

# “Public Procurement & The Health Sector”

Issues and approaches

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(Amended ppts available on request)

# Competition law / procurement law a reminder

- **Competition law surveillance administrative remedies *quasi penal***
  - Providing evidence from private sector
  - applicability of provisions – ban on contra-competitive activities
  - imposing penalties / criminal (ØKOKRIM - Authority for Investigation and Prosecution of Economic and Environmental Crime)
- **Procurement horizontal – contradictory based on private contract candidate's complaint or civil law suit**
- MS' option to authorise courts under remedies' directive 89/665 (amended Dir 07/66) or establishment of complaint board to opine or decide on procurement violations
- The Nordic setting:
  - Danish Klagenævnet quasi judicial
  - Norwegian complaint Board KOFA only advisory damage, injunctions, "ineffective" contract matters for civil courts
  - Swedish distinction between public administrative courts and civil courts

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(Forthcoming KK article

"EU Public Procurement Remedies Regimes The Nordic Experience"

In Natasa Pomazalová (ed) Public Sector Transformation Processes and Internet Public Procurement: Decision Support Systems (2012))

# Intersection (such as)

## State aid issues under umbrella "abnormally low tender bid"

Dir 04/18

Article 55

Abnormally low tenders

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2. The contracting authority shall verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.
3. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender **can be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was granted legally. Where the contracting authority rejects a tender in these circumstances, it shall inform the Commission of that fact.**

COM(2011)896 Draft Art 69

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4. The contracting authority shall verify the information provided by consulting the tenderer. It may only reject the tender where the evidence does not justify the low level of price or costs charged, taking into account the elements referred to in paragraph 3.

Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with **obligations established by Union legislation in the field of social and labour law or environmental law or by the international social and environmental law provisions listed in Annex XI.**

5. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender **may be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 of the Treaty. Where the contracting authority rejects a tender in those circumstances, it shall inform the Commission thereof.**

# The h/s dimension Status quo

- Directive 2004/18 limits the application of EU procurement law on H/S services – Dir article 21 reference to B-services only subject to a few provisions (articles 23 and 35 (4))
- Norwegian 2006 law reform extends EU procurement law to include H/S B services – 2006 Regulation (sub-threshold) **Part I/II** (basically mirroring Part III) – “violating” the 2005 *Soria Moria* “Red-Green” coalition Govt statement compromise on enhanced municipal procurement autonomy? [quote p 51: “øke terskelverdien for anbudskonkurranser ved offentlige innkjøp opp mot EU-nivå”]
- H/S services to ideal organisations **only** subject to 1999 Act (§ 5!) and 2006 Regulation basic **Part I** (Hedmark tingrett 5.7.2012 injunction dismissal elaborates on simplified Part I procedure even in a huge 680 mill NOK competitive service contract award)

# Cases and rulings on h/s services

- No Norw Supreme Court rulings per date
- Due to Dir 2004/18 B-service *exception* few EUCJ rulings – on scope and on *quasi* H/S services (plus on exercise of authority (Dir 2004 article 32, cf article 39)
- A few Norw CA (lagmannsrett) rulings – such as LE-2005-03-24, LH-2006-38200%
- Hedmark tingrett 5.7.2012 "Phoenix" on substance of 1999 Act § 5 and Regulation Part I – injunction request dismissed
- Many KOFA complaint board opinions on Regulation I and/or I-II
- Direct purchase viewed under penalty provision ("overtredelsesgebyr" until law reform July 2012) – framework agreements suspended/renewed – intricate questions on concept of "contract"
- Spectacular Regulation Reg KOFA cases: 2009/223 "Håpets dør" (Reg Part I) and KOFA 2010/364 "Bufetat" (regime scope issues)

# Current EU law reform

## COM(2011)896 final

- Green Paper (COM(2011)15)
- FAD response 15.4.2011
- Draft Directive 20.11.2011 with Explanatory Memorandum – on *i a* raising H/S threshold level to **EUR 500 000 (=NOK 4 mill)**
- Stakeholders' response – such as municipal CEMR June 2012 memo
- Implemented 2013? In force Norway end 2014 (1999 statute and amended regulations)?

**A sub-threshold Norwegian regional health care procurement officer dedicated to play "by the book"!**



# Four topics to follow:

- KOFA experience in the H/S sector (KOFA deputy director *E Pedersen*)
- Intricacies in drafting H/S contract documentation (attorney and KOFA member *M Goller*)

## INTERMISSION

- Suppliers' perspective on H/S procurement (*H Seeberg NHO*)
- Public/municipal perspective on handling H/S outsourcing (*N Aatlo KS*)