

THE DANISH SOCIETY FOR CONSTRUCTION AND CONSULTING LAW
2009, 25 YEARS ANNIVERSARY

Friday, 28 August 2009
Faculty of Life Sciences (LIFE) University of Copenhagen
Bülowsvej 17, DK-2000 Frederiksberg
“Celebration Hall”



HOW TO CHALLENGE AN AWARD OF A CONTRACT ACCORDING
TO THE EU DIRECTIVES IN TEN DIFFERENT EUROPEAN COUNTRIES

CHAIRMAN AND SPEAKERS

Jens Jordahn, PLESNER, Copenhagen
Monika Chao-Duvis, Technical University of Delft, Delft
Torkil Høg, Lett, Copenhagen
Colin Reese QC, Atkin Chambers, London
David Dvorak, Vice President of the Czech Society, Prague
Panagiotis Verveniotis, G. Verveniotis & Partners, Athens
Matthias Wohlgemuth, Austrian Federal Economic Chamber, Vienna
Helmut Christian Wirner, Hochtief Aktiengesellschaft, Essen
Tomas Kjellgren, Mannheimer Swartling, Stockholm
Michel Huet, Paris
Martin Beyeler, Fribourg

CONFERENCE DINNER AT 7 PM
at Mogens Dahl Koncertsal, Snorresgade 22, DK 2300 Copenhagen S

THE CONFERENCE AND THE HOMAGE VOLUME ARE SPONSORED BY

dreyersfond

Nykredit
fond

VILTOFT
PLESNER

MATTHIAS WOHLGEMUTH

is Secretary General of the Austrian Society of Construction Law. He is working in the Legal Affairs Department in the Federal Guild of Building Trades and the Trade Association of the Construction Industry at the Austrian Federal Economic Chamber. Mr. Wohlgemuth is member of the Austrian Federal Public Procurement Office and is further an expert for public procurement at the Austrian Standards Institute. wohlgemuth@bau.or.at

TORKIL HØG

is partner in Lett Law Firm. He is a specialist in Danish as well as EU competition law based on the extensive experience obtained in his previous employment with the Danish Competition Authority as well as later. Also, Torkil Høg is an expert in public procurement law, including tort matters related to procurement proceeding. This topic was the basis for Torkil Høg's ph.d., which he obtained in 2007. Torkil Høg is also engaged in mergers and acquisitions and corporate matters, including company law. Torkil Høg has thorough knowledge of matters relating to liability in tort, including professional liability and advisers' liability. tho@lett.dk

HELMUT, CHRISTIAN WIRNER

Attorney-at-law, University Passau, Germany; first state examination in Passau 1997, second state examination in Munich 1999; Dr. iur. Passau University 2003; worked at Passau University as Research Assistant (1997-2001); Associate in public procurement law at ARCON Schmidt-Sibeth Heisse Weisskopf Kursawe (2001-2004 in Erfurt); since 2004 Legal Counsel HOCHTIEF Aktiengesellschaft responsible for public procurement law; Member of Public Procurement Research Group University of Nottingham since 2002. helmut.wirner@hochtief.de

COLIN REECE QC

is specialized in disputes arising out of building and civil engineering activities in England and abroad with practice approximately equally divided between High Court litigation and Arbitrations/Adjudications. He is engaged in disputes between employers (public and private sector) and contractors; inter-contractor disputes; professional negligence actions; and, disputes over guarantees, bonds and financing arrangements www.atkinchambers.com/people/index.cfm?id=334 djones@atkinchambers.com

MARTIN BEYELER

"Dr. iur., attorney-at-law, born in 1977. Lawyer with Schumacher Baur Hürlimann Rechtsanwälte (Zürich/Baden, Switzerland) in Public Procurement and Construction Contracts Law; Researcher (University of Freiburg/Switzerland) in Public Procurement Law; Member of the Editor's Board of "Baurecht / Droit de la construction" (Construction Law Review, University of Freiburg/Switzerland)."

INTRODUCTION

The subject of the conference is to enlighten and compare the legal status in different European countries, in regard to especially

- Which venue – a special erected complaint board or the ordinary courts
- What kind of compensation can be obtained – if any – if the award was unjust

What is the outcome of a decision likely to be in the following four cases.

