

Datum

## Ansökan om forskningsmedel

Observera att ansökan med bilagor endast ska skickas elektroniskt till konkurrensverket@kkv.se

### 1 Sökande (huvudansvarig för projektet)

Namn

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### 3 Projektbeskrivning

Projekttitel För att radbryta texten, använd Alt + Enter

Abnormally low tenders: pricing strategies and efficient assessment by contracting authorities and courts/the complaints board

Projektet avses starta, datum

1.9.2015

Projektet beräknas vara slutfört, datum

31.12.2016

Sammanfattning av projektets syfte, betydelse och genomförande (högst 1400 tecken).

För att radbryta texten, använd Alt + Enter

The purpose of the project is to examine and assess the way Swedish courts/the Danish complaints board for public procurement handle (apparently) abnormally low tenders, in order to determine whether this handling is appropriate; in other words: are (apparently) abnormally low tenders handled efficiently in practice? The point of departure is taken in an empirical study of case law determining the current state of law on abnormally low tenders, as well as the pricing strategies deployed by tenderers. On this basis, a further purpose is to predict the effect of the amended provision on abnormally low tenders in the new Public Procurement Directive (Dir. 2014/24/EU) on the outcome of the empirical study. The research results will have an impact on the way courts, complaints boards and not least contracting authorities assess (apparently) abnormally low tenders, to the overall benefit of society. The research is interdisciplinary and will be conducted by Associate Professor, Ph.D., Grith Skovgaard Ølykke, Copenhagen Business School (law) and Ph.D., Johan Nyström, Swedish National Road and Transport Research Institute (VTI) and Centre for Transport Studies (CTS) at KTH (economics).

Bifoga en utförligare projektbeskrivning (max 10 A4-sidor).



#### 4a Redovisning övriga kostnader

	År 1	År 2	År 3
Material och utrustning	1 500	1 500	
Resor	5 400	21 400	
Övriga kostnader	18 000	22 042	
Summa	24 900	44 942	0

#### 5 Kostnadssammanfattning (anges i kronor) för nu sökt anslag

Total projektkostnad

777 603

Därav söks från

Tidigare erhållna anslag från

Konkurrensverket	Annan anslagsgivare *	Konkurrensverket	Annan anslagsgivare **
777 603 kr			

\*Anslagsgivarens namn

Ansökan inlämnad, datum

Sökt belopp

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\*\*Anslagsgivarens namn

Ansökan beviljad, datum

Beviljat belopp

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#### 6 Övriga projekt som samtidigt kommer att ledas av huvudansvarig

Projekttitel För att radbryta texten, använd Alt + Enter

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Namn och institution på personer som beviljas forskningsbidrag kommer att publiceras på Konkurrensverkets webbplats.

## **Abnormally low tenders: pricing strategies and efficient assessment by contracting authorities and courts/the complaints board**

*Abnormally low tenders is a highly topical issue at the practical level in public procurement: there is a fine line between fierce price competition and low pricing which is not desirable, and this line has not been clearly drawn. This project will examine where the line is drawn by courts/the complaints board, and make an economic assessment which should result in recommendations on how categories of low prices should be handled, taking into account the recent amendment of the provision on abnormally low tenders.*

### **Background and research questions**

The project is an interdisciplinary approach to abnormally low tenders, which is the only regulation of public procurement at EU-level that directly addresses the pricing behaviour of tenderers. The main purpose of public procurement at EU-level is to create an internal market for public contracts,<sup>1</sup> whereas at national level, the regulation of public procurement has several purposes, some of which are prevention of corruption, promotion of innovation, implementation of environmental and social policies, and last, but not least, value for money. The provision on abnormally low tenders is intended to provide contracting authorities with a safety valve in cases where price is too low – lower than “desirable”; a level which has not yet been clearly identified by the European Court of Justice (CJEU) and where national courts and complaint boards therefore have a wide discretion. The research will focus on how this discretion has been utilised. The optimal (first best) empirical data would be on how contracting authorities handle apparently abnormally low tenders, but such data is not readily available, as not all cases lead to the filing of a complaint. Therefore, the research is taking its empirical point of departure in the increasing number of cases concerning abnormally low tenders handled by the public procurement enforcement systems in Sweden (courts) and Denmark (the complaints board for public procurement).

