FAIR PUBLIC PROCUREMENTS

project results

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1 REPORT ON PROJECT RESULTS

Recently an international project was carried out to analyze the public procurement law, similar problems and best practices in four Nordic countries. Cooperation between non-profit organizations in Estonia, Finland, Norway and Denmark was funded by the Nordic Council of Ministers. We hereby provide a summary of the issues covered, together with possible solutions and recommendations that could be considered and taken to account in future legislation.

2 COMPILING OF EVALUATION COMMITTEES

2.1 Problems noticed

In public procurement the trend in Nordic countries is, that the quality of tenders should be taken into account instead of just the price. Qualitative criteria are often also subjective. This means that the weight of subjective criteria is growing and becoming decisive in selecting the winner. Subjective evaluation takes place primarily in those public procurements where the object of the procurement is not described in detail and describing of it is a part of the tender competition. In Estonian public procurements points for creative solutions are usually 40-80% of total value. The Finnish Marketing Union recommends that in marketing and communications procurements, the creative solution criteria should have a weight of 80% and price that of 20%. So the weight of subjective criteria can be very high.

The evaluation of proposals is carried out by a Contracting Agency (CA) appointed committee. Their preferences determine the winner - these people have the most significant role in the procurement. However, the law of participating countries does not impose any requirements on the CA for compiling evaluation committees. The competence of members of the Commission in the field of procurement is rather a good practice and a thing expected, but not a requirement. In all studied countries considerable effort is put into assuring that there is no conflict-of-interest in committees. Beside of that, the CAs have been given a huge amount of trust, as in fact, it is these people who decide the fate of contracts. Whether a state gets the best deal for taxpayers' money depends on the competence and honesty of CA committee members. However, they are not paid extra for their evaluation work and they also don't carry any legal responsibility over their decisions. As our partner pointed out "In reality, the evaluation committee members in Norway DO NOT have any financial and legal responsibility since they only perform their work on behalf of the contracting organization". We see this situation in whole too open for manipulation, arbitrariness or even corruption.

As the formation and work of evaluation committees does not fall under public procurement act, it is not possible to argue over the committee setup in court. By law committee members are allowed to be incompetent and without any experience on topic under evaluation. They can be each other's subordinates while looking for consensus, or even with valid criminal penalty (which is not allowed for tenderers). Larger CAs have in-house rules on how to set up committees and conduct public procurement. However, if the CA does not follow these rules, nothing serious will happen, as the law has not been broken. No tenderer may challenge a breach of the internal rules of a CA in court if he becomes aware of such information at all.

Only in case of procurement category "Idea Competition" (in Finland called "Design Competition") the subjectivity of creative solutions evaluation is lowered by law with set of requirements – jury members must be independent of any participants, at least ⅓ of the jury must have equal qualifications that are required from participants, decisions must be independent, evaluation done anonymously and based on the competition criteria.

2.2 Recommendations to consider

There is a growing trend towards price and value ratio, with creative solutions accounting for up to 80% of points. This shows the growing importance of the evaluation committees which decides over content, in deciding the winner. As the evaluation committee members are given a great deal of decision-making power, their selection should be extremely careful; these people should not be able to be manipulated. It may be worth considering the inclusion of the issue of the formation of evaluation committees in the law, so that this very crucial moment in procurement is not just the next issue in CA's internal rules and hope of following good practice.

For example, the law could stipulate that the committee member who evaluates qualitative and subjective content must also be competent in the field of procurement itself, which would exclude curiosities. At present, evaluators who are not separately remunerated for this work and who do not have real financial responsibility for their decisions, may not themselves have that high level of competence that is required of the tenderers. A person who gets the right to evaluate someone's offer professionalism, by doing so on a detailed evaluation scale, should also be a professional.

One solution for better procurement with creative solutions would be to require to evaluate the creative part with same rules, as it is now for design/ idea procurements. We can't ignore that fact, that even if in design/ idea competition 100% of points is subjective and in creative solution procurements „only" 60-80%, it is here were the winner is decided, not objective price. But procurements with creative solutions are approched as regular ones.

