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# A Comparative Approach to Damages Arising from Public Procurement: Finland and Sweden

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LAPIN YLIOPISTO  
UNIVERSITY OF LAPLAND  
Pohjoisen puolesta – maailmaa varten

# AGENDA

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- Conditions of liability under public procurement rules in Finnish and Swedish case law
  - Nature of the breach
    - Seriousness
    - Standard of proof
  - Strict liability
  - Recoverable losses
  - Chain of causality
    - Standard of proof
    - Direct awards?
    - Can rightfully cancelled award procedures establish liability?

# REGULATORY BASIS

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## ACT ON PUBLIC CONTRACTS AND CONCESSIONS

- **National rules in both countries reflect the wording of Remedies Directive**
- Act on Public Contracts and Concessions (laki julkisista hankinnoista 1397/2016 ) 169 §
  - Para 1: a candidate, bidder or supplier is entitled to compensation for all damages suffered due to an infringement of public procurement rules
  - Para 2: If the claim concerns compensation for costs occurred by attending the award procedure the claimant shall show proof that it would have had a real chance of winning the contract
- Act on Public Procurement (Lag 2016:1145 om offentlig upphandling) 20 kap. 20 §
  - Para 1: A contracting authority which has infringed the rules of this law, shall compensate damages inflicted to a supplier
  - Para 2: If the claim concerns bidding or participation costs, such costs are compensated if the infringement has had a negative effect on supplier's possibilities to get the contract

# NATURE OF THE BREACH

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## BREACH OF PROCUREMENT RULES

- FINLAND:
  - **Only breaches of procurement rules** can result to liability under Act on Public and Concession Contracts
  - **Finnish Supreme Court KKO 2011:54: If the CA has not infringed procurement law, there can be no liability under national procurement act**
    - 1) Court found that the CA had infringed procurement rules and annulled the award decision. Despite of pending appeal at the Supreme Administrative Court, the CA prepared a new contract award procedure in accordance with first instance ruling and contract was awarded to other company than in the first procedure.
    - 3) Two years later Supreme Administrative Court finally decided the matter regarding 1<sup>st</sup> award procedures and declared that there were no breaches in the 1st contract award annulling first instance ruling.
    - 4) Winner of the 1<sup>st</sup> award procedure claimed for damages at Supreme Court: **Even though it was clear that this company was the right winner at the 1<sup>st</sup> procedure, contract was not deprived by the CA's breaches (but rather the since overturned first instance ruling and that the appeal procedure at the Supreme Administrative Court took so long)**

# NATURE OF THE BREACH

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## STRICT LIABILITY

- **FINLAND: Kouvola Court of Appeal KouHO 2010:8**
  - Liability is strict and not subject to intentional or negligent breach Different interpretation would be against EU law (with reference to cases C-275/03 *Commission v. Portugal* and C-314/09 *Strabag*)
- **SWEDEN: Supreme Court NJA 2007 s. 349 Ishavet**
  - Liability is strict cannot be subject to intentional or negligent breach

# NATURE OF THE BREACH

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## SERIOUSNESS OF THE BREACH

- **FINLAND: The requirement for seriousness of the breach has not even been mentioned in Supreme Court cases**
  - Why? Supreme Court reasons its decisions with similar national cases outside public procurement rules (tendering for private sector projects KKO 1999:48)
  - Seriousness is seen rather as a question of negligence
  - Seems that any breach of procurement rules that has resulted to the likely loss of contract establishes liability (like in Fosen-Linjen?)
- **SWEDEN: Sufficiently serious breach is mentioned in many Supreme Court decisions**
  - NJA 2016 s. 358, most recent one states that: *klar, tydlig och inte bagatellartad* (clear and not meaningless)
  - However not necessarily requiring a specifically serious breach in practice **but rather that the breach is clear and has contributed to the loss**
  - Practice coming closer to Fosen-Linjen argumentation as “seriousness” has never been questioned?

# NATURE OF THE BREACH

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## SHOWING PROOF ON THE BREACH

- **FINLAND:**
- In litigation for damages a breach of public procurement rules is often established by an earlier decision of Market Court or Supreme Administrative Court concerning the same contract award (*KKO 23.8.2005 nro 1921, KouHO 2010:8, KKO 2015:11*)
  - Even though no binding legal effect in civil procedure, rarely questioned
  - If there is no prior decision, breach is looked in more detail in civil procedure
- **SWEDEN: NJA 2016 s. 369 Nils Bengtsson Byggnads Aktiebolag (NBB)**
- No direct link between administrative court's findings regarding the breach and fulfilling the conditions for damages: general court needs to establish the breach by itself and it is not bound to the administrative court's interpretation

# OTHER BREACHES

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## OTHER GROUNDS FOR LIABILITY

- **FINLAND AND SWEDEN: Other breaches (than of procurement rules) are covered by different grounds of liability or for some breaches one can claim damages on several grounds (principle of parallel claims)**
  - **Finnish Supreme Court KKO 2011:54:** Contracting authority's liability of false information / alleged commitments made during negotiations can be assessed via doctrine of *culpa in contrahendo*
  - **Swedish Supreme Court NJA 2013 s. 909 Gotlands kommun:** the possibility to claim damages under procurement law does not mean that a tenderer cannot claim damages under Tort law (*Skadeståndslagen*) for false information relating to award procedure concerned and given by an office clerk in oral



# LOSS

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## WHICH LOSSES ARE RECOVERED?

