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In case no. 6151–6159-20, **Dokumentismen i Umeå AB** (Appellant) v. **Örnsköldsvik Municipality and others** (Respondents), the Supreme Administrative Court delivered the following judgment on 10 January 2022.

RULING OF THE SUPREME ADMINISTRATIVE COURT

The Supreme Administrative Court rejects the appeal.

BACKGROUND

1. A framework agreement is an agreement which establishes the terms and conditions for a contract subsequently entered into between one or more contracting authorities and one or more suppliers. By executing a framework agreement regarding a particular good or service, a contracting authority need not carry out a new procurement each time it has a need for the good or the service, but may then instead purchase the good or the service from a supplier covered by the framework agreement (so-called call-off).

2. These cases concern whether, in conjunction with the procurement of a framework agreement, a ceiling must be stated for the goods and services to be covered by the framework agreement, i.e. an upper limit for the total quantity which may be ordered. In addition, the case gives rise to several questions regarding the harm assessment to be conducted when a procurement is subject to review.

3. Örnsköldsvik municipality, together with Stiftelsen Gideågården and a number of municipal companies, are procuring framework agreements referred to as “Printing service as function”. The procurement covers the needs of the orderers for printing, copying and scanning. The supplier is to offer this service as a functions undertaking in which all hardware and software are covered, including

service and support. Dokumentismen i Umeå AB submitted a tender in the procurement, but another tenderer was accepted as supplier.

4. The procurement document contained information regarding historical volumes for the relevant service and an estimate of the orderers' future needs. It also provided an order for the manner in which questions regarding the procurement could be presented during the tender period. As far as is apparent, no question regarding the maximum scope of the framework agreement was submitted.

5. Dokumentismen applied to the Administrative Court in Härnösand regarding review of the procurement and stated the following. No maximum value or any maximum volume has been stated for the framework agreement. The company is harmed as a result since the company would have performed another calculation and submitted another price had the maximum scope of the framework agreement been stated. The company is harmed or risks being harmed also due to the fact that, had a fixed limit been established, the contracting authorities would have been compelled to conduct a new procurement in the event the limit was exceeded. The company would have then had a chance to be accepted as supplier in the new procurement of the excess values.

6. The administrative court rejected the application. The administrative court observed that the estimated needs of the orderers and the information regarding the total annual cost for corresponding printing services during the preceding year had been stated in the procurement document. According to the court, the procurement document in aggregate thus possessed such information as made the volumes which could be expected sufficiently clear. Each supplier could accordingly form an understanding of the possibilities of submitting a competitive tender. In this light, the court found that the contracting authorities had not contravened the procurement legislation in the execution of the procurement.

7. The Administrative Court of Appeal in Sundsvall rejected Dokumentismen's appeal to it. The administrative court of appeal observed that no maximum

volume had been stated in the procurement which could be ordered under the framework agreement. The procurement had thus been carried out in a manner in contravention of the procurement legislation. The administrative court of appeal was of the opinion, however, that neither the circumstances nor the explanations provided by the company could form the basis for the conclusion that the lack of a ceiling volume had as a consequence that the company could not submit the most competitive tender. Furthermore, the administrative court of appeal was of the opinion that what the company had stated regarding the possibility to be able to enter into a subsequent, hypothetical agreement could not be deemed to entail that the company had been harmed or could be harmed in the sense required for an intervention against the relevant procurement.

CLAIMS, ETC.

8. *Dokumentismen i Umeå AB* claims that the Supreme Administrative Court shall order that the procurement be recommenced.

9. *Örnsköldsvik municipality, AB Övikshem, Höga Kusten Destinationsutveckling AB, Miljö och Vatten i Örnsköldsvik Aktiebolag, Stiftelsen Gideågården, Örnsköldsvik Airport AB, Örnsköldsviks Hamn och Logistik AB, Övik Energi Aktiebolag* and *Övik Energi Nät Aktiebolag* are of the position that the appeal is to be rejected.

REASONS FOR THE RULING

The questions in the cases

10. The first question in the cases is whether there is a contravention of procurement legislation in failing, in conjunction with a procurement, to state a ceiling for the total goods and services which may be ordered under the framework agreement. If such is the case, it raises the question of what is required for a supplier to be

deemed to have shown that a deficiency in this respect has had as a consequence that the supplier has been harmed or risks being harmed.

