Multicriteria awards of construction contracts: do Swedish administrative courts support or hinder sustainability

K. Åström[1] and J. Bröchner[2]
[1] *Division of Sociology of Law, Lund University, PO Box 42, SE-221 00 Lund, Sweden.*
[2] *Department of Technology Management and Economics, Chalmers University of Technology, SE-412 96 Göteborg, Sweden.*

Email: jan.brochner@chalmers.se

Abstract: In recent Swedish local government practice, lowest bid has increasingly been replaced as an award criterion for construction contracts by multicriteria approaches, including ecological criteria. An earlier interview survey of municipal procurement officials in Sweden has shown that there is a widespread opinion that reliance on multiple criteria, not least those related to ecological sustainability, causes a risk when awarding construction contracts. Officials appear to exaggerate the volume of award decisions that are contested and are believed to give rise to excessive cost and delays for local authorities. In fact, the number of court cases related to ecological criteria is small in Sweden. The purpose of this investigation is to analyse how court practice influences the local development of ecological criteria for awarding construction contracts. Theories of how the legal system interacts with decision making in local government are applied to this problem. Court decisions from 2003 through 2005 and relating to all of Sweden are analysed in order to answer questions as how ecological sustainability is argued and taken into consideration in administrative court practice. Findings indicate how and under what circumstances sustainability reasoning used by local procurement officials in their award decisions stand in the courts. Furthermore, general feedback effects on local contract award practice are discussed.

Keywords: Construction Procurement, Contract Award, Court Practice, Ecological Sustainability, Multiple Criteria

1. Introduction

In recent Swedish local government practice, lowest bid has increasingly been replaced as an award criterion for construction contracts by multicriteria approaches, including ecological criteria (Waara and Bröchner, 2006). An interview survey of municipal procurement officials in Sweden shows that there is a widespread opinion that reliance on multiple criteria, not least those related to ecological sustainability, causes a risk of legal complications when awarding construction contracts (Carlsson and Waara, 2006). In current practice, ecological award criteria are usually expressed in relation to the existence of an environmental management system within the tendering firm or in more vague terms, such as ‘environmental aspects’.

The issue of how courts react to protests regarding award decisions in best-value procurement is receiving wider attention (Shane et al., 2006). There is a possibility that court practice, or perceptions of court practice, introduces an obstacle to the development of ecological criteria

for the selection of construction contractors. A broad international overview of appeal procedures for public procurement has been published by the OECD (2000).

Just as it is difficult to reach consensus on defining sustainability in general, there is a variety of approaches to defining environmental sustainability, in particular so that these definitions can be used as criteria in public procurement (Marron, 1997). Nevertheless, it is a challenge for courts to contribute to the development of a more precise understanding of sustainability and criteria for sustainability as legal concepts.

Sustainability considered as a legal concept is an example of a goal-oriented norm, bringing some form of uncertainty into the legal framework and at the same time highlighting the importance of possibilities to appeal. Therefore, an important question is whether courts reduce this uncertainty significantly for procurement officers and for those who submit tenders for contracts.

The purpose of the present investigation is to analyse how court practice influences the local development of ecological criteria for awarding construction contracts.

After a short description of the Swedish appeal system for contract award decisions, the methodology is explained. The question of legal application in a context of markets and local politics is outlined, as well as the relationship between Swedish procurement law and EC directives. Empirical findings from interviews and a database of court cases are presented and discussed.

2. The Swedish appeal system

In Sweden, the National Board for Public Procurement (NOU) supervises the observation of the Public Procurement Act, the GATT agreement and the procurement agreement under the WTO. The Board disseminates information and gives general advice and comments on how the procurement regulations shall be interpreted. Suppliers may appeal to a County Administrative Court if, during an ongoing procedure of procurement, they consider that they have been harmed or risk harm (see Fig. 1). Decisions made by a County Administrative Court can in their turn be appealed to Administrative Courts of Appeal. On the other hand, when an award procedure has been concluded, suppliers who consider that they have been harmed can claim damages in a District Court. Also, when suppliers consider that they have been treated wrongly, they can appeal to the EC Commission or to the National Board, which reviews cases of general interest, but lacks sanctions. An earlier overview by Herlitz (1966/67) of the Swedish appeal system for administrative decisions is still valid as an introduction.

