

Public Procurement of infrastructure projects and energy projects

Organising Commissions: International Business Law and Environmental/Energy Law

Prague, 2014 – Working Session 7

National Report of Sweden

Daniel Sjöholm

Foyen Advokatfirma
Södergatan 28
211 38 MALMÖ
+46 40 661 56 50

Daniel.sjoholm@foyen.se

General Reporters

Per-Ola Bergqvist, Foyen Advokatfirma
Box 7229, 103 89 STOCKHOLM, SWEDEN
Tel: +46 733 22 84 34, e-mail: per-ola.bergqvist@foyen.se

and

Jan Rolinski. WKB Wierciński, Kwieciński, Baehr Sp. k.
ul. Polna 11
00-633 Warszawa
office: +48 22 201 00 00



INTERNATIONAL ASSOCIATION
OF YOUNG LAWYERS

direct: +48 22 201 00 14
mobile: +48 508 01 94 98
fax: +48 22 201 00 99
mail: jan.rolinski@wkb.com.pl
www.wkb.com.pl

2014-05-26

Public Procurement of infrastructure projects and energy projects

1. What is the legal framework on public procurement in your country governing public purchases of energy projects and large-scale infrastructure projects? Are the relevant rules to be found in a broad public procurement package or are they found in separate legislation? Are there relevant thresholds obliging to apply public procurement rules to such projects? Are there any exemptions from the application of the public procurement rules provided for in the legislation for such projects?

All public procurement in Sweden is regulated in in three separate acts, based on the EU-directives.

- The Public Procurement Act (2007:1091)¹, hereinafter referred as LOU.
- The Act on Procurement within the Water, Energy, Transport and Postal Services Sectors (2007:1092)², hereinafter referred as LUF.
- Defence and Security Procurement Act (2011:1029)³

Public procurement under the EU thresholds are also, for the respective division, regulated in an own chapter in the same acts as the public procurement over the thresholds. If the value of the contract falls below 270 964 SEK concerning LOU and 541 928 SEK concerning LUF the contracting authorities and entities can procure without applying the public procurement rules. Consequently Sweden has three different thresholds to relate to.

¹ Based on Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114–240.

² Based on Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30.4.2004, p. 1–113.

³ Based on Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, OJ L 216, 20.8.2009, p. 76–136.

Public purchases of energy projects and large-scale infrastructure projects are regulated in LOU and LUF. LOU is not applicable when LUF applies on the procurement. The applicability of LUF is not dependent on the purpose of the contract, but is determined of the kind of sectors that the entity which procures operates within. LUF is addressed to organizations operating in the fields of water, energy, transport and postal services.

There are no special exemptions in LOU or LUF concerning of energy projects and large-scale infrastructure projects. There are some exemptions concerning concessions which is relevant to consider. These exemptions will be elucidated under question number 7. There is also an exemption in LUF for procurements relating to the production and sales of electricity to the wholesale and retail market.

2. Is this legal framework based on international agreements and commitments, like the EU Directives?

As mentioned above the Acts in Sweden are based on three directives.

- Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114–240.
- Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30.4.2004, p. 1–113.
- Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, OJ L 216, 20.8.2009, p. 76–136.

3. If based on international agreements and commitments, have your county added any specific procedures and tools to the national legislation directed to the procurement of energy projects and large-scale infrastructure projects?

No.

4. Which, if any, is the procurement procedure envisaged in the legal framework for the procurement of energy projects and large-scale infrastructure projects?

What is the most commonly used procurement procedure within the legal framework for the procurement of energy projects and large-scale infrastructure projects? Are conditions for use of various procurement methods clearly established

The main and regular procurement procedures in Sweden is the Open procedure and the Restricted procedure. The Open procedure starts with a publication of an contract notice, then anyone can submit a tender. The Restricted procedure starts with an invitation to a number of suppliers to submit a tender.

The most frequently used procedure in Sweden is the Open procedure.

The contracting authority are free to choose between these two main procedures. The Negotiated procedure is also a procedure that the contracting entity can choose without fulfilling any conditions, if LUF is applicable. This procedure is similar to the Restricted procedure with an element of negotiation. There are other procedures as well, such as competitive dialogue. These are often not relevant for these kind of contracts and rarely used.

5. What are the award criteria (in public procurement procedures) most commonly used for energy and large-scale infrastructure projects? Are the Lowest price or the most economically advantageous tender most common? Are circumstances related to quality, time and output evaluated?

Today there are two trends in Sweden. The first and largest trend stipulates the use of the award criteria “the most economically advantageous tender”. The evaluation criteria is various from project to project but the time and environmental aspects is frequently used. The taking of references are also commonly occurring.

The other trend in Sweden is using the award criteria “the lowest price” together with high requirements in the supplier qualification.

6. Do the public procurement rules regulate relations between the investor, the contractors and subcontractors?

It is acceptable for a group of suppliers to submit one tender as a group. It is also possible for one supplier to rely on subcontractor's capacity when submitting a tender.

