Public Procurement & The Health Sector

Challenges in the drafting of contract documentation for acquisition of health and social services

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Morten Goller

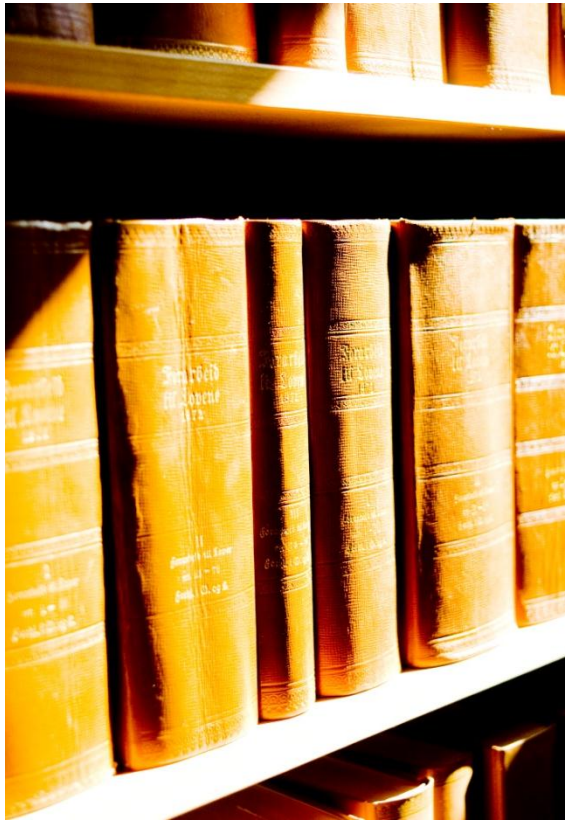
Green Paper on the modernization of EU Public Procurement policy – comments from the Norwegian Government:

- *"Fundamental rights are at stake as far as social services are concerned, and the public procurement principles are not always well designed for the specificities of these services. When procuring social services, it is challenging to impose good and relevant quality requirements adapted to the specific service. Quality in these services is not always easy to observe and measure, but depends on a certain degree of discretion depending on the individual needs of the users/patients. We are also often dealing with vulnerable users/patients that are in need of stability in their treatment".*

Topic of my remarks

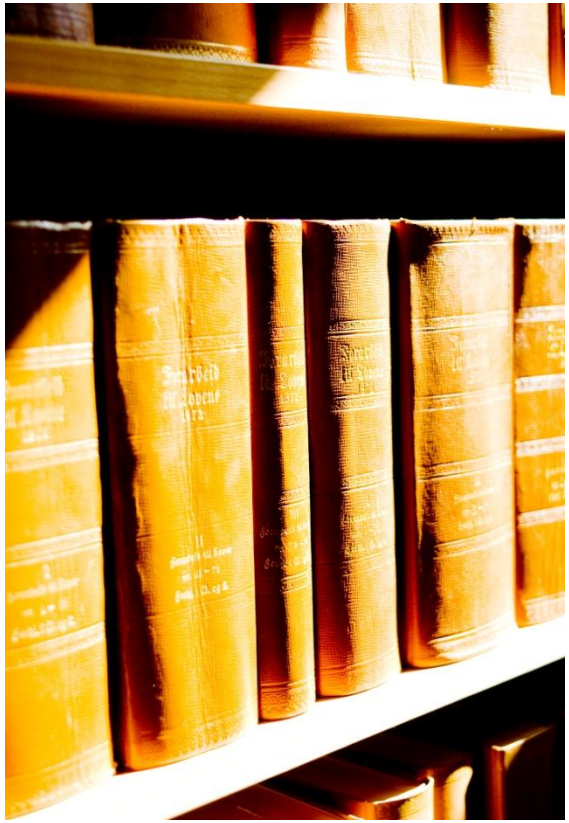
- Legal/factual framework conditions
- Particular challenges in the drafting of contract/tender documentation in this sector

Legal framework (i)



- Procurement of goods/equipment/works in the health sector are covered by the Norwegian Public Procurement Regulation part III (EU-rules, as in the EU)
- Procurement of health/social services are covered by the Norwegian Regulations part II (national rules, closely modeled on the EU-rules)
  - *An exception for procurement of such services from non-profit organizations and procurement of physical rehabilitation services (part I)*

