

Summary

Quality issues in conjunction with public procurement

The Committee feels that there is great potential for improving the quality of public procurement. Improved quality in public procurement procedures would yield greater value for money spent. The improved quality will mainly be achieved through improved knowledge and method development. Improved compliance with rules and commercial considerations will therefore be long-term and short-term benefits. The Committee feels a permanent quality and development council should be established for public procurement. The council could e.g. draw up guidelines for tender notices, specifications and contract terms for different fields. The council could disseminate information on good examples and systematically incorporate these examples in manuals for public procurement. The council is not envisaged as a public agency but as a private body with representatives of procurement entities and suppliers.

Commercial approach

The Committee feels that public procurement should be characterised by a commercial approach. This means that a procurement entity should have access to a professional and competent procurement organisation which follows existing rules and is also capable of utilising the market in achieving the targets buyers and citizens have a right to expect of public procurement. The Committee's view is that the Public Procurement Act (1992:1528) (LOU) allows procurement entities to take certain

sociopolitical considerations into account in public procurement. The EU Court ultimately determines the extent to which this is possible.

Purchases between municipalities and municipal businesses

The Committee proposes that one or more municipalities or county councils shall have the opportunity, under certain conditions, to buy and sell from/to wholly owned or jointly owned (intermunicipal) businesses without following a procurement procedure. The businesses may then only be owned by a municipality or county council, the business must be procurement entities and the municipality or county council must be able to show that acquisition without a procurement procedure is warranted because of obvious coordination advantages for the municipality or county council and the municipal or intermunicipal business.

Anti-discrimination clauses

Public procurement – a tool for counteracting discrimination

The Committee feels that it should be possible to use public procurement for counteracting discrimination. This is the case in many other countries, including the U.S. and Great Britain. However, basic EU legal principles, such as those concerning the free movement of goods and services, non-discrimination, equal treatment, proportionality and transparency, must obviously be observed..

Anti-discriminatory considerations can be taken at different stages of the procurement process

Anti-discriminatory measures consist of a number of social considerations. Social and labour market considerations may have

different purposes and can, according to prevailing regulations, be taken into account at different stages in the procurement process.

Anti-discriminatory aspects can be considered by making demands on the product to be procured. One condition is that demands made on a product or services are relevant.

Anti-discriminatory consideration can also be taken, to some extent, in the elimination phase through establishment of elimination criteria or qualification criteria. However, the possibility of taking this aspect into account is limited in the classic sector, i.e. in the procurement of goods, construction work and A services. Opportunities for taking this aspect into account are greater in procurement in supply sectors and in procurement outside direct control, i.e. procurement under threshold values and of B services.

The rulings of the EU Court of Justice support the conclusion that social aspects, with no direct link to the procurement item, can be taken into account in the evaluation phase. However, the Committee feels that using non-economic aspects as evaluation criteria would present certain difficulties. This is because evaluation criteria must serve as the basis for evaluation of the economically most advantageous tenders.

Social conditions, such as conditions concerning anti-discrimination, can obviously be covered in the form of supplementary contract terms. These terms must then be included in tender notices and must not be discriminatory. However, one limitation is that such terms may not be 'exported', i.e. they may not refer to circumstances outside the country to which the procurement entity belongs.

According to the Commission's present timetable, an interpretive statement on the possibility of taking social and labour market considerations into account will be published at the end of May 2001. This interpretive statement will clarify the extent to which such consideration may be taken into account in public procurement.

Environmental considerations

In a manner analogous to other social considerations, environmental consideration can be taken into account in different phases of the procurement process. According to the present timetable, the Commission plans to publish an interpretive

statement on environmental considerations in public procurement in the first quarter of 2001.

According to the Committee, it is important for procurement entities to utilise existing opportunities for observing environmental considerations linked to contracted items. This can be accomplished in specifications framed for items to be procured. It can also be accomplished in the procurement of services by making demands on the supplier's technical know-how and capacity or by including contractual provisions in the form of supplementary terms on environmental aspects.

The EU Court's practice does indeed support the conclusion that environmental aspects, in the corresponding way as for social aspects in general, not directly linked to contracted items, can be taken into account in the evaluation phase. According to the Committee, however, it would be even better if environmental demands could be included, to a greater extent than is currently possible, as exclusion or qualification criteria, thereby leading to the elimination of suppliers unable to meet these demands.

Review of selection rulings

Selection rulings should be subject to review

In the Alcatel case, the EU Court ruled that the so-called first review directive means that Member states are required to provide a review procedure with which appellants can obtain suspension of a ruling on the award of a contract, i.e. an award ruling.

The present stipulations in the LOU and the Secrecy Act (1980:100) mean that it is impossible, in practice, for a supplier to obtain a review of an award ruling. An outsider usually obtains knowledge of the award ruling only after a contract has been signed. No review is possible once the contract has been signed. For this reason, Swedish legislation must be adapted to the demands review directives make on national legislation. The EU ruling also points out that the affected party could be entitled to damages if the directive is erroneously implemented.

Information to suppliers

We propose that procurement entities be required to provide, at their own initiative, tender applicants and tender suppliers with contract award notices and the reasons why contracts were awarded. Information should simultaneously be supplied on the earliest date a valid contract can be signed and on the possibility of petitioning for a review or suing for damages.

