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A practical cross-border insight into
public procurement

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Norway



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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

Norway is a member of the European Economic Area (“the EEA”), and a party to the EEA agreement. Through the EEA agreement Norway has implemented EU legislation on, *inter alia*, public procurement. Consequently, Norwegian legislation on public procurement coincides to a large extent with the relevant applicable EU legislation in matters where the relevant EEA/EU thresholds regarding contract value are met. However, it shall be noted that national legislation applies to some extent below the EEA/EU thresholds. In this respect we refer to question 2.4 below.

Directive 2004/17/EC and Directive 2004/18/EC (“the Directives”) have been implemented in Norwegian legislation through three different pieces of legislation:

The Procurement Act of 1999 (“the Act”), which is of general application and includes principles applicable to public procurement such as, *inter alia*, equal treatment and transparency.

The detailed provisions for the procurement procedure are set out in two regulations: The Procurement Regulation of 2006 (*the “Regulation”*), which implements directive 2004/18/EC; and the Utilities Regulation of 2006 which implements directive 2004/17/EC, and is applicable to contracting entities that pursue activities in the water, energy, transport and postal services sectors.

Further to this, the Regulation on the Complaints Board for Public Procurement of 2002 contains procedural rules for the Complaints Board for Public Procurement (“KOFA”).

1.2 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

The Freedom of Information Act contains rules on the public’s access to documents in the public administration. All documents in a tender, including the tenders, will be accessible to third parties and the general public from the time the contracting entity has awarded the contract. However, information included in the tender that is subject to a duty of confidentiality, *inter alia*, business secrets, cannot be disclosed to the public.

1.3 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

As mentioned in question 1.1 above, Norway, being a party to the

EEA agreement, has implemented the EU legislation on public procurement. As such, EU case law and interpretative notices published by the European Commission is relevant for the interpretation of the Norwegian procurement legislation. However, the Norwegian legislation also applies to procurement procedures that fall below the contract value thresholds of the EU directives.

Norway has been a party to the WTO’s Government Procurement Agreement since 1994.

1.4 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

As the Norwegian procurement legislation implements EU legislation, the general principles underlying the EU/EEA rules in the field are relevant in the application of the national rules.

The general principles are developed and included in sections 1 and 5 of the Act. Section 1 states that the main objective of the Norwegian procurement legislation is to ensure that contracting entities carry out procurement in an efficient and cost effective way that respects the integrity of the contracting entity, and ensures equal treatment of all tenderers.

To comply with this, all contracting authorities shall, pursuant to section 5 of the Act, to the extent possible, carry out procurement through a call for competition, and ensure that the process is *inter alia* predictable, transparent and in compliance with good business practice.

It should be noted that the general principles are commonly referred to when interpreting specific rules in the Regulation and the Utilities Regulation.

1.5 Are there special rules in relation to defence procurement or any other area?

Defence procurement is, as a general rule, subject to the Act and the Regulation.

The following exemptions do, however apply:

- Procurement of arms and other products indispensable for defence purposes may be exempted pursuant to article 123 of the EEA Agreement (corresponding to article 346 TFEU).
- Defence procurement contracts classified as secret are exempt.
- A contract that is subject to particular security measures is exempt.
- Defence procurement contracts subject to rules on security interest are exempt.

The Norwegian armed forces have adopted detailed procurement rules that complement the Act and the Regulation.

2 Application of the Law to Entities and Contracts

2.1 Which public entities are covered by the law (as purchasers)?

The public entities covered by the Act and the Regulation correspond to the definition of contracting authorities in directive 2004/18/EC article 1.

Hence, the entities subject to the law include state, regional and local authorities, as well as bodies governed by public law, and associations formed by one or several of such authorities or bodies. A body governed by public law is defined in identical terms as in the Directive to be a legal person established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and controlled or mainly financed by the state, regional and local authorities or other bodies governed by public law.

2.2 Which private entities are covered by the law (as purchasers)?

Private entities are only in a limited number of cases covered by the Norwegian procurement legislation.

First, private entities that carry out activities in the water, energy, transport or postal services (“utilities”) sectors and operate on the basis of special or exclusive rights granted by a competent authority, are subject to the Act and the Utilities Regulation to the extent the contract relates to those activities.

Second, a private entity is covered by the law in cases involving building and construction contracts, where the contract is subsidised by more than 50% by contracting authorities.