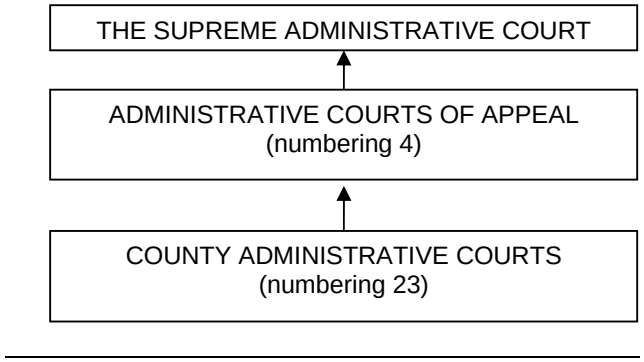

Fig. 1. The Swedish appeal system for ongoing procurement

From the 1980s and onwards the possibilities to appeal decisions made by public authorities, especially in local government, have increased. At least in theory, this has led to a new role for the administrative courts in terms of influencing public administration. The two main politically stated motives have been first, to strengthen the situation for the individual in relation to the state and the municipalities and secondly, institutionalising a system for convergence in the exercise of public authority, in order to compensate for the increasing use of soft law and the introduction of a more goal oriented style of legal decision-making. The need for institutions to provide convergence has grown as the reliance on goal oriented framework law has increased in many fields of administration.

However, the strength of courts as institutions that support administrative convergence should not be exaggerated. A useful classification recognizes three categories of legal norms: (i) material - defining what to do, (ii) procedural - defining how to do it and (iii) norms giving power to act and make decisions. Socio-legal research in the sector of welfare administration (Åström and Werner, 2002) has pointed to the fact that courts often avoid taking position in a material conflict, but rather twist the case into a question of procedural matters.

3. Methods

The methodology relied on here includes interviews with local procurement officials and an analysis of judgements from County Administrative Courts from 2003 to 2005.

Eight Swedish municipalities (Eskilstuna, Göteborg, Malmö, Sandviken, Stockholm, Uppsala, Varberg, Växjö) and two county councils (Västra Götaland, Västerbotten) have been selected based on 2000-2002 calls for tenders. A total of 25 procurement officials have participated in semi-structured interviews, and documents describing their models have been analysed.

For the judgements a commercial database, Allego, has been used. This database includes all judgements from every County Administrative Court from 2003 and onwards. The presentation of court practice given here is based on a preliminary assessment and interpretation of this material.

4. Market, local politics and legal application

Public procurement performed by local government involves many sectors of society. The overall responsibility lies with the elected representatives. Civil servants with various professional backgrounds actually manage the process of procurement, and courts have the last word if a contract award decision is appealed. Swedish procurement legislation underlines a requirement for public clients to use businesslike ("affärsmässiga") principles, thus going further than the European directives in ensuring fair competition between private contractors.

Hence, it is easy to identify that every single case of procurement involves four different forms of rationality, namely local politics, professionalism, business and adjudication process. It is to be expected that politicians, professionals and businessmen act in order to fulfil goals that they have defined themselves, while judges are supposed to make decisions according to norms that are defined by others. Thus politicians, professionals and businessmen engage in a form of decision making that is goal-oriented, while judges decide according to a form of decision making that is norm-oriented and which characterises the administration of justice in a legal positivist tradition, typical of Scandinavia and most of Europe.

5. EC directives and convergence of legal systems

From a Swedish viewpoint, it is increasingly obvious that the development in public procurement and its specific effects on both public sector management and private sector responses (in terms of behaviour and strategies of firms) is a question of merging two normative systems, the national and the one of the European Union.

Why should first instance verdicts in a statutory law country acquire some of the force of precedents in a common law system? This can probably be explained by considering the new sources of uncertainty that the implementation of EC directives has created in Sweden (Bernitz, 2001). It is a break with Swedish legal tradition and has complicated life for laymen who earlier were more able to gain an understanding of the legal issues raised by public procurement. Also, it should be kept in mind that municipal procurement, regardless of the contract sum, was not regulated through Swedish procurement legislation until recently. Earlier, there was a widely used set of principles issued by the Swedish Association of Local Authorities (cf. survey findings in Sweden, 1971).