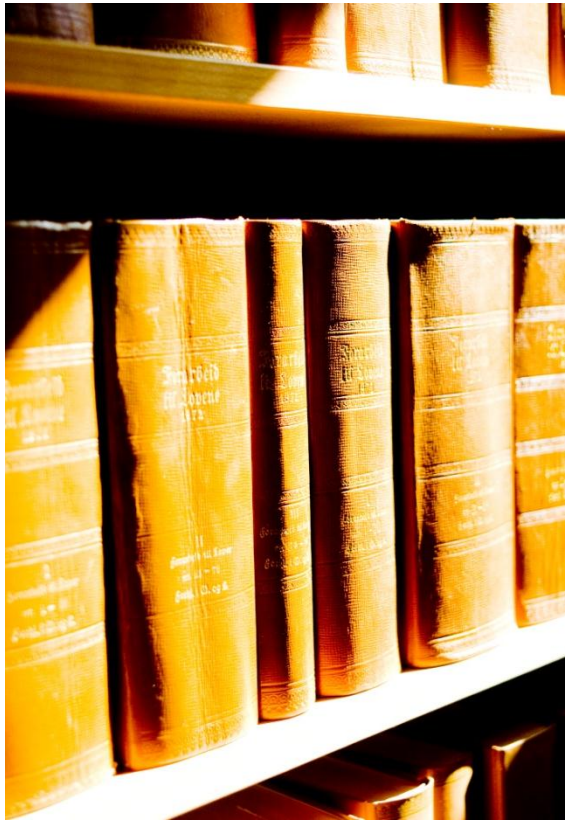
Legal framework (ii)



- Procurement in the health sector is to a large extent regulated/affected by sector rules, notably the Law on Specialist (Secondary) Health Services and the Law on Health Authorities

  - *Spesialisthelsetjenesteloven*
  - *Helseforetaksloven*

Legal framework (iii)

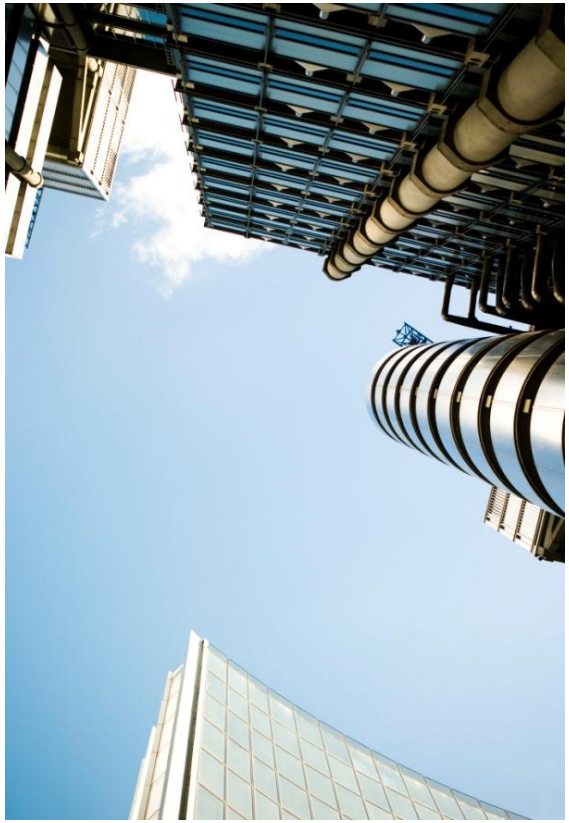


- Sørge for-ansvaret ("provide for responsibility"):
- Helseforetaksloven § 1:

"Helseforetakenes formål er å yte gode og likeverdige spesialisthelsetjenester til alle som trenger det når de trenger det, uavhengig av alder, kjønn, bosted, økonomi og etnisk bakgrunn, samt å legge til rette for forskning og undervisning."

- *An obligation to provide high quality health services equal to all, regardless of age, place of residence, ethnic background, gender or personal economy*
- *Broad definition of relevant services in Spesialisthelsetjenesteloven § 2-1a*