2.3 Which types of contracts are covered?

The Norwegian procurement legislation applies as a general rule to public works contracts, public supply contracts and public service contracts.

2.4 Are there financial thresholds for determining individual contract coverage?

The Act and the general rules in Part I of the Regulation apply to all public procurement procedures, irrespective of the value of the contract. In addition, more detailed procedural rules may apply, depending on the value of the contract.

Contracts with an estimated value below the national threshold of NOK 500,000 are not subject to any detailed procedural rules but the contracting entity has an obligation to respect the general principles set out in the Act and Part I of the Regulation. This entails, among other things, an obligation to use a suitable form of competition and a prohibition against discrimination on the basis of nationality.

Contracts with an estimated value exceeding the national threshold of NOK 500 000, but not the relevant EEA threshold, are subject to Part II of the Regulation, which contains procedural rules that in many respects are similar to, but somewhat more flexible than, those set out in Directive 2004/18/EC.

Contracts that exceed the relevant EEA thresholds are subject to detailed procedural rules in Part III of the Regulation. These provisions correspond to Directive 2004/18/EC. For public supply and public service contracts the EEA threshold is NOK 1.6 million, and for public works contracts the EEA threshold is NOK 40.5 million. However, service contracts above the EEA threshold are only subject to the less stringent rules in Part II of the Regulation if they relate to services defined as not prioritised, i.e. the services listed in Annex II B to Directive 2004/18/EC.

With respect to utilities procurement there is no specific national threshold. The EEA thresholds applicable in the utilities sector are NOK 3.2 million for supply contracts and service contracts, and NOK 40.5 million for works contracts.

Utility contracts with an estimated value below the EEA thresholds are subject only to the general principles included in the Act and in part I of the Utilities Regulation. Contracts with an estimated value that exceeds the EEA thresholds are subject to the general principles included in the Act and to part 2 of the Utilities Regulation, which contains procedural rules corresponding to those set out in Directive 2004/17/EC.

2.5 Are there aggregation and/or anti-avoidance rules?

The Norwegian legislation in the field contains detailed calculation and aggregation rules corresponding to those set out in the Directives. There is also an explicit anti-avoidance provision.

2.6 Are there special rules for concession contracts and, if so, how are such contracts defined?

Concession contracts are not subject to the Norwegian legislation on public and utilities procurement. However, it is generally held that the general principles of EEA law must be complied with when such contracts are awarded. This entails, *inter alia*, an obligation for the contracting authority to make such contracts subject to competition and ensure equal treatment and transparency throughout the procedure.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

The Norwegian procurement legislation sets out the possibility to carry out procurement through one of the four following award procedures, which correspond to those set out in the Directives:

- Open tender procedure: any interested party may submit a tender. Upon receipt of the tenders the contracting entity considers the qualifications of the tenderers and evaluates the tenders.
- Restricted tender procedure: any interested party may request to participate, but only those invited by the contracting authority may submit a tender. Invitations are normally sent only to the interested parties that have been considered qualified to perform the contract in question (pre-qualification).
- Negotiated procedure: the contracting entity negotiates the terms of contract with one or more interested parties. Prior to this, the contracting entity has normally considered the suitability of the potential providers (pre-qualification) and received an initial tender that forms the basis for the negotiations.

- Competitive dialogue: the contracting entity conducts a dialogue with the candidates admitted to the procedure, with the aim of developing one or more suitable alternatives capable of meeting the contracting entity's requirements, and on the basis of which the candidates chosen are invited to tender.

For contracts subject to the Regulation with an estimated value below the EEA thresholds, the contracting entity has the freedom to choose between the open, restricted or negotiated procedure.

Contracts subject to the Regulation with an estimated value above the EEA thresholds, shall as a main rule be awarded after the open or restricted procedure. The negotiated procedure and competitive dialogue may only be applied if specific conditions are present.

Under the Utilities Regulation the contracting entity has the freedom to choose between the open, restricted or negotiated procedure.

3.2 What are the minimum timescales?

With respect to contracts subject to the Regulation with an estimated value below the EEA threshold, no minimum deadlines apply, except that the timeframe must allow for the time necessary for preparing their tenders.

