



KIRSI-MARIA HALONEN, LL.M., Ph.D., Docent, Senior Lecturer in Commercial Law

The Danish Public Procurement Act Through Finnish Lenses

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LAPIN YLIOPISTO
UNIVERSITY OF LAPLAND
Pohjoisen puolesta – maailmaa varten

AGENDA

THINGS THAT CAUGHT MY EYE

- Few remarks on legislative technique
- Purchases within State (in-house / ex-house) and definition of contracting authorities
- Competitive procedure with negotiation
- Changes of selected candidates / bidders
- Contract amendments
- Joint cross-border procurement

LEGISLATIVE TECHNIQUE

RULES HIDDEN IN PREPARATORY WORKS

- Many countries practice more or less a “copy-out” method
- In Nordic tradition legislative proposals have a lot of importance
 - Considered to reflect the legislator’s intentions and objectives
 - Reflects on how the rules should be applied
- Preparatory works do not hold similar status than legal provisions and thus are not binding towards the courts
 - Denmark, Finland, Sweden
 - Creates ambiguity among practitioners
 - Makes national case law harder to predict
- Difficulties to establish the exact rules (foreign bidders)
 - E.g. Section 176 “In case of material changes to a contract or framework agreement, the contracting authority **shall arrange a new procurement procedure** in accordance with this Act”
 - Preparatory works: there is no obligation to arrange a new procedure

LEGISLATIVE TECHNIQUE

LEGAL PROVISIONS WITH GUIDANCE

- Danish PP Act includes several national rules that are not included in the Directives
- Some based on national needs, but many are based on interpretation of EU rules
 - Why things couldn't be left to be interpreted through EU case law?
 - Eg. Section 147 on changes of bidder consortia
 - Eg. Section 39 (2) on preliminary market consultations sets out obligations regarding the information provided and time limits
- But on the other hand in some cases where more guidance could be offered at the level of actual provisions, there is none
 - Eg. conflict of interest: MS shall ensure that CAs take appropriate measures
 - → Danish PP Act: "CAs shall take appropriate measures" – and nothing more (only at the level of preparatory work)

PURCHASES WITHIN THE STATE

DO PUBLIC PROCUREMENT RULES APPLY?

- Concept of State within PP regime has been problematic in many MS
- Are PP rules applicable to contracts concluded by different State authorities?
 - Previously in Denmark the State was considered to be comprised of separate (external) units and contracts between these units were covered by PP law
- Finnish PP Act's preparatory works suggest that PP rules do not apply to any authority's "own activity" i.e. when the purchaser and supplier are from same legal entity (HE 50/2006 vp., p. 16 and HE 108/2016 vp., p. 100)
 - State is one entity, but is organized in separate actors for functional reasons (central government and other authorities)

PURCHASES WITHIN THE STATE

DO PUBLIC PROCUREMENT RULES APPLY?

- Whether or not purchases within State are covered by PP rules has not directly been addressed in CJEU case law
 - Maybe because PP rules do not apply to such purchases?
- Definition of public contract requires a contract between two **legally distinct parties** (in line with the current Danish PP Act's preparatory work)
 - *C-84/03 Commission v. Spain*, para 38: “[in order for the PP rules to apply] it is sufficient, in principle, if the contract was concluded **between a local authority and a person legally distinct from it**. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and [...]” (similarly also *C-15/13 Datenlotsen Informationssysteme*, para 24)
 - → suggests that PP rules don't apply to purchases within same legal entity = State (“**own activity**”)
 - → if the supplier has a **legally distinct personality: PP / in-house rules** apply

DEFINITIONS OF DIFFERENT ENTITIES

IS STATE ONE AND THE SAME CONTRACTING AUTHORITY?

- Can be relevant question if considering on what level the estimated contract value should be calculated (aggregation)
 - the interpretations vary between the MS
- State is comprised of several contracting authorities (which can be further divided in decentralized / separate operational units)
 - Art. 2(2) divides State to central (listed in Annex I) and sub-central authorities which even apply different thresholds
 - → **State is one legal entity, but comprised of many CAs**
 - In Sweden even municipalities are comprised of many contracting authorities as the national public law defines a municipal committee (*nämnden*) as an (independent) public authority (HFD 122-18)
- If interested further: Concept of contracting authority and the characteristics of separate operational units (Section 31 of Danish PP Act) is further discussed in my report to Swedish KKV http://www.konkurrensverket.se/globalassets/publikationer/uppdragforskning/forsk-rapport_2017-1.pdf

COMPETITIVE PROCEDURE WITH NEGOTIATIONS

MORE FLEXIBILITY AND/OR MORE PROBLEMS?

- No strict limitations of use
- Section 64 (1): “If the contracting authority wishes to select more than five candidates, grounds hereof shall be provided”
 - why CA needs to provide grounds for choosing more than five tenderers?
- Section 66(2): final tenders, essential elements incl. minimum requirements and award criteria **shall not be negotiated**
- **1) Preparatory works: requirements can be negotiated** if does not have an impact to participation of candidates or tenderers
 - Problem: uncertainty of which requirement has been a “deal-breaker” for a potential candidate: candidates not meeting the minimum requirements have not submitted a request for participation in the first place
 - Solution (?): Never have anything as a minimum requirement in the beginning?

