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June 2012

## Right to judicial review of procurement process

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*Several of the players which regularly participate in public procurements are aware of the extended right to make an application to the court to have procurement cases reviewed. Almost a year has passed since the Supreme Administrative Court extended the right for suppliers to appeal in procurement cases to encompass a greater range of situations. Following this change to case law, a large number of decisions has been announced by the administrative courts of appeal as well as the Supreme Administrative Court. Delphi partner, Anna Ulfsson and Sara-Li Olovsson, associate, report below on the current legal position in this field.*

### Background

In three rulings from summer 2011, the right to bring an appeal before a court in procurement cases has been extended by the Supreme Administrative Court to include more situations. Since a ruling from 7 June 2011 (case HFD 2011 ref. 29), a supplier whose tender is challenged by a competitor – and which thus risks being adversely affected – may be allowed to defend its tender in court. Previously a supplier whose tender had been successful was unable to defend its tender against an application from a competitor to have the winning tender disqualified. This gave rise to repeated and protracted review procedures during the actual procurement.

The first ground-breaking ruling was followed almost immediately by a statement from the Supreme Administrative Court stated in another case (7311-10), that a supplier – which had not been given the opportunity to respond in court to a challenge to its tender – was allowed to apply for review of the decision by the administrative court to reject its tender.

Yet another decision followed (case no. 4658-11), in which the Supreme Administrative Court made clear that a supplier wishing to exercise its right to plead before court, was obliged to appeal against a first instance ruling and was therefore unable to wait to appeal a decision from a higher instance.

### Post 2011 developments in the right of judicial appeal

The Supreme Administrative Court's extension of the right for a supplier to defend its tender in court provided a welcome change in the public procurement field. For both contracting authorities and entities, as well as for suppliers, the repeated and protracted applications for review had constituted a problem which could considerably delay the conclusion of a public contract.

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However, the Supreme Administrative Court's decisions from summer 2011 raised as many questions as they answered, since their decisions failed to detail all situations in which a supplier can be considered as "adversely affected" by an application for review and thus should be given a right to lodge an appeal. Almost a year since the extension in appeal rights, the Administrative Court of Appeal has provided a number of rulings. Furthermore, the Supreme Administrative Court has made clear in two additional decisions in which cases an adversely affected party will have the right to lodge an appeal.

Below we describe the situations in which a supplier has been afforded the right to appeal.

Situations in which a party may appeal:

- Where the winning tender is challenged (cf. the Supreme Administrative Court's decisions in case HFD 2011 ref. 29)
- As above and where the party adversely affected was afforded the opportunity to make a submission but failed to do so due to internal circumstances. A supplier whose tender was subject to application for review was given the right to appeal against the Administrative Court's judgment since it was adversely affected by the judgment (cf. Sundsvall Administrative Court of Appeal's judgment in case 2147-11).
- A supplier which had not been given the opportunity to make a submission in the first appeal process in the Administrative Court, prior to the extension of the right to do so, was given right to appeal against disqualification of its tender by the Administrative Court (cf. the Supreme Administrative Court's decision in case 7311-10.)

Situations which do not entail a right of appeal:

- Where the tender in question is not itself subject to a challenge (cf. the Supreme Administrative Court's decision in case 6288-11).
  - Where re-evaluation relates only to the applicant's tender but would have the effect of downgrading another supplier's position under a framework agreement. A supplier thus affected has no right of appeal (cf. Gothenburg Administrative Court of Appeal's decision in case 5406-11).
  - Where the court rules that a procurement process is to be recommenced in its entirety. (cf. the Supreme Administrative Court's decisions in case 3129-11 and case 3328-11).
  - Where the court rules that a procurement process is to be recommenced in its entirety and all potential suppliers are given the opportunity to compete for the contract again. (cf. Gothenburg Administrative Court of Appeal's decisions in case 6427-11 and case 8732-11, Stockholm Administrative Court of Appeal's decisions in case 3270-11, Sundsvall Administrative Court of Appeal's decision in case 3247-11).
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- On application for recommencement of procurement but where the court merely orders re-assessment of tenders. (cf. Sundsvall Administrative Court of Appeal's decision in cases 2347--2352-11).

**Summary**

As shown above, so far the courts have only considered a supplier as being adversely affected if an application for review is directly aimed at alleged shortcomings in the supplier's tender, or otherwise challenges the current supplier's tender.

Even if the scope of the right to appeal has been made considerably clearer since the Supreme Administrative Court's first decision in this matter, in the summer of 2011, a number of questions remain to be answered. For example, there is no unanimous view regarding whether a supplier which is allowed to submit an opinion in its capacity as an adversely affected party in an appeal case, may at the same time allege its own claims and considerations in the case – e.g. defects in the tender from the supplier which has applied for review. Or are these new arguments to be put on hold until a new award has been made and then lodged in a separate appeal process? This question is currently subject to an appeal which has been submitted to the Supreme Administrative Court only a few days ago, and we obviously hope that the Court will grant leave for appeal in order to clarify this matter.

Thus, we recommend all players concerned by public procurement in Sweden to continuously keep updated in regard to the development of the right to plead before court in appeal cases since we are convinced that further principles governing the right to plead before court will be crystallized in the future.



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