With respect to contracts subject to the Regulation with an estimated value that exceeds the EEA threshold, the following apply:

- In the case of open procedures, the minimum time limit for the receipt of tenders shall be at least 45 days from the date on which the contract notice was sent.
- In the case of restricted procedures the minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice is sent, and the minimum time limit for the receipt of tenders shall be 40 days from the date on which the invitation is sent.
- In the case of negotiated procedures and the competitive dialogue the minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice is sent. There is no fixed deadline for submitting tenders, and the contracting authority will enjoy a wide margin of appreciation when deciding the deadline, as long as the deadline is deemed appropriate and the contracting authority takes into account the time estimated necessary for drawing up tenders.

The deadline for submitting tenders under the open or restricted procedure can be shortened by five days if the documents are available electronically from the time the call for competition is announced.

With respect to contracts subject to the Utilities Regulation with an estimated value that exceeds the EEA threshold, the following apply:

- In the case of open procedures, the minimum time limit for the receipt of tenders shall, as a general rule, be at least 45 days from the date on which the contract notice was sent.
- In the case of restricted procedures and negotiated procedures.
- The minimum time limit for receipt of requests to participate shall at least be 30 days from the date on which the contract notice is sent, and under no circumstances be shorter than 15 days.
- The time limit for submitting tenders may be agreed upon between the contracting authority and the tenderers. If no such agreement is made, the minimum time limit shall be 24 days from the date on which the invitation is sent, and under no circumstances be shorter than 10 days.

3.3 What are the rules on excluding/short-listing tenderers?

A contracting authority may limit the number of candidates in the restricted and negotiated procedures, and in the competitive dialogue. Such a reduction of candidates should be decided on the basis of objective criteria indicated in the contract notice. The minimum or maximum number of tenderers that will be invited to submit a tender shall be stated in the contract notice, together with the objective criteria that will apply for the selection of tenderers.

With respect to excluding tenderers under the Regulation, the contracting authority has an obligation to exclude tenderers that do not comply with the qualification requirements, or have been convicted of participation in a criminal organisation, corruption, fraud or money laundering.

The contracting authority may also choose to exclude tenderers, provided that certain conditions are met.

The Utilities Regulation does not contain any explicit obligation to exclude tenderers. However, the general principles (in particular as the principle of equal treatment) may arguably translate into an obligation to exclude a tenderer in exceptional circumstances.

3.4 What are the rules on evaluation of tenders?

It shall be noted that the contracting authority enjoys a wide margin of appreciation when establishing, *inter alia*, the qualification and award criteria. The evaluation of the tenders has, however, to be carried out in compliance with the main principles that are listed above in question 1.4.

3.5 What are the rules on awarding the contract?

The contracting entity may choose to award the contract based on the lowest price only, or to award the contract to the economically most advantageous tender. The tenderers must be informed of which methodology that is chosen in the contract notice.

When the contract shall be awarded on the basis of the economically most advantageous tender, the contracting entity has a wide margin of appreciation in respect to choosing the criteria, as long as the criteria are linked to the subject-matter of the contract in question. Typical examples on award criteria are quality, price and functional characteristics. For contracts with an estimated value above the EEA thresholds the contracting entity has an obligation to attach a relative weight to each criterion and inform prospective tenderers accordingly. For contracts below the EEA thresholds there is no obligation to establish such a weighting or priority beforehand but if it has been done prospective tenderers must be made aware of it.

3.6 What are the rules on debriefing unsuccessful bidders?

An unsuccessful bidder has the right to be notified, unsolicited, of the decision to award the contract. This notification shall contain information sufficient for the unsuccessful bidder to assess whether or not the decision has been in compliance with the relevant procurement legislation, and that the award has been based on the disclosed award criteria.

An unsuccessful bidder also has the right to receive a notification with the reasons for, *inter alia*, his exclusion.

3.7 What methods are available for joint procurements?

Two or more contracting entities may procure jointly, based on the

procedures described in question 3.1 above. Examples of this include regional procurement cooperation between municipalities.

Contracting entities may also establish a central purchasing body and this has been done, *inter alia*, in relation to procurement in the public health sector.

3.8 What are the rules on alternative bids?

Above the national threshold of NOK 500,000 alternative bids are as a general rule not allowed unless explicitly stated by the contracting authority in the contract notice.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions and who determines their application?

The exclusions and exemptions correspond to those set out in directives 2004/17/EC and 2004/18/EC.

With respect to the Utilities Regulation, no exemptions for Norway have currently been granted by the EFTA Surveillance Authority, *cf.* directive 2004/17/EC article 30.

As mentioned above in question 2.6, concession contracts fall outside the scope of the Norwegian rules on public and utilities procurement.

