

# Public procurement review systems

## The Danish Experience

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# Session 1 – Overview – Danish System

- The Complaints Board for Public Procurement - First instance (for all practical purposes)
- Independent – quasi-judicial
- Composition
  - President and vice presidents (10 High Court and City Court judges) + experts
  - Normally 1 judge + 1 expert – important cases 2 + 2
- Annual reports as from 2016 in English and French

<https://naevneneshus.dk/start-din-klage/klagenaevnet-for-udbud/aarsberetninger/>

# Session 1 – Overview – Danish System

- **Jurisdiction**

- The EU public procurement rules (directives + Treaty based rules).
- The Act on invitations to tender in the construction sector (national rules – below EU- thresholds)
- Pursuant to Section 37 of the Danish Access to Public Administration Files Act (offentlighedsloven), the Complaints Board is charged with the consideration of complaints of other authorities' decisions on access to documents in public procurement cases.

# Session 1 – Overview – Danish System

- **Other forums and appeal**

- In principle, non-standstill cases can be initiated at the ordinary courts, but it never happens.
- Only a limited number of cases decided upon by the Board are appealed to the ordinary courts
- There are a few important Supreme Court decisions
- The *main source* of case law are the cases decided by Complaints Board

# Session 1 – Overview – Danish System

- **Procedure**

- Normally written
- Decisions on procedure and normally also whether to uphold suspension are taken by the judge alone
- Normally two pleas from each party before material decision
- App. 1-2 cases pr. year are heard orally
- Information claimed to be confidential only submitted to the Board. If upon examination considered non-confidential, access is granted to complainant
- Not possible to file in other languages, but tender documents etc. in English are never translated

# Session 1 – Overview – Danish System

- **What works well**

- Experienced expert review organ
- Established case law
- Familiar with and updated on case law of the ECJ
- Referrals to the ECJ possible,
- Faster than ordinary courts - “Fumus”/”prima facie” decisions
- Cheaper than ordinary court procedure (Not the costs of lawyers)



# Session 1 – Overview – Danish System

- **What works less well**

- No legal assistance from the Board, if less experienced lawyer or no lawyer
- +/- In spite of administrative body (in principle) risk of having to pay (limited) costs to public entity) and relatively high fee
- Some cases take a long time (1-2 years) due to e.g. requests for access to documents/too many lengthy pleadings, difficulties with scheduling oral hearings, referral to the ECJ

## Session 2 – Length, cost and amount of litigation - Denmark

- **Period from issuing of a claim to claim being considered**
  - Average length of proceedings in recent years 4-7 months.
  - Many cases are solved at a preliminary stage as a result of the Complaints Board issuing a decision on suspension in which the merits are considered preliminarily - “fumus”/”prima facie” decisions (within 30 days)



# Session 2 – Length, cost and amount of litigation - Denmark

- **Amount of litigation**

- 1992-2002: 21
- Steadily increasing numbers until 2010: 182
- Decrease after substantial rise of fee and possibility to impose costs of contracting authority on unsuccessful complainant
- 2011-2016: 178-> 102
- No. of complaints 2013-2016 app 4 % of all tenders. 50 % of these decision were decided on the merits (“full procedure”)
  - ref. Competition and Consumer Authority’s report of February 2018 on figures 2013-2016
- A considerable number of cases dismissed each year: Insufficient formulation of claim, lack of fee, lack of jurisdiction etc.
- Cases decided in full in recent years app. 60-70 pr. year.

# Session 2 – Length, cost and amount of litigation - Denmark

- **Timing of an appeal process**
  - Short time limits for complaints first instance, if a tender (followed by contract) notice has been published e.g. 45 days from contract notice, 30 days from notice of intention to award directly (not time limits if no notice), 20 days from announcement to applicants that they have not been pre-qualified
  - Time limit for appeals to the ordinary courts of decisions made by the Board – 8 weeks from decision of the Board
  - Competition Authority longer time limit 1 ½ years
- **Requirement to notify the contracting authority**
  - Yes – but no consequence if not done.
- **Requirement to seek amiable solution**
  - No

# Session 2 – Length, cost and amount of litigation - Denmark

- **Costs**

- Fee of app. 2,500 EUR. Paid back if the complainant succeeds in at least one claim – no matter how insignificant
- Costs to the winning party (limited)
  - Cap in regard of complainant app. 10,000 EUR,
  - Average app. 3,000 // 6,500 EUR in 2013-2016
- Cost of lawyers