It would also help to increase objectivity if creative solutions are evaluated and points are validated before financial offers are opened that clarify the final ranking. Thus, knowing the price of offer does not affect the points awarded for the creative part of it.

3 WHAT IS A BUSINESS SECRET IN PUBLIC PROCUREMENTS

3.1 Problems noticed

In studied countries the tenderer can determine what his trade secret is. It is forbidden by law to call a trade secret only such numerical indicators that were requested in the procurement and give value points. Such a gray area can be used by successful bidders whose bids are requested to be seen by the competition - they just cover 100% of their offer as business secret. The CA also has no interest in fighting for the interests of a non-successful tenderer. In fact - the CA itself has an interest, that nobody will be able to challenge it's done decision in court. The less others see, the better for them. Even if one challenges a winner's proposal in court and pays state taxes, they may not see more than fully covered proposal. This is very limited position to stand for your rights that may be broken. Competitor can't even see, if public procurement requirement were met and if all required info was even presented.

In Norway public procurement follows the EU directives regarding business secrets and confidentiality. If the dispute goes to court, the court makes the decision of whether to include independent experts or not, to assess the business secret status, based on the circumstances of each case. Notably, in many cases though, tenderers decide what their business secret is and why it is to be kept as such. In Finland**,** what is business secret, is governed by the law and similar to Estonia - information that (1) is not publicly known or easily acquirable to people who usually handle this type of information, (2) is commercially valuable in business, and (3) which is protected by the legal owner in commensurate measures. The electronic system for submitting bids allows the marking of any input fields or

attachments as “trade secret” by the proposal maker. However, the CA ultimately makes the decision on what is a trade secret. The law on trade secrets says that in a court case, the court may use up to 2 experts to evaluate business secret status. Such experts must have a higher university degree and relevant expertise. In Denmark, the starting point is that full access to documents must be granted to competitors, and that the tenderer must be prepared for this and take this into account in the preparation of his tender. When applying for access to documents from a CA, it is also the CA that decides which information in the tender may be exempted from access. However, it follows from the principle of good administrative practice that the CA provides the winning tenderer opportunity to comment on the request for access to their proposal before the CA makes a decision about opening information to competitors.

3.2 Recommendations to consider

The protection of trade secrets vs right to see the winners proposal uncovered is an important issue in all countries. The countries reserve the right to decide what constitutes a trade secret for a tenderer; but in some cases the CA also has the right to decide whether the tender documents requested to be seen by a competitor are covered too much, or is only business secret covered.

There does not seem to be a good and universal solution. However, it should be taken into consideration, that a competitor should be able to see those parts of a successful tender that demonstrate that the essential conditions of the tender were met and that the required information was available in the necessary detail. Besides, if someone has challenged a successful bid in court, the appellant should have the right to ask the court to critically review the scope of the trade secret coverage, and the court must have an independent expert do so. It is very difficult for a competitor to know if information is over-covered somewhere when the entire offer is covered.

4 HOW CAN ONE DISPUTE CA’S DECISIONS

4.1 Problems noticed

The complaining and courts system, and corresponding state fees are quite different in four countries. Therefore is difficult to compare the size of fees, and living standards also vary. It can still be noticed, that in some countries the first step of dispute are kept easy and with low costs.

Firstly, in all studied countries one can dispute the procurement requirements. This dispute has to be turned in before the tender deadline. The option sounds fair, but there is no relevant motivation to do that. Usually interested party asks at first the CA to expand the too limiting requirements. Some CAs do it (they admit their mistake) others argue back and don't change the weird limitations. This is a signal, that they may be targeting the contract to „someone special". Usually other tenderers give up at this point, and simply don't participate, making it even more easy to give the contract to that favored one. The reason why others don't start dispute over too limiting requirements is lack of motivation. If you dispute, you must to pay state fee, and if you already make that investment, then you hire also a lawyer, not to lose this money for just incompetence. But you can never be sure you will win, and if not, you will lose paid fee and legal costs. Even if you win that dispute, you win nothing – you will not get a contract. One can just get paid costs back (or some of it). If the court rules that tender requirements must be changed to open the market, the CA may do so, but may also just cancel the whole tender. And if they open the market, then it opens to all competitors – there is zero advantage to that single company, which took a financial risk and took the case to dispute office or court. In case of service contracts that "problematic" company will probably not be the one which will later win the contract. If there are several companies who see that requirements are two limiting, they can't go to dispute together and share the costs, as they are anonymous in this round of procurement.

