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In case no. 7741-21, **Kvadrat Stockholm AB** (Appellant) v. the **Legal, Financial and Administrative Services Agency** (Respondent), the Supreme Administrative Court delivered the following judgment on 18 November 2022.

RULING OF THE SUPREME ADMINISTRATIVE COURT

The Supreme Administrative Court rejects the appeal.

BACKGROUND

1. In conjunction with public procurement, there are different procedures which the contracting authority may choose amongst, one of which is the restricted procedure. When the restricted procedure is used, the authority shall state in the notice or invitation to tender the criteria and rules to be applied in the choice of the candidates that may submit tenders. In conjunction with this procedure, the authority may also limit the number of candidates that will be allowed to submit tenders provided that the notice or invitation states the highest number of candidates that will be invited.
2. The question in the case is whether it is permissible to use the drawing of lots to limit the number of qualified candidates in the restricted procedure.
3. In September 2020, the Legal, Financial and Administrative Services Agency invited suppliers to submit a request to participate regarding procurement of IT consultancy services in accordance with a restricted procedure. It was apparent from the invitation – which covered a total of five tender areas – that not more than ten candidates would be allowed to submit tenders for each of tender areas 2 “Management of IT projects” and 4 “Architecture and development”. In order to qualify as a candidate, a number of requirements were enumerated in the invitation. In the event more than the stated maximum number of candidates fulfilled all of the requirements, a limitation would thereafter take place in accordance with certain stated so-called limiting criteria. In the event two or more

qualified candidates continued to share last place with the same number of points following a selection by means of these limiting criteria, differentiation between them would occur by means of a drawing of lots supervised by a notary public.

4. Following the conclusion of the application process, the Legal, Financial and Administrative Services Agency made a selection decision in January 2021 in respect of each tender area. In the decisions regarding tender areas 2 and 4, the authority stated that there were still 13 and 21 candidates respectively sharing last place after the limiting criteria had been applied. The authority accordingly drew lots in order to differentiate these candidates in the respective tender areas.
5. Kvadrat Stockholm AB (Kvadrat) fulfilled all requirements in the invitation to tender but shared last place following application of the limiting criteria in both tender areas 2 and 4. After lots had been drawn, the company was not invited to submit a tender for any of the areas.
6. The Administrative Court in Stockholm rejected Kvadrat's application for review regarding tender areas 2 and 4. The administrative court was of the opinion that the question regarding the drawing of lots must be determined in the individual case and stated that, in this case, it was permissible since the candidates which were subject to the drawing of lots were equivalent and that it was clear from the invitation that the drawing of lots could be used.
7. Kvadrat appealed to the Administrative Court of Appeal in Stockholm which rejected the appeal with principally the same grounds for the decision as the administrative court.

CLAIMS, ETC.

8. *Kvadrat Stockholm AB* claims that the Supreme Administrative Court shall decide that the procurement regarding tender areas 2 and 4 is to be carried out anew and states that the drawing of lots is not permissible since the contracting authority

may only apply limiting criteria which relate to the applicants' qualifications as regards the subject matter of the procurement. The drawing of lots is not such a criterion.

9. The *Legal, Financial and Administrative Services Agency* is of the opinion that the appeal is to be rejected.

REASONS FOR THE RULING

The question in the case

10. The question in the case is whether the drawing of lots is permissible when the number of qualified candidates in a restricted procedure exceeds the highest number of applicants which the authority intends to invite to submit tenders.

Legislation, etc.

11. Pursuant to Chapter 6, section 1 of the Public Procurement Act (2016:1145), the open procedure and the restricted procedure, among other things, may be used in conjunction with public procurement. According to section 2, in an open procedure, all suppliers may submit tenders. Section 3 states that, in a restricted procedure, all suppliers may, after a call for competition, apply to participate by presenting the information required by the contracting authority for the selection and that the candidates invited by the authority may submit tenders.
12. Chapter 4, section 6 states that a contracting authority that uses a restricted procedure may limit the number of candidates that can submit tenders. The contracting authority shall, in the notice or invitation to confirm interest, state the criteria and rules it will apply in selecting the candidates that will be allowed to submit tenders and, when relevant, the highest number that will be invited.