Today, in contrast with Swedish Acts that are outside the scope of directives, there are no adequate, Swedish-style *travaux préparatoires*; no authoritative commentary to the Act; no central government authority that is empowered to issue guidelines for public procurement, although the National Board for Public Procurement partly fills this need through its web site and its conferences on procurement issues. Neither is there a centralized court or administrative body for handling appeals, but these are dealt with at the district or regional court level, leading to diversity in legal practice. Furthermore, the fundamental principles of public procurement are not to be found in the Act itself, but belong to the *acquis communitaire* in the underlying treaties.

Under such circumstances, it is reasonable that practitioners turn to court practice for guidance in procurement. This tendency is strengthened by the greatly increased ease of

access to first instance verdicts by means of databases of legal cases, such as the Allego database used here. According to information from the Allego database managers, larger law firms, local governments and larger contractors are the primary users of their services at present. There are between 200 and 300 subscribers to the database, meaning that there probably are some 700 individuals who have access to the judgements found there. Allego also publish a paper containing, among other topics, comments on important cases from the courts. There has been considerable interest among subscribers for these comments. In other words, there is a widespread interest in what is going on in courts. However, it is too early to say whether this ease of access contributes to administrative convergence in local procurement. The importance of access to first instance verdicts is obvious since few cases from the County Administrative courts are appealed to the Administrative Courts of Appeal and it is only exceptionally that the Supreme Administrative Court takes up procurement cases.

In its annual report for 2005, the National Board for Public Procurement presents statistics of all cases on public procurement in the County Courts from 2000 to 2005. There has been a substantial increase in the number of judgements, from 108 in 2000 to 1213 in 2005. The Board estimates that about 30 percent of the cases are approved. In 2005, 345 cases were appealed to the Administrative Courts of Appeal, but only a minority of these cases were permitted for review. This means that the County Courts have an important task in shaping a more precise understanding of the content of the legal norms.

There is no statistical information of how many public contract awards that are made annually. A Swedish law committee (Sweden, 2001, p 437) estimated the total number of public procurement procedures to 200,000 annually, but this figure includes simplified procurement with contract sums below the directive threshold value. In relation to this estimate, it is obvious that cases brought to the County Courts are less than one percent.

6. Empirical findings

As there were no previously available statistics or estimates of the number of cases related to public procurement of construction, the first step when working with the Allego database was to identify and separate these cases. It was found that between 80 and 100 cases per year were brought to the County Courts. Many of these appeals were rejected, which means that about 20 to 25 cases every year are approved, the verdict implying that the procurement process should be corrected or remade. Interviews with procurement officials have shown a fear that appeals could cause severe delays. Surveying the court cases show that in half of the appealed cases, the court decision is made less than one month from the date of award. Only in about one quarter of the cases the delay is more than two months.

As mentioned before, we may distinguish between three categories of legal norms: material, procedural, and norms giving power to act and make decisions. From the database, it is possible to establish that most cases are about procedural matters, while fewer are about material questions as to the interpretation of the concept of sustainability or what should be acceptable practice for achieving sustainability in the appealed case. It appears that contentious issues are more related to the use of multiple criteria in general than specifically those that concern ecological sustainability. Although there are cases where the applicant complains that sustainability has not been correctly defined and assessed, but these issues are

often reformulated into a procedural matter by the court. It can therefore be said that courts avoid taking ecological sustainability, as such, seriously into account.

There might be various reasons for Country Administrative Courts to avoid entering into details of how criteria such as sustainability shall be evaluated. In one case the court has declared that normally, the procurement agency has the best capability to evaluate how different bids fulfil stated requirements, and the main task for the court is then to establish whether irrelevant considerations have influenced the decision (Länsrätten i Södermanlands län 2696-03E). In another case (Länsrätten i Stockholms län 9921-05E) the court clearly settles that the reasons or motives behind a local assessment of how different tenders fulfil sustainability requirements, do not have to be exhaustive.

7. Conclusions

The investigation of court cases has revealed that the fear felt by many local government officials that a construction contract award will end in court is exaggerated. Also, the risk of construction project delays seems to be weakly founded. It is obvious that courts avoid making judgements of what promotes sustainability. They simply do not make decisions on material matters in the context of public procurement of construction contracts.

One reason for this is probably the strong legal positivist tradition of Swedish courts to look at matters in terms of right or wrong, and not making evaluations in relation to legally defined goals on their own, without having strong support in *travaux préparatoires*. The outcome is that courts fail to give practitioners the guidance that they actually are asking for. Neither does legal practice contribute to a gradually more precise and convergent interpretation of material legal norms.