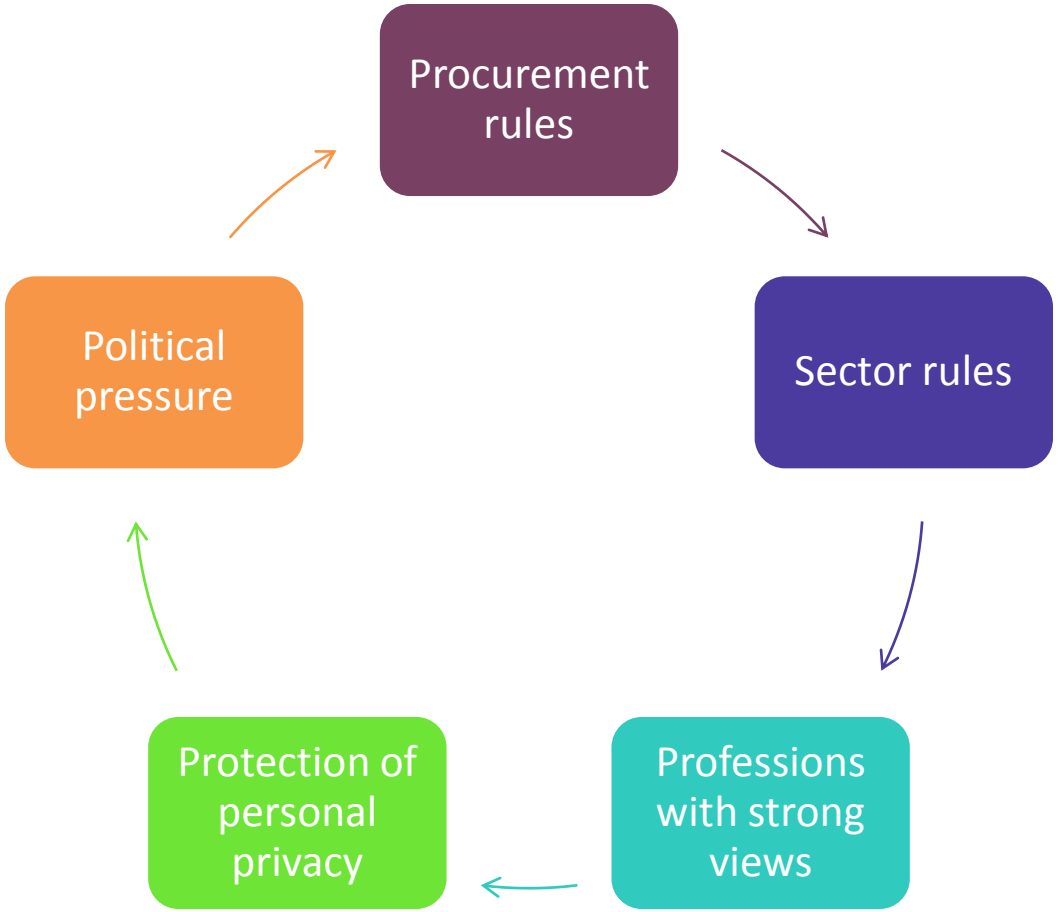
Factual framework



- National/regional procurement is necessary to ensure co-operation and/or to get good prices/terms, but ties up substantial parts of the market for a long time
- Few or no other possible customers in Norway

→ High willingness to dispute/litigate!

Challenging environment for procurement



Challenges – general (i)

- Limits to the extent the market can be divided into lots?
  - *Unproblematic to procure locally, but to procure nationally and award locally?*
- Limits to the extent that lots can be divided between suppliers?
  - *To ensure future competition ?*

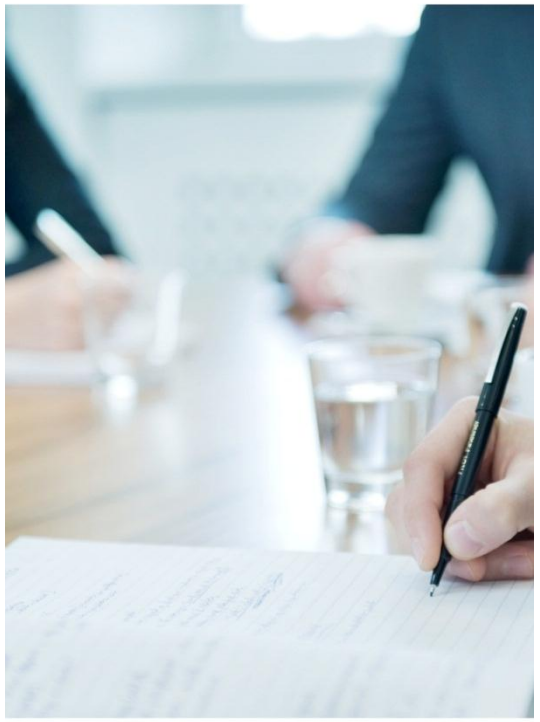
Challenges – general (ii)

- Requirement to retender complicates close cooperation between the local health authority and the service provider, as well as necessary investments
- Close cooperation complicates future competitions
  - *Continuous contracts (under Part I)?*