Legislation, etc.

11. According to Chapter 1, section 20 of the Public Procurement Act (2016:1145), a *framework agreement* means a contract concluded between one or more contracting authorities and one or more suppliers with the aim of establishing the terms of contracts to be awarded during a certain later time period. According to Chapter 7, section 1, a contracting authority may enter into a framework agreement if it uses any of the procurement procedures in the Act.

12. Chapter 4, section 1 states that contracting authorities shall treat suppliers equally and without discrimination and shall conduct procurements in a transparent manner.

13. These provisions correspond to the provisions in Articles 18 and 33 of Directive 2014/24/EU on public procurement.

14. According to Chapter 20, section 4 of the Public Procurement Act, 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 and the effectiveness of a contract concluded between a contracting authority and a supplier. If the contracting authority is in breach of any of the basic principles in Chapter 4, section 1 or any other provision in the Act and this has caused or may cause the supplier harm, the court shall, in accordance with Chapter 20, section 6, decide that the procurement shall be recommenced or that it may be concluded only once corrections have been made.

15. The provisions regarding a right of action in Chapter 20, section 4 have their 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). The article states that review procedures are to be available subject to the conditions stated by the Member States themselves, at least to any person having or having had an interest in a particular contract and who has been or risks being harmed by an alleged infringement.

The Court's assessment

Must the maximum scope of the framework agreement be stated?

16. The first question to be addressed by the Supreme Administrative Court is whether, in conjunction with the procurement of a framework agreement, there is a requirement that the maximum scope of the framework agreement is stated and whether this requirement in such case has been satisfied in the relevant procurement.

17. In the case of *Simonsen & Weel* (C-23/20, EU:C:2021:490, paragraphs 62, 63, 71 and 74) the European Court of Justice has stated the following.

18. The principles of transparency and equal treatment of economic operators with an interest in the conclusion of a framework agreement would be affected if the contracting authority did not set out the maximum quantity which such an agreement covers. The fact that this is stated is of considerable importance for a tenderer to be able to assess his or her ability to perform the obligations arising from that framework agreement. Information regarding the maximum quantity or the maximum value can appear either in the contract notice or the tender specifications. Once that limit is reached, the framework agreement will no longer have any effect.

19. Thus, it is apparent from the case that, in conjunction with the procurement of a framework agreement, the maximum quantity or the maximum value covered by the framework agreement must be stated. In the relevant procurement, only

information regarding historical quantities and costs and an estimate of the orderers' needs have been stated indicating that the needs may vary and, thus, be greater or lesser. The requirement of stating the maximum quantity or maximum value has thus not been met, as a consequence of which the contracting authorities have breached the principles of transparency and equal treatment in Chapter 4, section 1 of the Public Procurement Act.

Generally regarding the harm assessment

20. The next question is what is necessary for a supplier to be deemed to have demonstrated that such a deficiency has caused or may cause the supplier harm in the sense referred to in Chapter 20, section 6 of the Public Procurement Act. The fact that the supplier has the burden of proof is apparent from HFD 2013 reported case no. 53.

21. No direct equivalent to the provision regarding the harm assessment to be conducted by the court in accordance with Chapter 20, section 6 when a procurement is reviewed is found in the Remedies Directive. The harm prerequisite, however, is formulated in the same manner as the harm prerequisite which, according to Article 1 (3) of the Directive, applies in respect of the right of action itself. The harm assessment in accordance with Chapter 20, section 6 should accordingly be carried out taking into account the case law developed by the European Court of Justice in relation to the Remedies Directive.

22. A general starting point in the harm assessment is that a supplier who applies for review of a procurement must specify the manner in which a deficiency in the procurement has caused or may cause the supplier harm (HFD 2013 reported case no. 53). Inherent in this is that it is insufficient for the supplier to describe in general terms the harm or risk of harm caused by the deficiency. In order for the court to be able to assess whether the supplier has actually been harmed or may be caused harm, it is necessary that the supplier provide a clear and specific account

as to the manner in which the deficiency has affected the supplier's possibility to compete in the procurement.