- **FINLAND + SWEDEN: Division between positive and negative contractual interest**
  - Positive = a party is returned to the same position it would be had the rules been followed and contract been awarded to it (loss of profit + costs relating to investigating and enforcing the possible compensation)
  - Negative = a party is returned to the same position it was before infringement took place (like it had never participated the procedure: bidding costs, other possible costs)

# LOSS

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## WHICH LOSSES ARE RECOVERED?

- **FINLAND: Recoverable loss is closely tied to the chain of causation**
  - What would have happened and who would have won, had the CA respected the rules?
  - Has the breach in fact caused the damages or are they actually caused by something else?
  - KKO 2011:54: the CA had breached procurement law by failing to notify tenderers on the cancellation of first award procedure
  - But this breach did not inflict the damages (*losing the contract*) → no compensation

# LOSS AND CHAIN OF CAUSATION

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## WHICH LOSSES ARE RECOVERED?

- **SWEDEN: More liberal approach towards the link between loss and chain of causation**
  - Compensation is possible even in the event where a tenderer has not submitted a bid
  - Can include loss of profit or bidding costs
    - **How there can be any recoverable bidding costs if one has not submitted a bid?**
  - NJA 2000 s. 712, NJA 2007 s. 649 Ishavet: In case of a direct award it is enough to show that one would likely have submitted a bid and had a realistic chance to win the contract

# CHAIN OF CAUSATION

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## STANDARD OF PROOF

- **FINLAND, Supreme Court KKO 2015:11:** "Loss of profit can be compensated to someone who shows that it has **very likely lost the contract due to the infringement** i.e. that there is a **notable probability, but absolute certainty cannot be required**"
  - Standard should be high enough that not many can be successful
  - Seems that no true difference between standard of proof for loss of profit and bidding costs in practice: **In both cases the standard is on a high level - to show a chance to win is not enough**
- **In cases of direct award: almost impossible to try to show proof on the chances to win** as it is *not possible to know what would have been the award criteria, who would have submitted a bid and what kind of bid the claimant would have submitted*
- A claimant can try to show the causality with similar bids submitted to other tendering procedures

# CHAIN OF CAUSALITY

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## STANDARD OF PROOF

- **SWEDEN: Standard of proof seems a bit lower**
  - **Swedish Supreme Court, Tvättsvamparna NJA 2000 s. 712:** To recover loss of profit, it is enough that claimant shows that there **it is likely that the contract is lost due to infringement**
  - Possibility for compensation is recognized also **in case of direct award**, but rarely successful in practice
  - **RH 2002:15, Göta Appeal Court:** "any tenderer suffering damages due to the CA's infringement, should be entitled to compensation under the rules of LOU **regardless of the fact whether such tenderer would have had a real chance to win the contract**"
    - The liability was based on the fact that the CA has requested supplementary documents after bid submission, but rejected the bid later
    - Compensation covered the extra costs caused by the requests of supplementation
    - **Should such damages even be recovered through procurement rules or rather tort law rules?**

# MITIGATING THE DAMAGES

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## CONTRIBUTORY NEGLIGENCE

- **Contributory negligence: Duty to engage in reasonable activities that could prevent the loss or limit the extent of one's loss**
  - 1) duty to start legal proceedings against a wrongful decision in order to get it annulled and damages prevented
  - 2) try to get replacing contracts
  - Otherwise risk of having to bear the damage himself or reduce the damages recoverable
- **Doctrine accepted and applied by CJEU**
  - C-46/93 and C-48/93 *Brasserie du Pêcheur*; C-445/06 *Danske Slagterier*; C-104/89 and C-37/90 *Mulder*
- FINLAND: Recognized in Supreme Court KKO 2011:54 + Appeal Court KouHo 2010:8
- SWEDEN: Recognized in Supreme Court NJA 2016 s. 369 NBB and **Appeal Court RH 2010:48, in latter damage was mitigated to 0 SEK as the claimant had neglected its obligation to start legal proceedings against the wrongful decision**

# CANCELLATION AND CHAIN OF CAUSATION

## IN THE EVENT OF CANCELLED CONTRACT AWARD PROCEDURES

- **NJA 2013 s. 762, *Fidelia*: Procurement process was cancelled due to a fault in the contract award procedure → no compensation**
  - Two bids, Fidelia lost. Later after court procedure found that the winning tender should have been rejected → the CA cancelled the tender procedure
  - No compensation for loss of profit as the fault was corrected by cancelling the award decision
  - **Loss of profit can only be compensated if a contract is signed with the "wrong" winner which did not happen in the case concerned**
- **Similarly in *Fosen Linjen*: breach is repaired by cancelling the earlier award procedure**
- **Cr. Swedish case NJA 2016 s. 369 NBB no longer follows the logic in Fidelia → compensation for loss of profit even though earlier procedure cancelled and followed by new award!**
- **Cr. Finnish case KKO 23.8.2005 nro 1921: regardless of later cancellation, certain part /full length of the contract period was not cancellable → right for compensation on damages for that part**



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