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In case no. 5671-20, **Linde Bergslags parish** (Appellant) v. the **Swedish Public Employment Service** (Respondent), the Supreme Administrative Court delivered the following judgment on 6 September 2021.

RULING OF THE SUPREME ADMINISTRATIVE COURT

The Supreme Administrative Court rejects the claim to obtain a preliminary ruling from the European Court of Justice.

The Supreme Administrative Court rejects the appeal.

BACKGROUND

1. A public procurement shall be carried out in such a manner that suppliers are treated equally and without discrimination. Accordingly, a procurement may not be carried out with the intention of limiting competition so that certain suppliers are unduly favoured or disadvantaged.
2. For social reasons, a procurement may be reserved for sheltered workshops or suppliers whose principal aim is the social and professional integration of disabled persons or persons with difficulties entering the job market, so-called *social enterprises*. The sheltered workshop or the social enterprise must employ a certain percentage, not less than 30 per cent, of persons who are disabled or persons who have difficulties entering the job market.
3. The Swedish Public Employment Service is conducting a procurement of framework agreements through a so-called *simplified procedure*. The services to which the procurement pertains are work preparation efforts for job applicants who are registered with the Swedish Public Employment Service and have a substantial need of support in order to enter the job market. The procurement is reserved for sheltered workshops and social enterprises.

4. Linde Bergslags parish submitted tenders in the procurement and stated the following. The agreement was to be performed by S:t Mary Lindesberg. S:t Mary performs work integration activities within the Church of Sweden and is located in several areas, *inter alia*, in Lindesberg. S:t Mary Lindesberg is an independent organisational unit within the parish and meets the requirements for participating in the reserved procurement.
5. The Swedish Public Employment Service stated that it was the parish's entire operation, not only the work carried out by the S:t Mary Lindesberg unit, which was to fulfil the requirements in order to be able to participate in the procurement since it was the parish which had submitted the tender. The parish was not deemed to fulfil these requirements.
6. The parish applied to the Administrative Court in Stockholm for review of the procurement and stated the following. A supplier need not be an independent legal person but, rather, can be an organisational unit within such a legal person. It is apparent from the tender that S:t Mary Lindesberg is to perform the agreement. The fact that the parish in a formal sense has submitted the tender does not change the fact that it is a certain unit within the parish, S:t Mary Lindesberg, which is the supplier within the meaning of the procurement rules. The determination shall accordingly pertain to whether S:t Mary Lindesberg fulfils the requirements.
7. The administrative court rejected the application for review. The administrative court noted that it was the parish which had submitted the tender and that the requirements to be able to participate in the reserved procurement were therefore to be examined in the context of the parish's entire operation.
8. The Administrative Court of Appeal in Stockholm rejected the parish's appeal to it. The administrative court of appeal was of the opinion that an organisational unit of a legal person lacks the possibility to acquire rights and obligations and thus is not to be regarded as a supplier. Furthermore, the administrative court of appeal was of the opinion that it was not possible for a supplier to meet the

requirements of being able to participate in a reserved procurement by referring to an organisational unit within the supplier. Such an arrangement would make it possible for suppliers who have the possibility to be awarded contracts under normal competitive conditions to qualify for reserved procurements by creating operational units which meet the requirements.

CLAIMS, ETC.

9. *Linde Bergslags parish* claims that the Supreme Administrative Court shall decide, firstly, that the procurement is to be rectified by means of a new evaluation in which the tender from the parish is to be included and, in the alternative, that the procurement is to be carried out anew. In addition, the parish claims that the Supreme Administrative Court is to obtain a preliminary ruling from the European Court of Justice.
10. The parish states the following. The rules do not prevent a sheltered workshop or a social enterprise from participating in a reserved procurement as a unit within a larger organisation and that the unit submits tenders stating the legal person and status of the larger organisation. Accordingly, a supplier may qualify for a reserved procurement by reference to an organisational unit within the supplier constituting a sheltered workshop or a social enterprise.
11. *The Swedish Public Employment Service* is of the position that the appeal is to be rejected.

REASONS FOR THE RULING

The question in the case

12. The question in the case pertains to the conditions under which a tenderer may qualify in a reserved procurement when the tenderer has stated that the agreement

shall be performed by an organisational unit within the tenderer and that the unit constitutes a sheltered workshop or a social enterprise.

Legislation, etc.

13. According to Chapter 1, section 16, first paragraph of the Public Procurement Act (2016:1145), *supplier* means a market operator that provides services or products or executes works. A supplier also means, according to the second paragraph, groups of suppliers.
14. The provision implements Article 2 (10) of Directive 2014/24/EU on public procurement (2014 Directive). The article defines *economic operator* as any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market. The term *economic operator* corresponds to the term *supplier* in Swedish legislation.
15. Recital 14 of the Directive states the following. It should be clarified that the notion of ‘economic operators’ should be interpreted in a broad manner so as to include any persons and/or entities which offer the execution of works, the supply of products or the provision of services on the market, irrespective of the legal form under which they have chosen to operate. Thus, firms, branches, subsidiaries, partnerships, cooperative societies, limited companies, universities, public or private, and other forms of entities than natural persons should all fall within the notion of economic operator, whether or not they are ‘legal persons’ in all circumstances.
16. Chapter 4, section 18, first paragraph of the Public Procurement Act states that a contracting authority may, in a procurement, reserve participation to sheltered workshops or suppliers whose principal aim is the social and professional integration of disabled persons or persons with difficulties entering the job

market, or provide that a contract is to be performed in the context of a programme for sheltered employment. The second paragraph states that a condition for a supplier to participate in a procurement in accordance with the first paragraph is that no less than 30 per cent of the employees of the sheltered workshop, supplier or programme for sheltered employment are disabled persons or persons with difficulties entering the job market. The provision implements Article 20 (1) of the 2014 Directive.