23. The harm or risk of harm adduced by the supplier shall, furthermore, be related to the possibility to compete in precisely the procurement for which review has been requested (see *Sisal et. al.*, C-721/19 and C-722/19, EU:C:2021:672, paragraph 60 and the case law referred to therein and HFD 2017 reported case no. 62). The *Sisal* case took into account a supplier's interest in participating in a new procurement in the assessment of whether the supplier had a right of action in accordance with Article 1 (3) of the Remedies Directive (*Sisal et. al.*, paragraphs 58–65). However, in that case, the alleged breach consisted of a contracting authority, in breach of the legislation, having chosen to extend a concession for the benefit of an existing supplier in lieu of carrying out a new procurement. Such an extension is, in principle, comparable to an illegal direct award of a contract and, in accordance with Swedish law, is thereby covered by the provision regarding review of the effectiveness of a contract in accordance with Chapter 20, sections 13–15 of the Public Procurement Act. Thus, the case concerned a situation other than the situations covered by the provision in Chapter 20, section 6 regarding review of the procurement itself.

24. Whether or not the supplier has done what is required in order to avoid harm is, furthermore, to be taken into account in the assessment of whether a deficiency in the procurement has resulted in a harm or risk of harm for a certain supplier. A supplier who believes that the information provided in the procurement documents is incomplete or unclear should, for example, as early as during the tender period, turn to the contracting authority to inquire and request supplementations and clarifications. If the supplier fails to do so without acceptable reasons and, instead, postpones objection to any deficiency until after the award notice has been taken, the requirement in Chapter 20, section 6 according to which the deficiency caused or risks causing harm to the supplier is normally not deemed to be met (see *eVigilo*, C-538/13, EU:C:2015:166, paragraphs 55 and 56; *cf.*, also, *Simonsen & Weel*, paragraph 89).

The harm assessment in this case

25. Dokumentismen has stated that the company, due to the fact that it could not form an understanding of the potential scope of the agreement, has suffered harm in that it could not submit the most competitive tender. According to the company, it was willing to accept negative profit margins for the purpose of winning the procurement, but was of the opinion that such a risk was not possible since no maximum quantity was stated for the framework agreement. The company has further stated that it was compelled to submit tender prices which took into account the fact that the orderers would order greater quantities than those estimated in the procurement, which would have required that the company retain sub-contractors who would cause an increase in the price.

26. The Supreme Administrative Court finds that the company, during the tender period, could have requested clarification from the orderers regarding the maximum scope of the framework agreement. Instead, the company chose to submit a tender price which took into account the fact that the estimation of the orderers' needs stated in the procurement notice could be exceeded. Accordingly, the company cannot be deemed to have done what was necessary in order to avoid harm as a consequence of deficiency in the procurement. In addition, the company's description of the manner in which its tender price was affected by the fact that there was no information regarding the maximum quantity or the maximum value of the framework agreement is presented in relatively general terms.

27. In this light, the Supreme Administrative Court finds that Dokumentismen did not show that the deficiency in the procurement has caused or risked causing harm to the company in that it could not submit a more competitive tender.

28. Furthermore, the company has stated that it was harmed or, at least, was at risk of being harmed since the contracting authorities, had the maximum scope of the

framework agreement been stated, would have been compelled to carry out a new procurement had such scope been exceeded. The company would have then had a chance to compete in the new procurement.

29. As stated, the interest in participating in a future procurement, however, is not taken into account in a review of a procurement in accordance with Chapter 20, section 6 (see paragraph 23). What the company has stated regarding having been deprived of the possibility to participate in any future procurement is thus irrelevant to the assessment of whether the company was harmed or was at risk of being harmed as a consequence of the deficiency in the relevant procurement.

Conclusions

30. The contracting authorities have breached the procurement legislation by not stating the maximum quantity or the maximum value covered by the framework agreement. However, Dokumentismen has not shown that such deficiency has caused the company harm or can cause the company harm within the meaning of Chapter 20, section 6 of the Public Procurement Act. Accordingly, the company's appeal is rejected.

Justices Jäderblom, Ståhl, Bull, Anderson and Jönsson have participated in the ruling.
Judge Referee: Sara Westerlund.