The concept of an abnormally low tender is not defined in Article 55 of the Public Procurement Directive from 2004,<sup>2</sup> or in the new Public Procurement Directive from 2014.<sup>3</sup> However, an indication is given in the amended provision on abnormally low tenders in Article 69 in the new Public Procurement Directive from 2014. In Article 69, it is stated that contracting authorities are obliged to reject tenders as abnormally low, if the tender is low because it does not follow national labour law and national collective agreements, cf. Article 18(2) of the Public Procurement Directive from 2014. In other words, at a first reading of the wording of the provision a significant cost-component – i.e. wages – is now apparently fixed and strictly regulated by the obligation to reject any tender that does not include the required wage level in its budget; the interpretation of the

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<sup>1</sup> For a discussion of the purposes of the EU public procurement directives, see S.Arrowsmith (2012).

<sup>2</sup> Directive 2004/18/EC, of 31.3.2004, OJ 2004 L 134/114.

<sup>3</sup> Directive 2014/24/EU, of 26.2.2014, OJ 2014 L 94/65.

provision could however be different, which is one of the elements that will be examined in the research project. This apparent requirement to include wage-costs in the budget could change the “pricing game” for tenderers, as it may change the way courts and complaint boards assess whether a tender is abnormally low.

The project aims at establishing how courts and complaint boards in Sweden and Denmark currently handle apparently abnormally low tenders, and at categorising the types of pricing behaviour of tenderers, in order to predict any changes warranted by the Public Procurement Directive from 2014. This will be done by examining case law in the two countries. The main questions, which the research will aim at answering, are:

What is an abnormally low tender in Sweden and in Denmark, respectively?

Which pricing strategies can be identified in the case law?

From an economic point of view, is the handling of the pricing strategies by the courts/complaint board optimal?

How will the amendments introduced by Article 69 affect the assessment of abnormally low tenders and/or the pricing strategies of tenderers?

### **State of the art**

The CJEU has on a number of occasions had the opportunity to interpret the provision on abnormally low tenders, which has been present in all public procurement directives since the Public Works Directive from 1971.<sup>4</sup> Without exception, the judgments of the CJEU have concerned the procedural aspects of what is now Article 55 of the Public Procurement Directive; that is, the requirement to establish that an apparently abnormally low tender is actually abnormally low by conduction of an inter partes verification procedure.<sup>5</sup> The provision on abnormally low tenders has given rise to many academic writings, most of them by lawyers, but also some by economists; this literature is summarised below.

#### *a. On the concept of an abnormally low tender:*

Arrowsmith (1996) found that an abnormally low tender is one which appears to offer the tenderer no reasonable opportunity of making a profit. This point of view was explicitly changed, however, in Arrowsmith (2005), where she defined a tender as abnormally low when it is clear to the contracting authority that the tenderer will not be able to perform the contract. Arrowsmith (2014) recognises that not only risk of non-performance, but also any unlawfulness stemming from non-compliance with legislation, could be reasons to declare a tender abnormally low. This perspective

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<sup>4</sup> Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts, OJ 1971 L 185/5.

<sup>5</sup> C-76/81, *Transporoute*, ECLI:EU:C:1982:49; C-103/88 *Fratelli*, ECLI:EU:C:1989:256; C-295/89, *Impresa Doná Alfonso*, ECLI:EU:C:1991:255; C-143/94, *Furlanis*, ECLI:EU:C:1995:354; C-304/96, *Hera*, ECLI:EU:C:1997:496; C-94/99, *ARGE*, ECLI:EU:C:2000:677, which was a bit different as it concerned a tender tainted by State aid; Joined cases C-285 and 286/99, *Lombardini*, ECLI:EU:C:2001:640; C-283/00, *Commission v Spain*, ECLI:EU:C:2003:544; Joined cases C-147 and 148/06, *SECAP*, ECLI:EU:C:2008:277; and most recently, C-599/10, *SAG ELV Solvensko*, ECLI:EU:C:2012:191.