Challenges – specifications

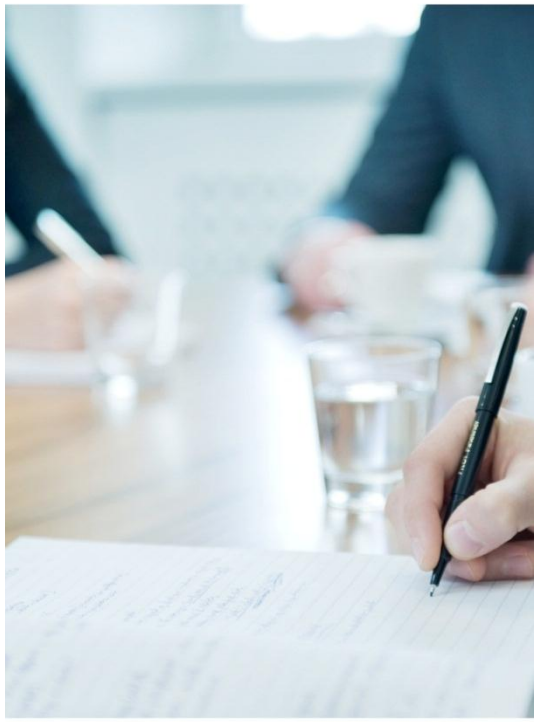
- What minimum requirements are acceptable (and how to assess them)?
  - *"Not create unnecessary pain" (Hålogaland Court of Appeals)*
- Establishing precise quality requirements for health services is complex
  - *Lack of agreed quality requirements/terms or systems of audit*

Challenges – contract award criteria (i)



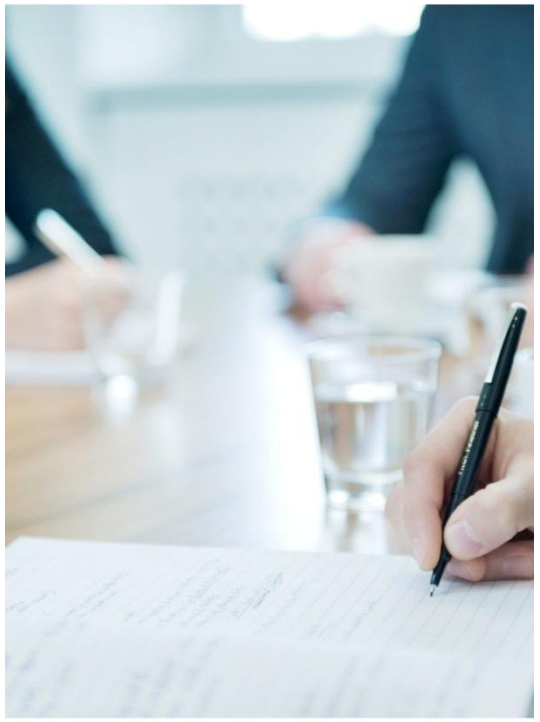
- The "provide for " responsibility can necessitate solutions that are not (strictly speaking) economically most advantageous
  - *Typically due to location*
- Complicated to capture in award criteria and assessment models, and limits foreseeability (KOFA 2007/223, Håpets dør)

Challenges – contract award criteria (ii)



- Strong patient rights conflicts with foreseeability
  - *Right to choose place of treatment*
  - *Right to choose product/method of treatment*
    - Medical necessity/previous experience/esthetical preferences…

Challenges – contract award criteria (iii)



- Competence/experience is obviously of particular importance in this field
  - *Lianakis provides a particular problem*
  - *Draft Directive partly resolves this (as has KOFA-practice previously in Norway)*

Solutions (i)

- Health services should only be regulated by part I of the regulations, or preferably by a separate (simple) set of rules (as proposed in the new draft EU-directive)
  - *Ensure foreseeability and equal treatment*
  - *Avoid discussions as to the application (and scope) of the general principles*

Solutions (ii)

- Procurement under part I (treatment of drug/alcohol addiction at non-profit institutions), structured more like a regular administrative decision, was recently carried out by Helse Sør-Øst RHF

- Decision was contested in local Court (Hedmarken tingrett), due to alleged lack of foreseeability, and breach of general principles
  - *Based on KOFA practice (2009/69, 2009/223 etc)*
  - *C-95/10, Strong Seguranca, shows that specific rules (for example on contract award criteria) cannot be established in part I on the basis of general principles.*
  - *Court accepted the chosen procedure, and the award*

Thank you!

Tlf.: (+47) 22 82 75 00
Fax: (+47) 22 82 75 01
E-post: mgo@wr.no

www.wr.no