Secondly, one can dispute the CA's decisions. The court systems and fees for public procurement disputes are quite different country by country. In Estonia the first step is VAKO, which has just as high fees as court. That is limited by law what exactly can be disputed. One usually also hires a lawyer. If plaintiff loses, he can go on to next level of court and pay fees again, plus for legal costs. In these disputes court also invites third party or even parties, who can voluntarily participate, but they don't have to. The third parties can also hire legal aid, and if they (actually CA) win, the looser has to compensate also third parties' costs. This is regardless of the fact, that they dispute on state/ CA's side, who also uses a lawyer, and so the third party's interests are already well protected with public money.

Therefore, it is not wise for a small business to go to court, because in case of loss, and this risk always exists, in addition to the state dispute fees and the costs of own lawyer, he may also have to pay the costs of legal aid of the CA, and the costs of legal aid for all third parties who voluntarily decide to participate in the dispute.

While in Estonian administrative court the state fees are symbolic – 20 EUR, then in case of public tender disputes the fees are much higher – in smaller tenders 640 EUR and for bigger 1280 EUR. This is so despite of the fact, that the dispute challenge does not mean the award of a contract, but merely the annulment of a contracting authority's decision. The contracting authority has the power to cancel an “unsatisfactory” procedure, leaving a "pretentious" tenderer who has demanded accuracy without contract anyway.

In Norway the right to challenge and appeal with regards to public procurement is fulfilled by the general courts system and the complaints board - KOFA. Decisions of the Complaints Board are only advisory and thus no appeal procedure applies, but the dispute may nonetheless be brought in before the courts. Decisions of the Norwegian courts may be appealed before the appeal courts and a decision of the EFTA Surveillance Authority may be appealed before the EFTA court. The plaintiff can argue about how the procurement process was conducted including issues of award of contracts, and seek for compensation. Generally, the state fees are affordable by most bidders. The complainants/ plaintiffs are required to pay a fee of NOK 8,000 (ca. 800 EUR). In addition, they must pay a court fee which currently stands at NOK 2,930 (ca. 293 EUR) for interim injunction cases, while the court fee for damages claims is NOK 5,860 (ca. 586 EUR) (with an additional NOK 3,516, ca. 352 EUR, for each day in court). Fees for damages claims however are much for many complainants/ plaintiffs and are likely to discourage them from complaining.

Those who argue their cases with success against the CA are awarded costs of the suit as well as compensation in some cases. As a main rule, the successful party shall be reimbursed its costs from the other party, including any court fees and costs to legal counsel. For example, see the Norwegian Supreme Court case “Fosen-Linjen” (HR-2019-1801-A) involving a claim for damages from a terminated tender procedure. The Fosen- Linjen case was subject to two EFTA court referrals before judgement was passed which awarded huge compensation to the plaintiff. https://www.domstol.no/en/enkelt-domstol/supremecourt/rulings/2019/supreme-court-civil-cases/hr-2019-1801-a/.

For large CA that have legal departments to normally handle their own litigation processes, however for smaller CAs that have no legal departments, hire external lawyers to defend them. Some of the CAs have lawyers on a retainer contract to handle their legal issues. For very complex issues pertaining procurements, even large CA with legal departments hire external lawyers who together with the CA lawyers defend the CA. If the disputing tenderer losses the case, then they have to cover the external

legal costs by the CA, and court has always agreed with that. Whoever loses the petition has to cover legal costs of the other parties, whatever their number.

The court in Norway is mostly concerned with determining the legality of the procurement selection including the selection criteria. Courts may look in the evaluation criteria to determine if its legal. One key requirement is that the criteria should not give the CA an 'unfair advantage 'over the tenderers.