The examination of the court judgements also points to the question of how those appealing public procurement decisions experience the legitimacy of courts, as a material question often is found to be transformed into a procedural one. At the same time, there are cases appealed on procedural grounds and judged in a rigorous way as such.

The effect of courts in practice is primarily to consider whether the award decision has been procedurally correct and not to examine the fulfilment of the legally defined goals of sustainability, as expressed in national preparatory works and EC documents. The role of the courts in relation to public procurement is thus another than in the context of welfare law and also physical planning law, as these two are more obvious examples of goal oriented frame laws, where the courts are intended to make legal objectives gradually more precise. In other words, there is a focus on procedural matters rather than normative when the courts are faced with appeals in procurement cases.

However, one effect of court decisions seems to be a higher level of uncertainty among procurers and bidders. What matters to local government officials appears to be the possibility of costly delays in construction projects and not only the prospect of having an award decision overturned. It may thus be that tenderers' ease of access to legal remedies is more important than procurement law in itself. Judges in County Administrative Courts do not enjoy the support of traditional legal preparatory works, and also lack experience in making decisions grounded in evaluations of how to promote fulfilment of legally defined goals such as ecological sustainability.

Finally, investigating court judgements on the first level of court hierarchy has revealed that courts do not directly hinder taking ecological sustainability into consideration in public procurement of construction, but the perception of court practice seems to be an obstacle to the development of local practice. On the other hand courts do not support the progress away from lowest price (as the only contract award criterion) towards a more multifaceted and ecological way of thinking. Court judgements do not, or only imperfectly, mirror the growth of advanced local practice in accordance with EC Buying Green principles (European Commission, 2004) or what can be found in a recent official law committee report on public procurement (Sweden, 2005), a report that stresses the importance of encouraging procurement officials to give priority to ecological sustainability. The legal sources reflect a challenge that so far has not been taken up by the County Administrative courts.

Acknowledgment

Support for this investigation through a grant from the Swedish Research Council for Environment, Agricultural Sciences and Spatial Planning is gratefully acknowledged.

References

Åström, K. and Werner, C. (2002), *De äldre och besvärsrätten: Överklagade beslut om hemtjänst och särskilt boende* [The elderly and the right to appeal, in Swedish], Socialstyrelsen, Stockholm.

Bernitz, U. (2001), *Sweden and the European Union: On Sweden's Implementation and Application of European Law*, Common Market Law Review, Vol. 38, No. 4, pp. 903-934.

Carlsson, L. and Åström, K. (2005), *Public procurement as a tool toward sustainable development: methodological explorations of a science of norms.* Paper presented at the First European Socio-Legal Conf. European Ways of Law, Oñati, Spain, 6-8 July 2005.

Carlsson, L. and Waara, F. (2006), *Environmental concerns in Swedish local government procurement.* In Thai, K.V. and Piga, G. (eds.), Advancing Public Procurement: Practices, Innovation and Knowledge-Sharing, PrAcademics Press, Boca Raton, FL, pp. 239-256.

European Commission (2004), *Buying green! A handbook on environmental public procurement*, SEC(2004) 1050.

Herlitz, N. (1966/67), *Legal Remedies in Nordic Administrative Law,* The American Journal of Comparative Law, Vol. 15, pp. 687-708.

Marron, D.B. (1997), *Buying Green: Government Procurement as an Instrument of Environmental Policy,* Public Finance Review, Vol. 25, No. 3, pp. 285-305.

NOU (2005), *Annual Report,* National Board for Public Procurement.

OECD (2000), *Public Procurement Review Practices,* SIGMA Paper No. 30. CCNM/SIGMA/PIMA(2000)114.

Shane, J.S., Gransberg, D.D., Molenaar, K.R. and Gladke, J.R. (2006), *Legal Challenge to a Best-Value Procurement System,* Leadership and Management in Engineering, pp. 20-25, January.

Sweden (1971), *Offentlig upphandling* Public procurement, in Swedish, SOU 1971:88.

Sweden (2001), *Mera värde för pengarna* More value for money, SOU 2001:31.

Sweden (2005), *Nya upphandlingsregler* New procurement regulations, SOU 2005:22.

Waara, F. and Bröchner, J. (2006), *Price and nonprice criteria for contractor selection,* Journal of Construction Engineering and Management, Vol. 132, No. 8, pp. 797-804.