17. Chapter 7, section 1 of the Public Procurement Act provides that a contracting authority may enter into a framework agreement if it uses any of the procurement procedures in the Act.
18. Chapter 19, section 2 provides that the provisions of Chapter 1, section 16, Chapter 4, section 18 and Chapter 7, section 1 also apply to procurements carried out in a simplified procedure in accordance with Chapter 19.

The Court's assessment

19. There is sufficient guidance for the assessment of the questions raised in the case. Accordingly, there is no reason to obtain a preliminary ruling from the European Court of Justice.
20. Linde Bergslags parish claims that it is S:t Mary Lindesberg which is to perform the agreement and which is thus the supplier within the meaning of the procurement rules and that the fact that the parish has in a formal sense submitted the tender does not change this. The Swedish Public Employment Service makes the opposite assessment.
21. The first question to be answered by the Supreme Administrative Court is thus, as between the parish and S:t Mary Lindesberg, who is to be deemed to be the supplier in the relevant procurement. Decisive in this respect is the purport of the

term *supplier* in the Public Procurement Act which accordingly corresponds to the term *economic operator* in the 2014 Directive.

22. Article 2 (10) and recital 14 of the Directive provide that the term *economic operator* is to be granted a broad interpretation and that the legal form is not decisive. Thus, in principle, all natural and legal persons and groups thereof and units within such persons are entitled to participate in procurement procedures. The case law of the European Court of Justice also provides that any person or entity which, in light of the conditions laid down in a contract notice, believes that it is capable of carrying out the contract, either directly or by using sub-contractors, is eligible to submit a tender (*cf.*, for example, *CoNISMa*, C-305/08, EU:C:2009:807, paragraph 42 and *Parsec Fondazione*, C-219/19, EU:C:2020:470, paragraphs 20–22).
23. In addition, no requirements are imposed in respect of reserved procurements according to which a sheltered workshop or a social enterprise must possess a particular corporate-law form or structure. Requirements are imposed only in respect of the aim of the activities and the groups of persons employed therein (Article 20 (1) of the 2014 Directive).
24. The term *supplier* in the Public Procurement Act is to be afforded a comparably broad interpretation. Accordingly, it is a wide and disparate group of operators who, irrespective of the manner in which they are organised, may be suppliers. Thus, there is no impediment to, for example, an organisational unit within a legal person submitting a tender in a procurement and hence being a supplier within the meaning of the procurement rules.
25. Another matter is that the contracting authority must formulate, *inter alia*, the qualification requirements such that all suppliers – irrespective of organisational form – have the possibility to submit tenders in the procurement subject to equal terms and conditions. A supplier must also acquire information regarding the procurement for the purpose of being able to submit a competitive tender and

may, if awarded a contract, need to make various arrangements in order for the contract to be able to be fulfilled.

26. In this light, as regards a particular tender, according to the view of the Supreme Administrative Court, there is no reason to consider someone other than those who have actually submitted the tender as supplier.
27. In the relevant procurement, it is Linde Bergslags parish which has submitted a tender and which is accordingly the supplier in the procurement, not S:t Mary Lindesberg. The fact that the tender could have been submitted by S:t Mary Lindesberg is irrelevant in this regard.
28. The next question to be addressed by the Supreme Administrative Court is whether the parish can qualify for the reserved procurement by reference to the fact that S:t Mary Lindesberg constitutes a sheltered workshop or a social enterprise and it is the unit which is to perform the contract.
29. By virtue of the provisions in Chapter 4, section 18 of the Public Procurement Act regarding reserved procurements, positive discrimination against certain suppliers is permissible for social reasons. The purpose of the rules is that the relevant suppliers are to be afforded an opportunity to be awarded contracts under conditions which would not apply under normal competitive conditions.
30. In order to ensure this purpose, according to the Supreme Administrative Court, the requirements imposed in order to qualify for a procurement must apply to the supplier as such. The supplier who submits a tender in a reserved procurement must thus, in order to qualify, be a sheltered workshop or a social enterprise and have a sufficiently high level of employment of persons with disabilities or persons who have difficulties entering the job market (*cf.* Government Bill 2015/16:195, p. 461 f.).

31. It has not been asserted that the activities at Linde Bergslags parish are such that the parish meets the requirements in order to be able to participate in the reserved procurement. Accordingly, the Swedish Public Employment Service has had reason to disqualify the parish from participation. Therefore, the appeal is rejected.

Justices Jermsten, Svahn Starrsjö, von Essen, Rosén Andersson and Anderson have participated in the ruling.

Judge Referee: Sara Westerlund.