COMPETITIVE PROCEDURE WITH NEGOTIATIONS

MORE FLEXIBILITY OR STRICTER RULES?

- 2) Award criteria shall not be negotiated
 - makes the procedure hard to use
 - Solution (?): Award criteria to be described on a very general level?
 - Could award criteria be then further developed i.e. more detailed sub-criteria added as suggested by the Finnish legislator?
- 3) Under Danish Complaint Board's case law initial tenders may contain reservations provided that they are removed from final offer
 - Problematic if the number of tenderers is reduced during negotiations and a tenderer whose offer does not contain such reservations is left out
 - Problematic if a CA has reserved a right to award the contract on the basis of initial tenders → tender with reservations cannot be accepted

CHANGES OF SELECTED CANDIDATES / BIDDERS

DANISH NATIONAL SPECIALITY

- Section 147 possibility to replace an economic operator to which a candidate / tenderer has based some of its ability or a member of a consortia (not based on the Directive)
- Unless the business to be replaced has had **decisive influence on the assessment in respect of the completion of the minimum requirements for suitability or on the evaluation**
 - in line with C-161/13 *Idrodinamica*: the exit of consortia member after award decision and before contract, can be material change if alters a decisive element in the award of the contract
 - C-223/16 *Casertana Costruzioni*: No replacement of “capacity relied company” was permitted under Italian law = in accordance with EU law
- In C-396/14 *MT Højgaard* a tenderer could continue despite of the bankruptcy of its consortia partner
 - → not decisive as the other could fulfil the minimum requirements
 - No new parties were introduced and at the selection phase no candidates were excluded (no harm done?)

CHANGES OF SELECTED CANDIDATES / BIDDERS

DECISIVE PARTICIPATION

- Should there even be a consortia / co-operation where someone's participation is not decisive?
- Procurement law:
 - C-314/01 *Siemens and ARGE Telekom* (para 43) states that "it is permissible for a service provider **which does not itself fulfil the minimum conditions required for participation** in the procedure for the award of a public service contract **to rely [...]** **on the standing of third parties** upon whose resources it proposes to draw if it is awarded the contract.
- Competition law is more clear on the matter:
 - **co-operation is only allowed if it is necessary** in order to participate to the contract award - Joint-bidding guidelines https://www.en.kfst.dk/media/50765/050718_joint-bidding-guidelines.pdf
 - Dansk Vejmarkerings Konsortium (Competition Appeals Tribunal, 11.4.2016)
 - → if co-operation is allowed only when absolutely necessary, is there truly often a situation where a business is not decisive on fulfilling the requirements? (interaction between procurement and competition rules is not clear)

CONTRACT AMENDMENTS

CHANGE OF CONTRACTUAL PARTY

- Section 182 allows for changes of contractual party due to re-organisations (M&A or insolvency)
 - Preparatory works state that the estate of the bankrupt firm can continue the contract and - as a part of its duties, the estate administrator can even transfer the contract even to a new operator
 - The estate have rarely goals to continue doing business, but to recover debtors – sell of contract can be useful
 - Not directly addressed in the Directives or CJEU case law, but should be possible and should also fulfil the “unforeseeable change” -threshold (section 183)
 - Must meet the qualifications / requirements initially set
 - cr. Finnish MaO 652/15 where the qualifications were evaluated prior to transfer and not after the transfer...

JOINT CROSS-BORDER PROCUREMENT PROCEDURES

WHICH RULES APPLY?

- Danish PP Act set out basic rules of joint procurement and establishment of joint unit for CAs from different Member States
 - Danish PP Act states that in joint cross-border procurement, participating CAs shall agree on which national rules apply (Section 125)
 - Can under Danish public law public authorities agree on the applicable law?
 - Perhaps possible relating to contracts / commercial disputes, but on administrative procedures and remedies?
 - Can under Danish law a joint entity apply the law of its registered office although it would carry its activities somewhere else? (Section 126)

FINNISH PUBLIC PROCUREMENT ASSOCIATION

Julkisten hankintojen yhdistys ry

YOUNG, BUT ACTIVE ORGANISATION

- Established in 26 September 2016 by 15 establishing members
- President Kirsi-Maria Halonen since the beginning
- Currently 290 members
- Holds events, seminars, researcher seminar, workshops 4-8 per year
- Not reserved for lawyers, but also other practitioners
- www.hankintayhdistys.fi
- Interested in future co-operation?



Kirsi-Maria Halonen
LL.M., Ph.D., Docent

Member of European Commission Stakeholder Expert Group on Public Procurement
Senior Lecturer in Commercial Law, University of Lapland

Kirsi@kmhalonen.fi

+358 445724944

<https://fi.linkedin.com/in/kirsi-maria-halonen-2472612>

@Kirsi_MariaH (Twitter)

ulapland.fi