4.2 How does the law apply to “in-house” arrangements, including contracts awarded within a single entity, within groups and between public bodies?

The Norwegian procurement legislation recognises that services may be provided in-house without a call for tender.

To qualify as “in-house” the service provider must satisfy the criteria established by the Court of Justice of the European Union in the *Teckal* case, and further developed in subsequent case law. First, the contracting authority must exercise full control over the service provider in question as if it was the contracting authority’s own department. Second, the service provider must carry out the essential part of its activities with the public authority which controls that activity.

Further to this, and based on the judgement of the Court of Justice of the European Union in the *Stadtreinigung Hamburg*-matter, an exemption may also apply in cases of horizontal cooperation, where the control criterion is not complied with. In accordance with the *Stadtreinigung Hamburg* judgement it can be assumed that contracts that meet the following criteria are exempted from the scope of the Regulation:

- Only public entities must be involved the cooperation.
- The co-operation must solely be governed by considerations and requirements relating to the pursuit of objectives in the public interest.
- The operation must be a joint public task of all the public entities involved.
- There must be no financial transfer beyond cost reimbursement.
- The arrangement must not be a circumvention of public procurement law.

With respect to the Utilities Regulation, it shall be noted that in relation to the second *Teckal*-criteria, under which the service provider must carry out the essential part of its activities with the

public authority which controls that activity, the essential part is defined as at least 80%.

5 Remedies and Enforcement

5.1 Does the legislation provide for remedies/enforcement measures and if so what is the general outline of this?

The Norwegian procurement legislation provides for a stand-still period between the reasoned award decision (question 3.6 above) and conclusion of the contract. For contracts with an estimated value above the national threshold of NOK 500,000 the Regulation and the Utilities Regulation requires the stand-still period to be “reasonable”. It is generally held that reasonable implies at least 10 days, but longer in the case of complex contracts.

Tenderers can submit a complaint to the contracting entity with a view to altering the award decision. Such complaints may relate to any part of the procurement procedure and may seek to establish that there are procedural errors or that the award decision is incorrect on the facts.

The tenderer may also file an injunction with the ordinary courts in order to stop the contract signing.

A complaint to KOFA does not prevent the contract from being signed. The contracting entity may however agree to suspend the procedure until KOFA has considered the matter, and in such cases KOFA will give priority to the case. It shall be noted that a complaint to KOFA does not cause automatic suspension and that the contracting entity has no obligation to abide with KOFA’s decision.

The Remedies Directive (Directive 2007/66/EC) has not yet been implemented in Norwegian law. Until this occurs there are no rules on automatic suspension and contracts concluded in violation of the procurement rules are valid as between the parties. Hence, after the contract has been signed, a dissatisfied tenderer has no effective remedy but may to claim damages before the ordinary courts.

With respect to utilities procurement, it shall be noted that the courts not are entitled to issue an injunction, but may impose a penalty payment on the contracting entity with the aim of preventing or correcting the infringement.

5.2 Can remedies/enforcement be sought in other types of proceedings or applications outside the legislation?

A dissatisfied tenderer or another interested party may lodge a complaint with the EFTA Surveillance Authority with a view to establishing that Norway has violated its obligations under the EEA Agreement. Since the case handling before the EFTA Surveillance Authority is lengthy and the complainant is not in control of the procedure, this is not a very common procedure.

5.3 Before which body or bodies can remedies/enforcement be sought?

As set out above in questions 5.1 and 5.2, remedies can be sought before the contracting entity itself, the ordinary courts, KOFA or the EFTA Surveillance Authority.

5.4 What are the limitation periods for applying for remedies/enforcement?

Appeals to KOFA:

Appeals must be lodged (i) within 6 months after the contract has

been entered into for matters related to infringements of the Act or the Regulation, or (ii) within 2 years after the contract has been entered into if it is held that the contract in question is to be considered as an illegal direct award. KOFA's decisions are only advisory and not binding for the parties. An appeal to KOFA does not cause automatic suspension.

Appeals to the ordinary courts:

An injunction cannot be awarded after the contract is signed.

With respect to the Utilities Regulation, the court may not issue an injunction, but may, before the contract is signed, make an order for the payment of a particular sum with the aim of correcting any identified infringement and preventing injury to the interests concerned. To the best of our knowledge, the courts have never made such an order.

Damages can be claimed before the ordinary courts. The claim is subject to a 3-year general limitation period.