takes its point of departure in the overall economic situation of the specific tenderer and requires the contracting authority to assess whether the low price in casu will lead the tenderer into bankruptcy. This approach was criticised by Ølykke (2010) who argued that Arrowsmith's non-performance approach would discriminate SMVs and favour public tenderers, and at the same time it would be contrary to a coherent interpretation of EU-law, as there is a well-established case law in the area of competition law, build on principles of economic theory, which identifies a lower boundary for rational price-setting. There are two types of this price setting in public procurement; predatory pricing but also unbalanced bidding (cf. Section c. below). Ølykke proposed a model for the former one, where this test as a tool from competition law could be implemented into public procurement law, allowing for discretion so contracting authorities could assess reasons provided for price-setting below total costs of fulfilling the specific contract, and pointed to the compatibility with indications provided by the CJEU in the sparse case law available. Other academics have similarly focussed on costs of fulfilling the specific contract,<sup>6</sup> some even with specific reference to competition law.<sup>7</sup> However, Arrowsmith's risk of non-performance approach has been favoured by others, notably Trepte (2004 and 2007), and Sanchez-Graells (2013).

*b. National application of the provision on abnormally low tenders:*

A comparative compilation edited by Comba and Treumer (2013) concerns award procedures in several Member States: Denmark, France, Germany, Italy, Poland, Romania, Spain and United Kingdom. Each of the chapters on national law includes a section on the handling of abnormally low tenders. Moreover, a chapter in the book is dedicated to "Rejection of abnormally low and non-compliant tenders in EU public procurement: A comparative view on selected jurisdictions", written by Sanchez-Graells: it compares the rules and reported practice from the mentioned countries. The focus in that chapter is on legislative solutions for identification of abnormally low tenders in the selected Member States. The section on abnormally low tenders in the chapter on Denmark, written by Steen Treumer, is not comprehensive, in the sense that only a few cases (5) are considered. Notably, Sweden is not represented in the book. Even though it must be acknowledged that some interest in the topic "abnormally low tenders" has been given also from a comparative perspective, it is submitted that the proposed research has a completely different aim, scope and method, especially considering the comprehensive and interdisciplinary approach.

*c. Economics on pricing strategies in public procurement*

There are basically two types of low tenders in the literature. The most commonly discussed is when the total price of the bid is low, a version of predatory pricing. Another version is when certain parts (i.e. unit prices) of a bid is low, but the ex ante offer as a whole seems reasonable i.e. unbalanced bidding.

Calveras, Ganuza and Hauk (2004) take a company law perspective on the first type and analyse the effects of limited liability on tenderers pricing behaviour. They argue that in situations where costs

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<sup>6</sup> Cf. C. McCrudden (2007) and S.T. Poulsen, P. S. Jakobsen and S. E. Kalsmose-Hjelmborg (2011), who seemingly connect the risk of non-performance approach with situations where price *does* cover costs, but a risk of non-performance is nevertheless present, contrary to S. Arrowsmith (2005) who refers to the tender's "favourable terms" and the risk that the tenderer "may seek extra payment", at p. 532.

<sup>7</sup> J. E. Falk (2011), at p. 406.

are difficult to estimate, a tenderer with bad financial standing will have less to lose than a tenderer with a good financial standing, which results in more aggressive bidding from tenderers with bad financial standing. The phenomenon that tenderers with bad financial standing price low could be denominated “last chance pricing”, as the company may survive for the duration of the contract if the tender is successful, whereas if the tender is unsuccessful, the tenderer goes bankrupt. In a later paper, Engel, Ganuza, Hauk and Wambach (2006) argue that a tender is abnormally low, if it is clearly below the expected costs of fulfilling the contract. From the point of view of the tenderers’ strategies leading to an (apparently) abnormally low price is based on collusion (punishment of deviator) or abuse of dominance (predation), Ølykke (2012) discusses the impact of acceptance or rejection of such tenders on (future) competition for public contracts.