If doing the abovementioned the suppliers must be aware of the Swedish competition act that forbids some forms of cooperation between companies.

When submitting a tender together with another supplier it is crucial to investigate this supplier, seeing that Swedish courts has accepted an exclusion of a supplier because of the other suppliers bad history.

7. Are there works concession procedures used for the procurement of energy projects and large-scale infrastructure projects? And if so, are there one or several specific procurement procedures envisaged for this in your national legislation?

There are no special provisions in LUF concerning concessions. The contracting entity is therefore free to procure a concession according to the rules in LUF.

When it comes to LOU there is a special chapter which contains some general provisions concerning concessions, these provisions does not mention the procurement procedures for concessions. The contracting authority is therefore bound by the procurement procedures concerning procurements in general.

There is an exemption from the application of the public procurement rules for additional work in a public works concession. This exemption is only applicable in certain circumstances and with a limitation in relation to the cost of the additional work.

8. According to your experience, how often do foreign bidders participate in award procedures related to energy projects and large-scale infrastructure projects in your country?

Unfortunately foreign bidders seldom participate in any public procurement in Sweden. It is even rarer that a non-Nordic bidder is participating. The participating of foreign bidders are understandably depending on the magnitude of the contract.

9. Are the model contracts for the construction works commonly used (at national as well as international level, like the FIDIC Books)? If so, which are the most commonly used model contracts for the procurement of energy projects and large-scale infrastructure projects? Are the model contracts specifically designed for public procurement?

Sweden has an old model contract called AB (General Conditions) which is published by the Construction Contracts Committee. The Committee consists of members representing both the contractors and the employers. Because of this constellation, AB as an agreed document becomes an acceptable compromise concerning liability. The current versions of the relevant AB model contracts are AB 04 and ABT 06. These model contracts are widely used in Sweden regarding all forms of constructions, including the ones where a contracting authority is the employer.

On an international level FIDIC is commonly used, often with influences from AB. One example of this influences is that the engineer often is replaced with the employer.

10. Please briefly describe the how do the model contracts regulate the contractual liability of the contractor Are models of liability similar to those applied in case

of Turn-Key Contracts, design-build contracts or build contracts (where the design is provided by the procuring entity) commonly used?

As abovementioned the most frequently used model contract for construction in Sweden is AB 04 and ABT 06. These model contracts are for the most part identical. The difference is that AB 04 is oriented towards constructions where the employer has the liability related to the design and the contractor's liability is basically only concerning to the construction. ABT 06 is used when the employer wants a Turn-Key contract where the contractor's liability covers both the construction and the design.

To generalize AB 04 and ABT 06, it can be stated that AB 04 is an equivalent to FIDIC Red Book and ABT 06 to FIDIC Yellow Book with some differences.

11. To what extent are external lawyers engaged to draft, or otherwise involved, contract notices and/or contract documents in the case of procurement of energy projects and large-scale infrastructure projects?

Many Swedish contracting authorities have a procurement section of some sort but when it comes to larger public procurements external lawyers are often involved from the start.

12. Is it, in your country, common to appeal against award decisions related to procurement of energy projects and large-scale infrastructure projects? What is the authority relevant to recognize the appeal (common court, arbitration court, other)?

It is common to appeal against an award decision in these types of public procurements in Sweden.

The authority relevant to recognize the appeal is the administrative court in whose judicial district the contracting authority is based.

13. From your experience – what would you indicate as the most problematic issue while awarding public procurement for such projects and on the other hand what would you call the biggest achievement/improvement made of the legislation implemented during last years for such projects.

The most problematic issue must be the inflexibility that the public procurement provisions creates. It is a common complaint that the public procurement rules are too rigid for these types of contracts which often is affected by changes.

The biggest improvements is the clarifications concerning the in-house procurements.

14. What are the most commonly used/provided by the public procurement laws instruments for securing of the performance of the contracts?

LOU and LUF do not contain any provisions concerning contractual matters. The Swedish Acts concerning public procurement is totally focused on procedural matters and leaves the contractual aspects to the Swedish Act on contracts.

The most commonly used instrument is by far bank guaranties and guaranties from another company, typically a parent company.

15. Is it possible to sign the contract for the procurement of energy projects and large-scale infrastructure projects in other than national language?

It is possible to sign a contract in any language in Sweden for any public procurement. There are no provisions in Sweden concerning the language of any procurement contracts. The contracting authorities have only the principles of equal and non-discriminatory treatment to consider.

16. Is there a legal or regulatory requirement for public disclosure of the information related to the award procedure?

The contracting authority is obliged to inform the tenderers and the candidates about the decision of which tenderer that will be awarded the contract and on which grounds. The contracting authority is furthermore obliged to, at the request of a tenderer who has submitted an admissible tender, specify the characteristics and the advantages of the tender selected.

Additionally there is a general provision in the Swedish constitution that stipulates a right for everyone, whether Swedish citizens or of another country, to access public documents held by public authorities. There are some exemptions from this provision concerning sensitive materials as state secrets and personal information.