In Finland, if the CA seems to have broken laws or regulations other than in the public procurement process, then the first course of action is to notify the CA for corrective measures. If they do not comply, then one should contact the Governing Court ("hallinto-oikeus") to force a change. The fee for Governing Court is 260€ if the case is lost, 0€ if the case is won. One can further apply to the High Governing Court, where a fee is 510€ if the case is lost. This case is rather rare, since CAs usually do a good job of operating properly.

If the CA has worked according to laws, but the decision criteria and winners are in dispute, one should first contact the CA, and only after then should one complain to the Market Court ("markkinaoikeus"). The fee for filing a complaint is 2050 EUR (or more if the procurement is over 1M EUR in size, up to a fee of 6140 EUR). Each party is responsible for their own costs unless there is inappropriate business practices involved, in which case the loser pays the costs of the winner.

Usually if a bidder files a complaint to the Market Court, their demands are a) prevent the procurement contract signing and any other method of proceeding with the flawed procurement; b) demand corrected procedure, c) payment of compensation to suffered loss, d) payment of legal fees. They may also demand "inefficiency repercussions", or a shortening of the winning contract, and payment to the state. Usually the CA will in turn demand the plaintiff to cover their legal fees (which include lawyer fees etc). Most likely the winner of the procurement may also have demands eg. payment of their legal fees.

No law clearly forbids the use of external legal aid. Looking at past case records, the CAs usually have legal fees they want compensated. The loser pays also cost of third parties. The court may adjust down especially the cost demands of corporations (usually not the public sector CA).

The Market Court works strictly by looking whether the procurement process and decision is legal. They will not make moral judgment nor go very much into detail in qualitative criteria and whether the CA was competent in evaluating them. They may look at the criteria and whether they are appropriate and legal. One legal measure is that no criteria should give the CA "uncontrolled authority" over the decision.

At least legal fees have been compensated in all cases where the plaintiff has won the case. CAs have been ordered to re-evaluate their procurements again. Although at that time it is possible for the CA to just cancel the procurement and initiate a new one later. There are cases where the bidder has lost, complained, won the dispute, but during the court proceedings they have not been actually given the contract, and have then complained to the supreme court for compensations, and won. Here is an example case with 100k€ in compensations for lost profit, that was caused by CA obvious mistakes.

In Denmark a complaint can be brought before the Complaints Board for Public Procurement. The Complaints Board can pass legally binding decisions and award damages for losses suffered by the economic operator. In Denmark one has to pay court fee and assessment fee. If the value of the case is less than DKK 100 000 (13 400 EUR), the court fee is DKK 1000 (134 EUR). If the value of the case is bigger, the court fee is DKK 2000 DKK (264 EUR), and an assessment fee must be paid on the basis of certain fixed intervals, depending of the value of the case. If the Complaints Board judges in favour of the complainant, the fee is repaid.

Parties with legal interest may complain all stages of the tender process. Cases that have been before the Danish Complaints Board for Public Procurement can be brought before the national courts. The procurement law cases handled by the national courts often relate to issues of compensation assessment after the Complaints Board has upheld the complaints.

Tenderers and several organizations can bring cases before the Complaints Board for Public Procurement, which finds out whether the tender rules have been violated. The board can i.a. stop a tender process or award compensation. The rulings deal with, for example, complaints about errors in the tender material, evaluation, control bids, award and selection criteria, reservations, negotiation, contract, cancellation, etc. In general the Complaint Board may decide that the losing party in the appeal case must pay the other party an amount to fully or partially cover their costs.

There was a change in the law in 2013, which increased the financial risk of complaints from bidders. Previously, only the CA could be ordered to pay the complainant's legal costs if the complainant was fully or partially upheld. The new rules have introduced that the Complaints Board may order complainants to pay the legal costs that the CA, if the CA is fully or partially upheld in the appeal case. However, a ceiling has been set for the imposition of legal costs of a maximum of DKK 75 000 (approx. EUR 10 000). This maximum can be deviated from in the specific case with reference to the size of the contract, or when special circumstances otherwise warrant it.

