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In case no. 4998-20, the **National Board of Health and Welfare** (Appellant) v. **Umeå University** (Respondent), the Supreme Administrative Court delivered the following judgment on 10 June 2021.

RULING OF THE SUPREME ADMINISTRATIVE COURT

The Supreme Administrative Court grants the appeal, overturns the judgment of the administrative court of appeal and affirms the administrative court's decision to disallow.

BACKGROUND

1. As a starting point, a government agency shall apply the procurement rules in acquisitions of, *inter alia*, services. In a public procurement, the suppliers who so wish submit tenders to the contracting authority. A government agency may also be a supplier on a certain market.

2. A supplier that considers itself to have been harmed or is at risk of being harmed in a public procurement is entitled to apply to an administrative court for review of the procurement provided that the supplier has or has had an interest in entering into an agreement in the procurement.

3. The National Board of Health and Welfare carries out a public procurement of framework agreements for, *inter alia*, research-related services within catastrophe medicine. Umeå University submitted a tender with respect to two contract areas. The National Board of Health and Welfare decided, however, that the engagements would be awarded to other tenderers.

4. Umeå University applied for review to the Administrative Court in Stockholm in respect of the two framework agreement areas for which the university had submitted a tender. The administrative court disallowed the university's

application by reference to the fact that the university had no right of action. The administrative court noted that the National Board of Health and Welfare and Umeå University were both government agencies which constitute part of one and the same legal entity, the State. According to the administrative court, acquisitions between them are not covered by the procurement rules.

5. The university appealed to the Administrative Court of Appeal in Stockholm which overturned the decision of the administrative court and remanded the case to the administrative court for an examination on the merits. The administrative court of appeal was of the opinion that the university had a right of action since the decisive aspect of the possibility for legal review of a procurement is that that which is acquired is covered by the procurement rules. According to the administrative court of appeal, the university was to be regarded as a supplier and was thus entitled to review of the procurement.

CLAIMS, ETC.

6. *The National Board of Health and Welfare* claims that the Supreme Administrative Court, by way of amendment of the judgment of the administrative court of appeal, is to affirm the administrative court's decision to disallow.

7. *Umeå University* is of the opinion that the appeal is to be rejected.

REASONS FOR THE RULING

The question in the case

8. The question in the case is whether a government agency is entitled to apply for review of the procurement of another government agency.

Legislation, etc.

9. Pursuant to Chapter 1, section 2, first paragraph of the Public Procurement Act (2016:1145), the act applies to procurements conducted by a contracting authority. Procurement covers measures taken in order to procure supplies, services or works through contract award.

10. Chapter 1, section 22, first paragraph states that a *contracting authority* means, *inter alia*, a government agency. *Supplier* means according to section 16, first paragraph, a market operator that provides services or products or executes works.

11. According to Chapter 20, section 4, following an application for review from a supplier that considers itself to have been harmed or risks being harmed, an administrative court may review a procurement as well as the effectiveness of a contract concluded between a contracting authority and a supplier.

12. The provisions in Chapter 1, sections 2, 16 and 22 of the Public Procurement Act implement Articles 1(1), 1(2), 2(1)(1) and 2(1)(10) of Directive 2014/24/EU on public procurement (the 2014 Directive).

13. The provision regarding right of action in Chapter 20, section 4 of the Public Procurement Act has its background in Article 1(3) of Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (the Remedies Directive). That article states that the review procedures shall be available under rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

The Court's assessment

14. Initially, it may be observed that the National Board of Health and Welfare is a contracting authority. The National Board of Health and Welfare is carrying out a public procurement for a framework agreement and the procurement rules are applicable to the procedure. The National Board of Health and Welfare is thus obliged to conduct the procurement in accordance with such regime, and suppliers that consider themselves to have been harmed or risk being harmed have the possibility to apply for review of it.

15. In addition, it may be noted that Umeå University is a supplier on the relevant market. Accordingly, as a starting point, the university has the same right as other suppliers to apply for review of procurements carried out on this market.

16. However, the National Board of Health and Welfare and Umeå University are both state administrative agencies under the Government. Thus, they are part of one and the same legal entity, the State, and cannot enter into agreements with one another which are binding according to civil law. Before courts of law, they do not represent themselves but, rather, the State within their respective areas of operations (see, for example, HFD 2017 reported case no. 66). The issue is what this circumstance entails as regards the application of the procurement rules to the relationship between them.

17. Prior Swedish case law did not exclude the possibility that acquisitions between independent units within one and the same legal entity, at least in certain cases, can be covered by the procurement rules (see case NJA 2001, p. 3). Since the procurement procedures are governed by EU directives in the area, however, it is Union law which ultimately establishes the boundaries regarding which acquisitions are covered by the regime.

18. It is apparent from the case law of the European Court of Justice that the procurement rules are applicable only to agreements entered into between a

contracting authority and a natural or legal person independent of that authority (see, for example, *Teckal*, C-107/98, EU:C:1999:562, paragraphs 46 and 49–51, *Stadt Halle*, C-26/03, EU:C:2005:5, paragraphs 47 and 48, *Parking Brixen*, C-458/03, EU:C:2005:605, paragraphs 58–60, *Technische universität*, C-15/13, EU:C:2014:303, paragraph 24 and *Undis Servizi*, C-553/15, EU:C:2016:935, paragraph 28; *cf*., also, Government Bill 2015/16:195, p. 401 f., Government Bill 2011/12:106, p. 58 f. and Government Bill 2009/10:134, pp. 9 ff. and 44 f.). Legally binding obligations whose execution is legally enforceable cannot namely arise, in the manner required, within one and the same legal entity (*cf. Helmut Müller*, C-451/08, EU:C:2010:168, paragraph 62 and *Remondis*, C-51/15, EU:C:2016:985, paragraph 43).

19. The procurement rules are thus not applicable to a procurement between the National Board of Health and Welfare and Umeå University. An entirely different matter is the fact that these rules are applicable to the relationship between the National Board of Health and Welfare and other suppliers in the relevant procurement.

20. However, the university claims that the fact that it is a question of an acquisition subject to a procurement obligation and that the university is a supplier on the relevant market means that the university nonetheless has a right of action.

21. In HFD 2017 reported case no. 62 it is stated that a condition also for the right of action is that the supplier has or has had an interest in entering into an agreement in the relevant procurement (*cf.* Article 1(3) of the Remedies Directive). Accordingly, the procurement procedure must be able to result in an agreement which is legally binding between the contracting authority and the supplier. As has been set forth, this is not possible when the contracting authority and the supplier are part of the same legal person. Accordingly, the university has no right of action.

22. Accordingly, the appeal is granted and the administrative court's decision to disallow is affirmed.

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Justices Jermsten, Ståhl, von Essen and Rosén Andersson have participated in the ruling.

Judge Referee: Lina Hjorth.