

Dispute Resolution in Public Procurement Contracts

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ABSTRACT

The public sector not only provides services and functions that are critical to society, it is also an important partner for the business community in Sweden. This is particularly true in certain sectors, such as construction, consultancy, health and social care, and pharmaceuticals,² as well as telecommunications and transport. Public procurement accounts for almost one third of Swedish public sector expenditure and contributes to about one sixth of Sweden's gross domestic product ('GDP'), which corresponds to the average among EU Member States. In Sweden, this amounts to almost SEK 900 billion.³

The European Parliament has stated that 'Public procurement contracts are crucial to Member States' economies, contributing over 16% of EU GDP. The construction sector is highlighted as particularly important. As a result, public procurement is a key driver of economic growth, employment, and innovation.⁴

Every year, more than 17 000 public procurement contracts are advertised in Sweden, with municipalities accounting for around seven out of ten contracts. Of all procurements in Sweden, more than four out of ten are for services and three out of ten for works.⁵

The activities covered by these contracts are thus of great importance to the functioning of Sweden for individual citizens and businesses. For the development of society, public procurement contracts create the conditions for contributing to sustainable development, market competition, and above all economic growth.⁶

In the ordinary course of business, disputes can of course arise. If the parties involved cannot resolve these disputes by themselves, the dispute resolution clause in the relevant contract becomes very important. The dispute resolution clause governs the procedure, including the applicable forum and rules for resolving the dispute.

In order to minimise the impact on day-to-day operations, an effective dispute resolution method is required. This is particularly true in cases where an actor is engaged in activities that are essential to society, where interruptions in work can have a serious impact on both individuals and businesses. With respect to the parties' chosen dispute resolution method, there are many aspects to consider, such as the choice of decision-maker, their competence or specialist expertise, the confidentiality, cost, and time to a decision, as well as the parties' influence over the shape of the proceeding.

This report analyses dispute resolution in publicly procured contracts at the SCC Arbitration Institute ('SCC') and in the general courts of Sweden. It compares data from cases decided between 2013 and 2023 that relate specifically to public procurement contracts. When comparing data, the average is used to the greatest extent, as the average of different samples provides a simple overview. However, for some comparisons, the median is also shown to provide a clearer picture where the data is more dispersed, and the values vary to a greater extent.

The first part of the report focuses on dispute resolution at the SCC, with a description of the different dispute resolution methods and statistics on cases at the SCC involving public contracts. The second part deals with cases in general courts. The third part of the report contains comparisons and conclusions that can be drawn from the previous two parts of the report. In the fourth and final part of the report, we summarise the conclusions, look ahead and share our thoughts on what dispute resolution in procured contracts might look like in the future.

Key findings of the report include:

- Public sector entities have chosen to use all dispute resolution methods offered by the SCC.
- The SCC has handled disputes of significantly higher value compared to the general courts of Sweden, and in less time.
- There is a strong interest on the part of the parties to public contracts to reach settlement agreements.

The report shows that public actors have chosen to use all dispute resolution methods offered by the SCC. They appear as parties in all types of SCC cases concerning public procurement contracts, arbitration, expedited arbitration, emergency arbitration, SCC Express and mediation.

The comparison with general court cases shows that the SCC has dealt with significantly higher value disputes compared to general courts, and in less time. In terms of cases handled under the SCC Rules for Expedited Arbitration, the processes take only about six months. Compared to cases concerning similar disputed values in general courts, the time can be shortened by about one year. From a socio-economic perspective and in order to ensure that the societal functions to which these disputes relate can continue, there is every reason for parties to carefully consider the most appropriate dispute resolution method for the individual contract.

We note that construction cases take significantly longer in the general courts compared to the SCC. The time taken can have serious consequences for both the parties and society at large, depending on the individual project. When comparing construction cases at the SCC and in the general courts, these are handled twice as fast at the SCC, compared to the average. We therefore see that dispute resolution in construction cases at the SCC can have a positive impact on the national economy, in that consequential costs and delays that can arise as a result of interruptions in projects due to protracted processes can be avoided.

Furthermore, we have observed that settlement agreements are frequently reached both at the SCC and in the general courts, and that there is therefore a great interest for the parties in public procurement contracts to reach mutual solutions. Here there is significant potential for parties to use the SCC's various tools to facilitate reaching a settlement at an earlier stage of the dispute. For example, mediation under the SCC Mediation Rules and expert dispute assessment service SCC Express have been successfully used for tendered contracts. SCC Express can be used to obtain an assessment of a particular legal issue, which in turn can facilitate subsequent settlement discussions. Both methods are time-efficient and both mediation and SCC Express have predictable costs.

Therefore, looking ahead to future dispute resolutions for public procurement contracts, the SCC's recommendation is to carefully consider which dispute resolution method is best suited to the contract to be procured and include it in the tender documents.