5.5 What remedies are available after contract signature?

Complaints to KOFA can be filed after conclusion of the contract, provided that the 6-month and 2-year deadlines set out in question 5.4 above are complied with. KOFA may issue an administrative fine if KOFA finds that the contract in question qualifies as an illegal direct award. The fine can constitute up to 15 per cent of the value of the contract. The fine is payable to the state and does not benefit the dissatisfied tenderer(s).

Damages can be claimed before the ordinary courts within the general limitation period of 3 years, *cf.* question 5.4 above.

5.6 What is the likely timescale if an application for remedies/enforcement is made?

KOFA gives priority to matters where the contract has not yet been entered into. The case handling time in such matters is approximately 2-3 months. For other cases the case handling time is currently between approximately 7 and 12 months.

The case handling time for a possible interim measure before the ordinary courts in the form of an order for the payment of a particular sum will normally be from one week to one month, but increasing in the case of an appeal from one of the parties.

A claim for damages shall as a general rule be heard by the District Court within six months after the opening writ is submitted. The judgement of the District Court is subject to appeal and depending on the complexity of the case and the workload of the Appeals Court, total case handling time will normally be from 12 to 18 months, but longer in the rare cases where a further appeal is admitted to the Supreme Court.

5.7 Is there a culture of enforcement either by public or private bodies?

It is normal that tenderers that assert that faults have been committed in the procurement procedure file a complaint to the contracting authority.

It is also not uncommon that dissatisfied tenderers file a request for an injunction before the courts.

Claims for compensation are less common, probably because the criteria for being awarded substantial amounts are stringent and not often satisfied.

KOFA receives quite substantial numbers of complaints each year.

Apart from this tenderer-driven enforcement activity it should be added that the Norwegian Business and Industry Confederation review procurement procedures, in particular with regard to possible illegal direct awards of contracts.

5.8 What are the leading examples of cases in which remedies/enforcement measures have been obtained?

The leading Norwegian cases on remedies and enforcement are linked to a claim for compensation for loss of contract.

The Supreme Court's ruling in Rt.2001.1062 (*Nucleus*) establishes the criteria for obtaining damages for loss of a contract, i.e. loss of net profit. The court held that the tenderer must prove (i) that the contracting entity has committed a material breach of the procurement legislation, and (ii) that there is clear preponderance of evidence that the tenderer would have been awarded the contract if that breach had not been committed. Subsequent case law has supported and developed this position.

Further to this, the Supreme Court's ruling in Rt.1997.574 (*Firesafe*) establishes the criteria for awarding a tenderer compensation for cost accrued in connection with its participation in a flawed tender procedure. According to the judgement the tenderer must substantiate that he would not have participated in the tender procedure if he had known that the errors would occur.

5.9 What mitigation measures, if any, are available to contracting authorities?

In respect to compensation for damages for loss of a contract, the contracting authority may mitigate his loss by not exercising options, such as prolonging the contract.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) pre-contract signature? If not, what are the underlying principles governing these issues?

The contracting authority may alter the basis for the competition prior to the deadline for submitting tenders, as long as the changes not are substantial.

6.2 To what extent are changes permitted post-contract signature?

The Norwegian procurement legislation recognises to some extent the possibility for changes post-contract signature. The principles laid out in the judgment of the Court of Justice of the European Union in *Pressetext* will apply.

As a general rule changes provided for in the terms of the initial contract will always be acceptable. This would typically be options to prolong the contract, or to adjust the contract price in accordance with pre-determined price index.

Changes that are not provided for by the initial contract are only permissible if they are non-material. Whether this is the case or not, will depend on the facts. In accordance with *Pressetext*, it can be assumed that Norwegian law will as a general rule not permit the introduction of conditions which would have allowed for the

admission of tenderers other than those initially admitted, or that would have allowed for the acceptance of a tender other than the one initially accepted, or if the contract is extended to encompass services not initially covered, or if the economic balance of the contract is changed in favour of the contractor in a manner which was not provided for in the terms of the initial contract.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

Norway has no special rules in relation to privatisations.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

Norway has no special rules in relation to PPPs and the impact of the public procurement rules to such arrangements must be assessed on a case-by-case basis.

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

It is expected that the Remedies Directive (Directive 2007/66/EC) will be implemented in Norway with effect from 1 July 2012 or 1 January 2013. This will imply significant changes with regard to the enforcement and effectiveness of the public procurement rules.



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