislation that the contracting authority is to reject tenders which are abnormally low and which have not been accounted for in a satisfactory manner. Before a tender is rejected on this basis, the authority is to provide the economic operator with the opportunity to account for the low price through a so-called *inter partes* procedure.
3. According to case law, establishing as an obligatory requirement that a tender under a certain price level, a so-called floor price, will not be accepted is incompatible with the principle of equal treatment and the provisions regarding abnormally low tenders. This has been explained by the fact that such a floor price

prevents the economic operator from competing on the basis of price and that it entails that the contracting authority lacks the possibility to assess submitted tenders under conditions of effective competition.

4. Vallentuna municipality is conducting, by means of a simplified procedure, a procurement of a framework agreement for asphalt surfaces, asphalt milling and road marking and appurtenant services. In the procurement documents, the municipality stated the works, etc., which were covered by the procurement broken down into various quantitative intervals. In the tenders, the economic operators were to state their price per unit (unit price) for these various intervals. The evaluation of the tenders would then take place by multiplying the unit prices provided by the stated quantities and adding in a certain way in order to produce a comparison total. A framework agreement was to be entered into with the economic operator who had the lowest comparison total. It was further stated that tenders in which the unit price for a larger quantitative interval was higher than the unit price for a smaller quantitative interval of the same type of work would be rejected.
5. Svevia AB submitted a tender for the procurement. The company stated a higher unit price for a larger quantitative interval than for a smaller quantitative interval for a certain type of work. The municipality rejected the company's tender due to its failure to meet the requirement and decided to enter into a framework agreement with another economic operator.
6. The company applied to the Administrative Court in Stockholm for review of the procurement. The company stated that the municipality had acted contrary to the principle of equal treatment and that the relevant obligatory requirement had prevented the company from submitting its most advantageous tender. The administrative court rejected the application. The court noted that the municipality had established a relative ceiling price in which the highest price for a larger quantitative interval was dictated by the price stated by the economic operator for a smaller quantitative interval in respect of the same type of work. According to

the court, the requirement was not comparable to such a floor price as had been rejected in case law. The administrative court further found that the obligatory requirement could not be deemed to limit the tenderer's ability to compete with its pricing in accordance with the principle of equal treatment.

7. The Administrative Court of Appeal in Stockholm approved the company's appeal, overturned the administrative court's judgment and decided that the procurement was to be carried out anew. The administrative court of appeal noted that the obligatory requirement contained no ceiling or floor price and thus did not prevent the suppliers from establishing low unit prices for the various quantitative intervals. However, the administrative court of appeal found that the obligatory requirement entailed a limitation on the tenderers' ability to freely compete with their best prices in respect of the smaller quantitative intervals. In the same way as applies to floor prices, the requirement had also prevented the municipality from assessing the tenders under conditions of effective competition. Accordingly, the municipality had violated the principle of equal treatment.

CLAIMS, ETC.

8. *Vallentuna municipality* claims that the Supreme Administrative Court, by way of amendment to the judgment of the administrative court of appeal, shall reject the application for review and states the following.
9. Procurement legislation contains several provisions which limit the tenderers' pricing. The principle of equal treatment accordingly does not entail that tenderers are entitled in all situations to submit their best tenders and have the same assessed under conditions of effective competition. Rejection of tenders which do not fulfil obligatory requirements need not be preceded by any *inter partes* procedure. On the contrary, it is counter to the principle of equal treatment not to reject such tenders. The purpose of the now-relevant obligatory requirement is not to determine in advance that tenders under a certain price level are to be deemed to be abnormally low, but to ensure that the municipality receives the best

possible terms in accordance with market economic principles and to counteract unsound strategic bidding.