The new rules thus, even with set ceiling, mean that complainants may risk having to spend significantly more financial resources on complaints before the Complaints Board than hitherto, which probably has lead more bidders to reconsider whether a matter should be brought to dispute. A tenderer who loses an appeal can be sentenced 1) to lose his appeal fee (which would be refunded if the appeal was met); 2) to pay his own legal costs, including any expenditure on external consultants; and 3) to cover the provider's legal costs, however with a maximum of DKK 75 000 and typically with a smaller amount. If a third party on the winning side must also get costs covered, the total costs to refund by the losing party is still max of DKK 75 000, and typically the total amount is lower.

If the tenderer wins an appeal against the contracting authority with a compensation order, the losing party must not only pay the winning party's legal costs, but also pay a compensation of lost income.

4.2 Recommendations to consider

It has been the practice in many countries in the past for large public authorities to pay their own legal aid costs in litigation, even if they win. In recent years, however, this trend has changed and public authorities have also begun to ask to recover their legal costs through the courts. This situation is worrying, as smaller companies are unable to argue with large public authorities to defend their rights for financial reasons. State has always more money to hire top lawyers specializing in procurements, than a SME. Situation, when CA is using external legal aid to defend their decision in court must be exceptional, like in case of small CAs who don’t carry out procurements very often and thus have no inhouse competence.

It is important to take into consideration, that public procurement arguments are not civil disputes or compeating adversarial disputes, but they are administrative disputes, where citizen argues over state decision. Those public sector people who have been given the right to decide on public procurements must be competent in their field, including in the area of public procurement law. Contracting authorities are usually trained on public procurement with taxpayers' money. The higher the amount of the contract, the more competent must be the persons behind the decision. So it should not be natural, that CA needs expensive legal assistance to explain their own decision later in the court. At the same time, tenderers usually don't have in-depth knowledge of public procurement law - their need for external legal assistance is natural.

If there are very high financial risks involved in filing a dispute, and the court may order the applicant to bear the costs of legal aid of CA, even when the CA has its own public procurement department inside the house and/or fulltime lawyers who receive a daily salary from the state, the plaintiffs may not file a challenge. In the long run, this is not good for the state, as it allows CAs greater arbitrariness or even corruption. We recommend to stop this trend, those situations we huge CA legal costs in public procurement disputes is compensated should be exceptional. We can't talk about state taking care of its citizens, if in diputes they attack them with public money and may deliberately increase the costs, just because they can.

One good approach to control legal costs is in Denmark, where there is a ceiling set on the costs of tenderer to be compensated in case of loss. This will help to avoid a situation where the costs of party starting a dispute are pushed maliciously high by CA, and also by competitors, who can, but usually don't have to enter the dispute as well. We propose to consider this approach also in other countries.

We also propose, that the cost of third parties, on whose side CA is already arguing with public money, should be compensated only as an exception, not as a rule, as it is now. They argue voluntarily, they may maliciously and unpredictably increase the plaintiff's costs, and if their side wins to, they will receive the desired contract under dispute.

We propose, the complainant must be paid back 100% of paid state fee, if he succeeds in at least one claim – no matter how insignificant, as it is in Danish complaint board. If CA was wrong in at least one claim, then complain was justified. This helps to avoid situations where the tenderer suffers damage

because of disputing CAs excessive decisions as “wrong” claims. At least in Estonia it has happened several times, that CA makes a row of formal decisions and sends those to tenderers, and tenderer disputes them. But complaints board considers some of those claims to be based on CAs excessive (legally not mandatory) decisions that can’t therefore be argued, and so does not review them, but leaves the proportion of costs of fees to be paid by complainant.