The Court's assessment

13. An authority that uses a restricted procedure shall state in the notice or invitation to confirm interest the criteria and rules it will apply in selecting the candidates that will be allowed to submit tenders. It is not apparent from the wording of the act nor from the preparatory works or case law what type of criteria and rules may be used or whether drawing of lots is included amongst them.
14. Kvadrat has referred to the judgment of the European Court of Justice in *Commission of the European Community v Italian Republic*, C-360/89, EU:C:1992:235, in support of its position that drawing of lots is not a permissible means for differentiating candidates. In that judgment, the court found that a selection criterion laid down in national legislation according to which preference is given to companies which carry out their main activity in the region in which the procured work is to be carried out was not compatible with the then applicable Procurement Directive (71/305/EEC). However, the court did not consider whether the drawing of lots could be used in the selection phase for differentiating equivalent tenders. The decision, furthermore, applied to the application of an older directive. Accordingly, no conclusions can be drawn from the decision in the assessment of the question in this case.
15. Case RÅ 2009, reported case no. 60, examined the issue of whether the drawing of lots was permissible in an open procedure. It is apparent from the case that, when two identical tenders with the lowest price have been submitted in an open procedure in which only one tender is to be accepted, it is appropriate to differentiate the tenders by the drawing of lots. This is supported, according to the Supreme Administrative Court, by the fact that the drawing of lots occurs in many contexts in which chance is desired to differentiate cases which are identical in all relevant respects, *inter alia*, when it has been shown that the usual selection rules are inadequate. According to the Court, such a method is generally regarded as not benefiting one of the participants at the expense of any other. Therefore, no principal impediment to the drawing of lots in conjunction with identical tenders was deemed by the Court to exist.

16. The fact that this view is also compatible with the now applicable Directive 2014/24/EU regarding public procurement is suggested by the formulation of recital 93 in the Directive in which it is stated that, in awarding contracts, recourse to the drawing of lots as the sole means should be avoided.
17. In conjunction with a restricted procedure, the suppliers do not submit any tender when they confirm their interest in participating in the procurement. Tenders are submitted at a later stage of the procedure and then only by the candidates that, following selection, have been invited to submit tenders. In the selection phase, it is thus not various tenders which are to be compared but, rather, the suppliers' qualifications in respect of the subject matter of the procurement and their ability to perform the contract to be awarded which is to be assessed. This difference relative to the open procedure justifies, according to the Supreme Administrative Court, no other view as to whether it should be permissible to use the drawing of lots as a selection method provided that the authority has first assessed the ability of the candidates to perform the contract based on enumerated qualifications and limiting criteria.
18. The Legal, Financial and Administrative Services Agency has chosen to limit the number of candidates that may submit tenders and has in the invitation to submit a request to participate stated the maximum number that will be invited. In conjunction with the selection, the authority has first applied the requirements enumerated in the invitation in order to qualify the candidates. Thereafter, differentiation has occurred by means of the limiting criteria stated in the invitation. Only thereafter has the drawing of lots been used as the final method for differentiating the candidates. As far as has come to light, the candidates that are the subject of the drawing of lots had equivalent abilities to perform the contract.
19. Against this background, the Supreme Administrative Court makes the assessment that the Legal, Financial and Administrative Services Agency, by differentiating

equivalent candidates by the drawing of lots at the end stage in order to limit the number of applicants to the maximum number set forth in the invitation has not contravened the procurement regime. Accordingly, the appeal is rejected.

Justices Henrik Jermsten, Margit Knutsson, Marie Jönsson, Linda Haggren and Martin Nilsson have participated in the ruling.

Judge Referee: Lina Bjersbo.