



"Competition and Public Procurement Law challenges in the Health care sector"

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KOFA- pure facts

- Established in 2003 to ensure compliance with the Norwegian law and regulations on public procurement.
- Advisory power only /non-binding decisions. (note that until 1. July this year Kofa had power to fine public authorities when intent/gross negligent illegal direct procurement)
- Health Authorities have been fined in three (of 51 in total since 2007) cases (2009/40, 2010/24,2011/220) for illegal direct procurement.
- Kofa has handled 2200 complaints since its establishment in 2003.



Kofa in the Health sector- perspective

- According to HINAS (company responsible for coordinating public procurement on behalf of the Norwegian Health enterprises) the health authorities procure annually for approx. **30 billion NOK.**
- In 2011 regional health authorities and municipalities/The Norwegian Labour and Welfare Service (NAV) procuring health related goods/services amounted in total to **approx. 20 percent** of the complaints in Kofa.



Kofa experience

- Transport services (2006/140, 2008/90, 2009/238, 2011/320)
- Medical Equipment (2011/176, 2007/91), see also judgement of Hålogland lagmannsrett (Court of Appeal) 8. juni 2012.
- Day- surgery services (2006/83, 2006/73)
- Psychiatric counselling (2011/86 mfl)
- «Håpets dør» 2009/223
- Institutional care and other measures under the provisions of The Child Welfare Act chapter 4. (2010/265, 2011/75, 2010/105)



BUF- case 2010/364

- Norwegian Directorate for Children, Youth and Family affairs, region east (BUFetat) - Confederation of Norwegian Enterprise (NHO).
- Procurement of institutional care to single users from private companies. B- services. (also contracts which were concluded with non-profit organizations, but these are excepted from the duty to announce according to the regulation 2-1 (3)).



Legal problems

- Problem I: Does the EU procurement directive 2004/18 apply to services which are exempted according to the EEA agreement art. 32 (art. 39)»(exercise of official authority»)
- Problem II: If no: is there such exercise of official authority in this case?
- Problem II: If yes: does the norwegian procurement regulation still apply?



The Kofa-solution

- Directive 2004/12 does not apply, see C- 160/08.
- Single procurement of places in child welfare institutions under the provisions of The Child Welfare Act is covered by the exception in the EEA agreement art 32, jf. art 36 and are «*activities which in that Contracting Party, even occasionally, ...are connected, even occasionally, with the exercise of official authority*».
- Private child welfare institutions have the right to exercise coercion which is of a radical character towards the child.
- Examples: body-search and search of property and belongings, necessary coercion as physical retention etc.



The Kofa solution..continued

- Does the norwegian regulation 2006 have a wider application than the directive when it comes to agreements with exercise of official authority?
- Unclear legal situation, but "Yes", they are covered by the regulation.
- Thus: Framework agreements must be concluded according to the procurement regulation 2006.
- However: single procurement of institutional places (as in the present case) are not "contracts of pecuniary interest" due to their "special character".
- The best interest of the child, jf. The Act of Children Welfare and the UN Convention of the Rights of the Children art. 3 (1).
- The economical aspect is subordinate.

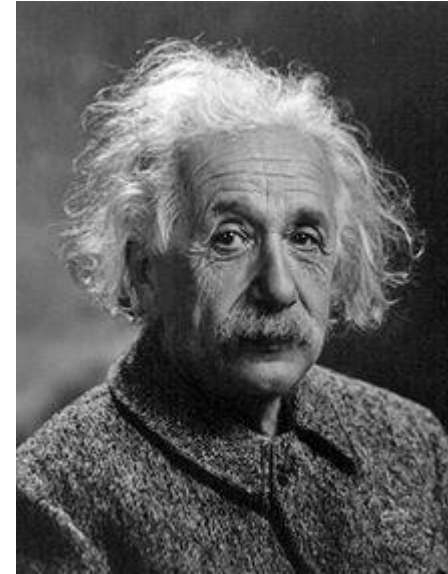


In the aftermath...

- Question: Can the legal argumentation in the Buf-case be applied in other similar cases where the economic element of the contract is subordinate?
- Kofa case 2011/75 : Procurement of other measures (tiltakstjenester) under the Childrens Act chapter 4. Same legal argumentation. Single procurement of such services are not a "*contract of pecuniary interest*".
- Kofa case 2010/105: As a consequence of the new Kofa practise the decision was set a side, and the fine (of 1.6 million) repaid to the public authority.
- The exception of exercise of official authority is suggested taken into the procurement regulation. Hearing of June 2012.



Albert Einstein



«Not everything that counts can be measured. Not everything that can be measured counts”



Thank you for the attention!

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