The second form of low prices is referred to as unbalanced bidding in the literature. This refers to a situation with unit price contracts, where the contracting authorities specify quantities for e.g. building a road and the contractor provide bids in the form of price vectors of unit prices. Economic theory has theoretically shown how it is rational for an informed bidder to skew the prices i.e. raise the unit price of underestimated quantities and cut the unit price on overestimated quantities in a manner that allows the total price bid to stay the same, whereas the ex post profit will go up (Athey and Levin, 2001; Ewerhart and Fieseler, 2003; Mandell and Nyström, 2013). Unbalanced bidding is seen as information rent in economics. There is also an models on providing practical guidance for clients to detect (Arditi and Chotibhongs 2009) and for contractors to optimize, unbalanced bidding (Cattell et al., 2008, 2010; Yizhe and Youjie, 1992).

From an economics point of view regarding low prices, there is a fine line, between competitive behaviour on the one hand and abuse on the other. Often a solution is that the contracting authorities should stick to the contract and demand that contractor provides what is offered. This also provides a signaling value of the contracting authorities being really determined.

*d. State of the art – gaps justifying the research project*

Summarising the above, state of the art on abnormally low tenders could be illustrated as follows:

Law	Holistic perspective/non-performance	Covering the costs of fulfilling the specific contract
Economics	Last chance pricing	Predatory pricing/total costs Unbalanced bidding/Unit prices

Previous research is monodisciplinary and purely theoretical and/or primarily based on the case law of the CJEU. Broadly stated, the CJEU interprets EU law by giving preliminary rulings, cf. Article 267 TFEU, and rules on the compatibility of national law with EU law, cf. Article 258 TFEU. In preliminary rulings, the CJEU does not decide on the facts of the national case, and no case involving a practical aspect of (apparently) abnormally low tenders has been brought before it by the Commission in a breach of Treaty procedure. Hence, there is a gap in the research on the practical handling of (apparently) abnormally low tenders, and it is submitted that an

interdisciplinary approach is preferable as law and economics are equally important in assessing when a tender is abnormally low and how different pricing strategies of companies resulting in apparently abnormally low tenders should be handled in practice by contracting authorities.

## **Methodology**

As the point of departure will be the application of the provision on abnormally low tenders by courts/the complaints board, initially, the cases must be collected. To the knowledge of the researchers involved in the project, in the spring of 2014, there were more than 50 judgments from Swedish courts involving (apparently) abnormally low tenders, whereas the Danish complaints board for public procurement had given 20 verdicts. The first task will be to gather all the cases which will form the empirical basis for the research.

The examination of the case law should, first, reveal indications of how the concept of an abnormally low tender is perceived by the two legal systems; and, second, try to categorise the different types of pricing behaviour observed, and clarify how each of these behaviours are handled by the courts/the complaints board. This will be an interdisciplinary exercise which will rely on a systematic registration of several parameters for each case, such as: who relies on the provision on abnormally low tenders (contracting authority unsuccessful competitors, the tenderer who submitted the tender rejected as abnormally low); which reason is provided by the contracting authority for rejecting or accepting the low price tender; which reason is provided by the tenderer who's tender is claimed to be abnormally low; what are the market conditions; how many tenderers tendered; which price elements are low; which arguments did the courts/the complaints board use; was the tender found to be abnormally low or not. The categorisation will have qualitative aspects and any assumptions made by the researchers in this categorisation will be clearly spelled out.

The methodology applied in order to determine the current state of law with regard to the concept of an abnormally low tender will be the legal dogmatic method. A challenge is the different legal systems, but the analysis will not be comparative, as ultimately EU law applies. Hence, the legal dogmatic analyses will be made separately for each country (länderberichtsmetoden), based on the national legal sources, and then a comparison will be made of how the national legal systems administer Article 55 of the Public Procurement Directive from 2004 (dynamic comparison);<sup>8</sup> lastly, compatibility with EU law is assessed using the legal dogmatic method which is characteristic for the Scandinavian legal theory,<sup>9</sup> but based on the legal sources which are relevant at EU-level.<sup>10</sup>

Third, by theoretically explaining and assessing the possible success of the identified pricing behaviours it will be possible to determine whether the courts/complaint board are treating the apparently abnormally low tenders correctly. This will include an economic analysis to define whether the verdicts are in line with the theoretical definitions of predatory pricing or unbalanced bidding. Regardless of whether the judgments/verdicts and the definitions coincide, an efficiency

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<sup>8</sup> O. Lando (2009), at p. 206-208.

