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## Who is authorized to sign a tender in a Swedish public procurement?

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*During the past year there have been several court cases concerning the question of who, i.e. which company official, is authorized to sign a tender in a public procurement procedure. In this article partner Kristian Pedersen and associate Ingrid Sandstedt account for the latest developments on the subject.*

There are no provisions on authorization to represent a company, or to sign tenders in public procurements, in the Swedish Public Procurement Act (2007:1091) ("LOU") or the Swedish Act on Procurement within the Water, Energy, Transport and Postal Services Sectors (2007:1092) ("LUF"). Instead which official of a Swedish limited company is authorized to sign a tender is dependent on what the contracting authority or entity has specified as mandatory requirements in the tender documents and the provisions of the Swedish Companies Act (2005:552) ("ABL").<sup>1</sup>

The certificate of registration of a Swedish limited company states which officials are the company's authorized signatories. It is common that the managing director is authorized to sign on behalf of the company for measures falling within the day-to-day management, but that the board members (often two of the board members together) have the right sign on behalf of the company for other types of matters (full authorization).

A crucial question, when analyzing for which measures the managing director is authorized to sign on behalf of the company, is whether or not the measure falls within the day-to-day management of the company in accordance with Chapter 8 Section 29 ABL. According to the generally accepted interpretation of the concept, the day-to-day management includes all actions which are not, in view of the extent and nature of the company's operations, unusual or of major importance. What constitutes day-to-day management may also be stated in written instructions from the board to the managing director. Hence, what is covered by a managing director's authorization to sign on behalf of the company is to some extent dependant of the nature of the company's business and its size.

### **Contradictory case law from the Administrative Courts of Appeal**

In the Gothenburg Administrative Court of Appeal's judgment of 21 December 2011 in case No. 5136-11 the court found that the company's managing director was not authorized to sign the tender. The contracting authority had, in the tender documents, stated as a mandatory requirement that the tenders should be signed by an "authorized person" and that the tender form should be signed by and "authorized signatory". The

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<sup>1</sup>The analysis in this article is based on the legal situation of Swedish limited companies in public procurement, since this is the type of company most frequently submitting tenders in Swedish public procurements.

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Administrative Court of Appeal found that the requirement of an authorized person had been defined in the tender form and that the tender therefore should be signed by an authorized signatory.

The company's managing director had signed the tender, but was not on his own authorized signatory at the time when the tender was submitted. Following submission of the tender a decision was taken by the board that the managing director should have sole authorization to sign on behalf of the company. Since, however, fulfillment of the requirement, according to the Administrative Court of Appeal, should be assessed on the circumstances at the time of submission of the tender, the company had not met the mandatory requirement that an authorized signatory should sign the tender, despite the fact that the managing director had been authorized to sign at a later stage.

The Jönköping Administrative Court of Appeal made a similar assessment in a judgment of 1 February 2012 in Case No 3805-11. The contracting authority had, in the tender documents, stated as a mandatory requirement that the tenders should be signed by an authorized signatory. The company's managing director had signed the tender but was not on his own authorized signatory, since he only had authority to sign on behalf of the company for measures falling within the day-to-day management. According to the court, the tender did not meet the requirement in the tender documents.

However, there are also examples of cases where the courts have found that authorization to sign on behalf of a company for measures falling within the day-to-day management is enough to sign a tender in a public procurement procedure.

In the Stockholm Administrative Court of Appeal's judgment of 27 August 2012 in case No. 2803-12 the court found that the company's managing director was authorized to sign the tender. The contracting authority had, in the tender documents, stated as a mandatory requirement that the tenders should be signed by an authorized signatory. The company's managing director had signed the tender but was not on his own authorized signatory, since he only had authority to sign on behalf of the company for measures falling within the day-to-day management. The court found that the value of the contract was equivalent to about 10 percent of the company's turnover and that the company had previously delivered similar services to the same contracting authority. Therefore, the Administrative Court of Appeal found that signing the tender was a measure falling within the day-to-day management and that the company's managing director was authorized to sign the tender.

The Gothenburg Administrative Court of Appeal came to the same conclusion in a judgment of 12 September 2012 in Case No 5882-12. The contracting authority had, in the tender documents, stated as a mandatory requirement that the tender should be signed by an authorized signatory. The company's managing director had signed the tender but was not on his own authorized signatory, since he only had authority to sign on behalf of the company for measures falling within the day-to-day management. The Administrative Court of Appeal found, given the nature of the company's business and

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its turnover, that signing the tender was neither an unusual measure nor a measure of major importance for the company. The action to sign the tender was therefore a part of the day-to-day management and that the company's managing director was authorized to sign the tender.

**Things to consider for contracting authorities and entities as well as suppliers**

Since the case law of the Administrative Courts of Appeal is not unambiguous, and the assessment of who is authorized to sign a tender is often made based on the circumstances in each case, it is important to act with care, both for contracting authorities and entities as well as their suppliers.

Contracting authorities and entities should carefully consider which requirements that need to be applied, and clearly state in the tender documents what is required from the tenderers, in terms of documentation, proof of authorization etc. For example, the contracting authority or entity should, in order to avoid problems of interpretation, clarify that it is necessary to provide a power of attorney if the requirement is that the tender should be signed by an authorized signatory and the person signing the tender is a sole authorized signatory.

Suppliers should, regardless of how the requirement in the tender documents is drafted, always make sure that tenders are signed by officials with full authorization, i.e. not only for the day-to-day management. This can be done either by letting the board sign the tender, by the board issuing a power of attorney for the managing director or someone else (in which case the power of attorney should be attached to the tender), or, in the case of Swedish limited companies, by registering a so-called specially designated signatory with the Swedish Companies registration Office.



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