

Report on the project: “Abnormally low tenders: pricing strategies and efficient assessment by contracting authorities and the courts/the complaints board”

Resume

In the absence of an EU definition regarding abnormally low tenders, this project aims at examining how the concept has developed in Sweden and Denmark, and to economically assess these definitions. The resulting paper takes an interdisciplinary law and economics approach to examine a dataset consisting of Swedish and Danish judgments concerning the issue. We show that the definition of abnormally low tenders had developed differently in the two countries, with regard to how pricing strategies are treated by the courts. The data indicates that economic operators use various pricing strategies which may result in tenders being rejected as abnormally low or the awards of contracts to such tenders being contested.

Activities

The project has been carried out between September 2015-June 2017 by Johan Nyström, who is a senior research leader at The Swedish National Road and Transport Research Institute (VTI) and Grith Skovgaard Ølykke, who is a Professor (mso) at Copenhagen Business School. The different geographical locations of the researchers required a few research meetings face-to-face, but mainly communication has been conducted via Skype and email.

In the period October 2015-March 2016, a student was employed to find, read and make resumes of all the Swedish and Danish case law.

In May 2016 the very preliminary results from the project were presented at a lunch seminar at University of Copenhagen. Both Johan and Grith presented and we combined the presentation with a research meeting.

In November 2016 the more developed results were presented by Grith at the annual Nohrcon procurement conference in Copenhagen, where the audience was Nordic.

In January 2017 the more developed results were presented by Johan at Transportforum 2017 in Linköping.

In June 2017, the final results were presented by Grith at the Global Revolution Conference at University of Nottingham.

Outcome

The database for the study consists of 258 Swedish judgments and 20 Danish verdicts. Initial data handling and analysis was challenging and time consuming. Each case contributed to several parts of the analysis and as both a legal and an economic perspective was taken. Hence, apart from the initial student work both researchers have read all the judgments and verdicts. The data was registered by the researchers and the points of analysis were noted to allow for statistics and generalised results. The analysis and results were written as a paper entitled “Defining abnormally low tenders – a comparison between Sweden and Denmark” (22.000 words) which has the following structure:

1. Introduction
2. What is the problem with abnormally low tenders?

3. What is an abnormally low tender in EU law and legal theory?
4. Approach and data
 - 4.1. Dataset
 - 4.1.1. Data from Sweden
 - 4.1.2. Data from Denmark
 - 4.2. Overview of the Data
5. Legislative frameworks for abnormally low tenders in Sweden and Denmark
 - 5.1. Sweden
 - 5.2. Denmark
 - 5.3. Similarities and differences
6. What pricing strategies causes abnormally low tenders
7. Interpretation of the provision on abnormally low tenders
 - 7.1. Sweden
 - 7.1.1. Is there an obligation to verify apparently abnormally low tenders and to reject tenders that are shown to be abnormally low?
 - 7.1.2. When does a tender appear abnormally low?
 - 7.1.3. What is an abnormally low tender in Sweden?
 - 7.1.3.1. Risk of non-performance
 - 7.1.3.2. Assessment of explanations
 - 7.1.3.3. Individual prices or total price?
 - 7.2. Denmark
 - 7.2.1. Is there an obligation to verify apparently abnormally low tenders and to reject tenders that are shown to be abnormally low?
 - 7.2.2. When does a tender appear abnormally low?
 - 7.2.3. What is an abnormally low tender in Denmark?
 - 7.3. Similarities and differences
8. Conclusions and outlook: impact of the 2014 Public Procurement Directive

The main conclusions of the interdisciplinary analysis of the dataset are: 1) that the abnormally low tenders appear to be (and are sometime explicitly) the result of application of different pricing strategies by economic operators. These pricing strategies will predominantly result in higher pricing in the longer run and therefore are inefficient from a societal welfare point of view. However, there are examples where they may lead to a low price for the contracting authority and thereby be efficient from a societal welfare point of view; 2) that the concept of an abnormally low tender has developed differently in the two countries; and 3) that the courts/the complaints board do not take into account economic efficiency when they assess cases on abnormally low tenders.

It was decided to focus the paper on the provision on abnormally low tenders from the public procurement directives from 2004. This was due to the fact that case law on the amended provision has only started to emerge in 2016/2017, as procurements subject to the national rules transposing the public procurement directives from 2014 are being contested. However, in the conclusion to the paper we discuss which changes in national practice the new directives may bring about. It would be interesting to replicate the study in 5 years' time to detect any developments.

The paper has been accepted for publication in Journal of Competition Law & Economics (<https://academic.oup.com/jcle>), where it will probably appear in 2017/20