<sup>9</sup> C. D. Tvarnø and R. Nielsen (2014), at. p. 423.

<sup>10</sup> Cf. R. Nielsen (2010).

analysis will be made deciding on the magnitude of the low tender from a socioeconomic perspective. This will be done on a case by case basis to see whether there are any trends in the material.

Lastly, the impact of the new obligation to reject introduced by Article 69 in the new Public Procurement Directive from 2014 will be examined and assessed by reference to the pricing behaviours and current perception of the concept of an abnormally low tender which have been documented in the previous analyses; this is an interdisciplinary exercise. The new provision on abnormally low tenders will significantly change the pricing game in public procurement, as an obligation to reject tenders as abnormally low will be placed on contracting authorities under certain circumstances. It will be examined how the change introduced will affect the concept of an abnormally low tender as it is currently understood in Sweden and Denmark, respectively. The intention is that the research should include legal policy, *de sententia ferenda*,<sup>11</sup> advising on how the contracting authorities and subsequently courts/the complaints board should assess apparently abnormally low tenders in future cases under the new obligation to reject such tenders. The recommendations will focus on satisfying the welfare at EU level; that is, the interest in obtaining the internal market in contrast to other national interests in public procurement. National intentions stipulated by contracting authorities from accepting/rejecting abnormally low tenders will be acknowledged but will not be decisive.

## **Impact**

Initially, the research will focus on mapping the national practices in Sweden and Denmark, but the findings and recommendations could be generalised within the EU. Hence, the research strives for benefiting the taxpayers in all EU Member States by giving recommendations on how (apparently) abnormally low tenders should be handled to ensure that the best tenderers win public contracts.

Apart from contributions on the EU level, the mapping of Swedish and Danish legal practices regarding low bids is of value on its own. There is a lack of empirical work regarding low tenders. Forthcoming work (Nyström, 2014) indicates that the magnitude of the problem with unbalanced bidding in the Swedish construction industry could be overrated. There is a need for more empirical work on these topics.

## **Research plan**

The research will be conducted in cooperation between associate professor, Ph.D., Grith Skovgaard Ølykke, Copenhagen Business School, who will do the legal part of the research, and Ph.D., Johan Nyström, Swedish National Road and Transport Research Institute (VTI) and Centre for Transport Studies (CTS) at KTH, who will do the economic part of the research. Grith, who has a Master in Business Administration and Commercial Law, wrote her Ph.D.-thesis (published in 2010), on the concept of an abnormally low tender from a competition and State aid law perspective, drawing on economic theory, e.g. on predatory pricing. Since, she has published in the area of interaction between public procurement, competition and State aid rules, and has engaged in interdisciplinary research projects. Johan is an economist, but wrote his Ph.D.-thesis at KTH on collaboration and

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<sup>11</sup> A. Ross (1953), p. 421 ff.

procurement in the construction industry. Since then, he has worked as lobbyist and management consultant on different topics including public procurement; however, five years ago, he returned to economic research in the area of public procurement and contracting. His recent work has focussed on unbalanced pricing.

In the first term (autumn 2015), the empirical material, i.e. the case law, will be collected, and a registration of the data will be initiated.

Primo the second term (spring 2016), a meeting will be held to discuss the registration based on the experiences already made in the first term, and during the second term, the registration will be completed. The analysis will be initiated. One or two meetings will be held to discuss this work.

In the third term (autumn 2016), the research is finalised. The paper will be presented at both Copenhagen Business School and VTI to secure academic quality. One or two meetings will be held to facilitate the finalisation of the project and writing of the expected outcome, which is an article for an international peer-reviewed journal.

## **Budget**

In the budget under “other expenses” an amount is requested to pay for research assistance in the first and second term with regard to the collection and registration of the empirical material (2015: 200 SEK/hour and 2016: 206 SEK/hour). Moreover, estimated expenses to pay for obtaining the judgments from Swedish courts, as well as travelling costs, will be included in this budgetary post.

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