10. *Svevia AB* is of the opinion that the appeal is to be rejected and states the following.
11. The evaluation model displays substantial similarities to the floor price model which has been deemed to be impermissible in case law, and the formulation thereof is not intended to lead to a fair result. The principle of equal treatment entails that obligatory requirements regarding pricing may not give rise to automatic exclusion, but the contracting authority must first examine the circumstances in the individual case within the framework of an *inter partes* procedure. A contracting authority may not circumvent the provisions regarding abnormally low tenders by imposing obligatory requirements for certain pricing. Had the municipality applied an *inter partes* procedure in lieu of rejecting the company's tender, the purpose sought would have been achieved by means of a less restrictive measure.

REASONS FOR THE RULING

The question in the case

12. The question in the case is whether it is compatible with procurement legislation to establish as an obligatory requirement that tenders in which the price per unit for a larger quantitative interval is higher than the price per unit for a smaller quantitative interval for the same type of work will not be accepted.

Legislation, etc.

13. Chapter 19 of the Public Procurement Act (2016:1145) contains provisions applicable to procurements the value of which are calculated to fall below the threshold referred to in Chapter 5, section 1 or section 2. According to Chapter 19,

section 2, the general provisions in, *inter alia*, Chapter 4, section 1 are also applied in conjunction with such procurements.

14. Pursuant to Chapter 4, section 1, contracting authorities are to treat economic operators equally and without discrimination and shall conduct procurements in a transparent manner. Furthermore, procurements shall be conducted in accordance with the principles of mutual recognition and proportionality.
15. It follows from Chapter 19, section 27 that, if a tender appears abnormally low, the contracting authority shall request that the economic operator account for the low price or cost. The authority shall reject the tender if the economic operator has not, in a satisfactory way, accounted for the low price or cost (the so-called *inter partes* procedure).

The Court's assessment

16. A contracting authority has relatively extensive freedom to determine the specifics of the obligatory requirements to apply for a certain procurement. However, the requirements must be formulated such that they are compatible with the basic principles for public procurement, *inter alia* that economic operators are treated equally, and otherwise in accordance with procurement legislation.
17. As regards requirements related to pricing in the tender, the Supreme Administrative Court found in case HFD 2018 reported case no. 50 that it is not compatible with procurement legislation to establish as an obligatory requirement that an hourly fee must rise to a certain minimum level, i.e. to apply a floor price. This was explained such that an obligatory requirement for a certain lowest price prevents economic operators from competing on the basis of price since tenders under the floor price are automatically excluded. Such a procedure can thus lead to the economic operators being treated differently. The Court also pointed out that a floor price entails that the contracting authority lacks the ability to assess submitted tenders under conditions of effective competition and determine

whether a tender with a low price is genuine. A tender perceived by the contracting authority to be based on an abnormally low price is thus to instead be evaluated in accordance with an *inter partes* procedure as prescribed in the provisions regarding abnormally low tenders.

18. The obligatory requirement which is now the subject of examination also entails that the economic operators are not entirely free to price their tenders since the price stated by an economic operator for a certain quantitative interval dictates the price which may be stated for other quantitative intervals in respect of the same type of work. On the other hand, the requirement sets no absolute lower limit for the prices that may be offered. Accordingly, the requirement does not prevent the economic operators from competing on the basis of price. The requirement is also not designed in such a way that it leads to abnormally low tenders being automatically rejected.
19. The now-relevant obligatory requirement is thus distinct in a decisive manner from that examined in case HFD 2018 reported case no. 50. The requirement cannot, according to the Supreme Administrative Court, be deemed to be in conflict with the principle of equal treatment or the provisions regarding abnormally low tenders. Furthermore, it has not come to light that the requirement in some other way is contrary to the procurement legislation.

It is clear that the company's tender does not fulfil the obligatory requirement. The municipality thus acted correctly in rejecting the tender. Since there is accordingly no reason to intervene in the procurement, the application for review is rejected.

Justices Henrik Jermsten, Kristina Ståhl, Thomas Bull, Mats Anderson and Marie Jönsson have participated in the ruling.

Judge Referee: Jack Hillerström-Forsyth.