## Session 3 – Remedies - Denmark

- **Main remedies** – apart from suspensive effect:
  - Annulment of award decision or procurement process as such
  - Declare the contract without effect and/or economic sanction (only in the instances described in the control directives, i.e. award of contract without an EU tender and similar)
    - Few cases – 5 such declarations + sanctions in the period 2013-2016
  - Enforcement of article 185 (2) of the Public Procurement Act - Obligation of contracting authority to repeal the contract if the award decision is annulled, except in extraordinary circumstances
    - No cases so far
    - Only Procurement Directive

## Session 3 – Remedies - Denmark

- **Main remedies** – apart from suspensive effect (cont.):
  - Right of Board to request information
    - Not used very often, but e.g. huge investigation by the Board in decision of 24. april 2019, Sagemcom Energy & Telecom SAS vs Vores Elnet A/S

## Session 3 – Remedies - Denmark

- **Main remedies** – apart from suspensive effect (cont.):
  - Award damages
    - Damage claims are normally decided upon separately after claims regarding breaches – Quite often no need to adjudicate damage claims (no claim since not found in favour of complainant or settlement – typically only 3-4 decisions pr. year)
    - No need to prove serious breach. Either lost profits (if *proven* that complainant would have won)
    - Or costs of tendering, *but* excluded if the infringement appeared from tender documents (own fault/lack of causal link)
    - Difficult to obtain damages
    - Amounts vary considerably (loss must be proven)

## Session 3 – Remedies - Denmark

- **Timing**

- 4 out of 10 complaints are submitted within the initial stand still period (10 days)

- **Success rate**

- Decision in favour of complainant partly or in full 25 % of cases decided in full in 2013-2016
- Besides app. 30-40 cases pr. solved by way of “fumus” / “prima facie” decisions. Success rate presumably even lower in these cases (my impression – no figures)

# Session 3 – Remedies - Denmark

- **Typical claims**

- Illegal tender conditions contrary to equality and transparency requirements
- Insufficient scrutiny of winning tender



# Session 3 – Remedies - Denmark

- **Typical claims**

- Evaluation contrary to tender conditions and/or contrary to equality and transparency requirements
  - Award decision annulled – the contracting authority may re-evaluate and award again
  - Danish specialty Public Procurement Act section 160: The contracting authority must always publish its evaluation method in the procurements documents (in complete detail).
  - If published: Limitation of review by the Complaints Board and the Courts with respect, however, of the possibility to review infringements of equality and transparency requirements

# Session 3 – Remedies - Denmark

- **Typical claims (cont.)**

- "Hot topic" 1 – Framework agreements in the light of C-216/17, Autoritá par. 61
  - "... only up to a certain quantity and once that limit has been reached the agreement will no longer have any effect"
- "Hot topic" 2 – Exclusions grounds and self-cleaning
  - Few cases
  - Strict competition law vs. lenient procurement case law on JV's
  - No cases on self-cleaning

# Session 3 – Remedies - Denmark

- **What works well**

- Fumus/Prima facie decisions on suspension enforced by
- legal duty to repeal contract that has been annulled, except in extraordinary circumstances

- **What does not work well**

- +/- Difficult to obtain damages
- - Exclusion ground on competition law
- +/- Formalism vs. pragmatism
- +/- Suspension, ref. session 4

## Session 4 – Applications for the lifting of automatic suspensions - Denmark

- Automatic 10 day stand still period, ref. the control directives
- If complaint within stand still period automatic prolongation of stand still
- The Complaints Board must decide within a 30 days from complaint whether to prolong the suspension until a material decision has been reached
- Suspension may also be granted upon request in case of complaints after the 10 days stand still period

# Session 4 – Applications for the lifting of automatic suspensions - Denmark

- **Conditions** of the ECJ and General Court, ie:
  - Fumus boni juris/Prima facie infringement
  - Urgency (irreparable and serious damage if suspensive effect is not granted)
  - Balance of interest speaks in favour of suspensive effect
- If complaint within the 10 days stand still
  - Softening of "irreparable" *if* "sufficiently serious", ref. C-35/15 P(R), Van Breda
  - but no softening of "serious", ref. T-77/12, Wahl, and T-158/17 R, Post Telecom

## Session 4 – Applications for the lifting of automatic suspensions - Denmark

- Suspension granted in 2-4 cases a year app.
  - Mainly pre-qualification decisions, direct award of contracts, tailor-made tenders that exclude all but one supplier from tendering
- Even if urgency requirement is not fulfilled, the Board will often give a preliminary opinion on - “fumus”/”prima facie” -> many cases solved in this manner
- In simple cases material decisions may be handed down within 30 days