Contract award notices and the reasons why contracts were awarded must also be supplied if requested by any supplier. All such information must therefore be supplied to a potential supplier, if she/he so requests, with the right to petition for a review or demand damages.

Formal requirements for a procurement contract

We propose that the formal requirements for a procurement contract be clarified in the LOU. The definition of a 'procurement contract' should stipulate that it is a written, signed agreement entered into by a procurement entity according to the procurement procedure laid down in law. We also propose a codicil stating that a procurement contract may be in electronic form and that it may be signed with an electronic signature.

In addition, we propose an addendum stipulating that procurement contracts may not be signed until a reasonable waiting period has elapsed, i.e. at least 10 days from the date the procurement entity issues this information. We propose that the entity, at its own initiative, shall send tender bidders and procurement entities contract award notices stating the reasons why contracts were awarded. A contract would be invalid if the formal requirements for procurement contracts are not observed.

Exceptions from formal requirements for procurement agreements

In certain procurements, a valid procurement agreement can be reached with no need for a procurement contract and no demands for a reasonable waiting period after the aforesaid information has been despatched.. Exceptions apply in those instances in which procurement is pursued without advertising. Direct procurement is another exception when this procurement is secret, is subject to other restrictions with a view to national security or concerns

procurement of defence products and services, with no civilian use, covered by article 223 in the Treaty of Rome.

Secrecy

Today, information on a tender or the equivalent offer in a municipality or a county council may not be divulged to anyone except the party having submitted the tender or made the offer until all tenders or offers have been made public, a contract has been signed or the matter has been concluded in some other way. Thus, absolute tender confidentiality applies during this time, and information concerning tenders or corresponding offers may not be divulged.

In order to permit a review of contract award rulings, we propose that absolute tender secrecy be lifted as soon as a decision on a supplier has been reached. As is also presently the case, it should be possible to suspend absolute tender secrecy if tenders or offers are made public or a matter is concluded before a decision on a supplier is reached.

When absolute tender secrecy ends, information on tenders or the corresponding offers within a municipality or county council and information on individual commercial or operational circumstances may not be divulged at present until a confidentiality review has been performed. The right to damages is intended to protect both public and private interests. This means that information is public, as a main rule, but that it may not be divulged if it is detrimental to public or private interests.

We propose that a regulation be introduced which states that information, notwithstanding this confidentiality, may be divulged as laid down in the LOU. The regulation targets information the entity, according to our proposal, is obliged to divulge, at its own initiative, to tender submitters and tender issuers as well as information the entity is required to give any supplier requesting same.

Local procurement

The Committee has studied the extent to which it is possible for a procurement entity to set conditions for participation in a procurement or apply evaluation criteria which take local

considerations into account in individual procurements. The Committee does not feel this is permissible under EU law or the LOU or that opening the possibility of favouring local suppliers is desirable. However, procurement entities are already able to pursue long-range competition strategies and plan procurements in a way allowing even small and medium-sized suppliers to participate in public procurement. This can be accomplished e.g. by pursuing procurement in 'slices', where possible, and separating the procurement of goods from the procurement of warehousing and distribution.

Increased competition through positive special treatment

The Committee feels that a growth in the number of new suppliers should be stimulated in order to increase competitive pressure in public procurement.

Support for hiving off

The Committee suggests that a procurement entity should be allowed to reach agreements, within the framework of Chapter 6 of the LOU, with a staff group on transferring an activity to the group without a preceding procurement operation (hiving off). No such agreement may be reached for a period of time exceeding five years. A new procurement must follow after that.

Special demands on suppliers in public health and social services

The Committee suggests that procurement entities be given the right to demand that suppliers of services in the field of public health and social services do not pursue operations for the purpose of making a profit for owners or the equivalent. This is because increasing competition pressure and the percentage of alternative operational forms must be possible in municipalities and county councils dubious about profit interests in public health and social services.

Customer selection system

Customer selection systems with checks are usually devised in such a way that a private party performs a municipal service on behalf of the municipality. The contractual relationship makes a procurement procedure necessary. The Committee considered suggesting to the Government that the customer selection system be regulated in the LOU or in special legislation. However, the Committee has reached the conclusion that the customer selection system is intimately linked to the control and monitoring demands which should be made on welfare services financed by society and that the customer selection system is not suitable for the system of norms in procurement legislation. Therefore, the Committee feels that the customer selection system in geriatric services, medical care, child care services etc. should be the subject of separate study.

Direct procurement

The Committee proposes that the scope for direct procurement should increase by incorporation of a regulation, stipulating that seven 'basic price amounts' are a low value, in the law. Every procurement entity shall establish guidelines, less than this value, for the procedural rules to be practiced. A procurement may not be subdivided in order to get down to this amount. Direct procurement may even be pursued if the cost of procurement is not in reasonable proportion to the value of the procurement or if the procurement of services, comprising public health or social services, is inappropriate or risks an impairment of those services.

Guidelines for Government work in the EU

The Committee's report contains proposals for supplementary and new guidelines for the Government's work with procurement matters in the EU.