5 IN CASE OF CREATIVE SOLUTIONS CA HAS VAST DISCREATION THAT CAN’T BE ARGUED

5.1 Problems noticed

In case of creative solutions, CA has vast discretion, that can’t be even argued at court. Court is considered to be no expert in content, which is correct approach, so they don’t have a right to judge if subjective points were given correctly. Court is looking only for indisputable, procedural mistakes made in process. But CA has a right to compile an evaluation committee as they please. Its members don’t have to be content experts either (just like jury members don’t have to), but now their decision matters in court. In fact their opinion can’t even be challenged, as in practical situations courts don’t consider external experts opinion, if plaintiff adds one. The reason is, that the external experts make assessment alone, but the CA committee evaluates creative solutions in a group, often by finding a consensus. Courts say that single expert may have reached a different decision, if in a group. Looks like if someone wants to draw court’s attention to a wrong decision in creative content evaluation, that was evaluated by a group, he has to find also a group of independent experts and put them into dispute situation, finding consensus, which is not realistic expectation.

5.2 Recommendations to consider

If any subjective part of the tender was assessed by a group of people - the committee - and the appellant submits to the court an assessment by a competent external expert that differs significantly from that of the CA's committee, the court should take this expert’s opinion seriously, even if it is a single one. The argument that in tender the offer was evaluated by several people, finding consensus, nominated by the CA does not in itself make it more competent than the evaluation by one competent expert. Let us not forget here, that the competence of the evaluation committee is not prerequisite coming from any law. Nor can it be presumed that the appellant should organize a discussion group of people in order to obtain a competitive opinion for court. If the courts only accept the CA's committee

evaluation, then such an approach makes the opinion of CA's commissions superior, which can't be even argued in courts; and this would be wrong.

If the subjective opinion of one competent external expert differs sufficiently from that of the CA Commission's, the court should appoint another independent external expert to give the opinion. If the second independent expert also finds that the CA's subjective assessment was manifestly incorrect, the court must annul the CA's decision about the winner and the CA must set up a new committee with more relevant competence or integrity.

6 DIGITAL OPENING OF TENDERS

6.1 Problems noticed

Years ago, bids were submitted on paper in a sealed envelope. All the tenderers could be present at the opening of proposals that took place on the spot. At the presence of all competitors the names of the tenderers and their price offer was announced. It was also checked in public that all formally required documents were included, and proposals that missed the deadline were rejected. Competitors at present signed the opening protocol, where all shortcoming of proposals were reported, if any. In this way, the tenderers immediately found out basic info about competition and thus were able to assess their chances of winning early. The latter is very critical for small companies.

Today tenders are sent electronically and competitors will not be able to see the opening. However, in case of large procurements, the CA usually has to display the names and prices of the tenderers within a few hours in the public system portal, but for several procurement types and smaller procurements, the CAs do not have to do this. Thus, an entrepreneur can wait for months in ignorance, without the opportunity to evaluate his chances to win. It is also no longer possible to know whether someone's bit was initially missing something when submitted and that the contracting authority gave the opportunity to retrieve it afterwards. The whole process has not become more transparent for bidders, but on the contrary - the bidders are kept in darkness, and the process is less transparent.

CAs and auditors can always say that there will be electronic traces left, if CA or someone is dishonest and opens some bids before deadline, accepts late proposals, lets someone change the price etc. This is probably true, but other tenderers will never have a chance to see those „electronic traces", if there

are any - they have no way to find it out, or a right to ask to check each time. Unfortunately, there is much less control from competitive market side itself now.

In studied countries all bids are today submitted electronically through web-based platforms, and tenderers can't see the opening procedure. Only in Denmark some local municipalities still accept tenders on paper, and then the opening can take place in public. However, official opening is not a requirement of the Public Procurement Directive anymore.

6.2 Recommendations to consider

It is very important for bidders to know as soon as possible how big is the competition in the tender. The tenderers understand, that the opening protocol is just basic info, and many proposals may be excluded in late phases. However this info will help, especially SME companies, to plan their activities and workload. There does not seem to be any good reason to keep this information from bidders for months, like CAs are allowed to do, and they do.

Digital procurement has unfortunately removed an important control mechanism from public tendering - vigilant control by market participants themselves. We propose that tenderers will be given a chance to participate at the opening procedure online. Thanks to covid-19 pandemic online meetings and collaboration have become very common. This will give back the lost transparency of the opening ceremony and participant will get the basic info about the tender right away.

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