QUESTIONNAIRE AND CASES

The contracting authority had in all the cases initiated the procurement procedure according to Directive No 2004/18/EC on 31 March 2004.

QUESTIONNAIRE

1. Did the Contracting Authority act in accordance with the national implementation of the EC directive no. 2004/18/EC on 31 March 2004?
2. If not – which articles in the national implementation of the EC directive were not complied with?
3. Which measures would be appropriate if the rules in the national implementation of the directive were not complied with?
4. Would the contractor be awarded any kind of compensation? In the affirmative, please state the legal "frame of the compensation" and "the amount awarded".

CASE 1 – THE FLOORS

The procurement procedure concerned the floor in a big new collective housing building. The award criterion was the "cheapest tender". The contracting authority requested a price for a well-known floor product named "A" and another product named "B or a similar product". The total floor area was not specified. The bid schedule only had one blank space for the pricing.

Tenderer 1 only quoted a price for product A, whereas tenderer 2 gave the price for product "A" in the blank space and in handwriting added a reduced price per square metre for product "B or a similar product".

To compare the prices, the authority measured the floor area, calculated the price reduction for "B or a similar product" and asked tenderer 2 to confirm the calculation. The consequence was that tenderer 2's price was the lowest and the contracting authority accordingly awarded the contract to tenderer 2.

Tenderer 1 decided to challenge the decision. The owner of this small company was in charge of the administration himself and took part in the different administrative tasks. The company's organisation had made a report stating that the average margin for small companies similar to the claimant's had been 19.5% for the year prior to the relevant year.

The company's chartered accountant had calculated the average margin for the 3 previous years to be 13%. For the actual year the margin was -13%, which – due to the financial statement of the supervisory board – was a result of the loss of the contract of DKK 3.2 mill., in which an 18% margin was included. On basis hereof the claim was set at DKK. 575,000. As the company had expected to be awarded the contract and had thus started preparation of the work, no attempts were made to obtain other contracts. After the unjust decision by the contracting authority, the company had been unable to get other assignments for the relevant period.

The contracting authority claimed the company had not fulfilled its loss-reduction commitment (under Danish law an obligation to minimize the loss suffered)

CASE 2 – THE WATERFRONT

The procurement procedure concerned a major construction of apartments. Part of the works was the construction of a waterfront, including major dredging works in the sea. According to the announcement, "no bid containing major reservations would be considered". The award criterion was "the most economically advantageous tender".

One tenderer's bid included a reservation in respect of winter measures concerning the dredging works.

The contracting authority found that it could calculate the economical consequences of this reservation. Having added the value of the reservation to the tenderer's bid, the tenderer could still be awarded the contract as it was the economically most advantageous bid. This decision was challenged by another tenderer who argued that it was a major reservation since it was not possible to foresee the costs of winter measures within an acceptable degree of certainty.

PROGRAMME

Chairman Jens Jordahn

Morning		Afternoon	
09.00	Registration, coffee	13.30	Speakers
09.30	Chairman's introduction	15.00	Coffee
09.45	Speakers	15.20	Speakers
11.15	Coffee	16.20	Discussion
11.30	Speakers	17.00	End of conference
12.30	Lunch		

The company's bid for the contract was approximately DKK 190 mill. The costs to carry out the contract were in the bid calculated to approximately DKK 170 mill. Consequently the loss was estimated at DKK 20 mill. The contracting authority claimed that a margin of 10% was unrealistic compared to the financial statement for the previous years. Furthermore, as contracts involving work in nature or at sea will always include an unforeseeable risk, the result will often be a smaller profit than calculated or perhaps even a loss. This risk, however does not exist anymore. Accordingly, the claim must be reduced.

CASE 3 – THE CARPETS

The procurement procedure concerned the supply and installation of carpets for an office building. The tenderer was required to document his ability to supply the material in the proper quantities and install it in accordance with the time schedule fixed by the contracting authority.

The award criterion was "the most economically advantageous tender". Furthermore, it was stated that the final decision regarding the award would be taken on the basis of an "overall estimate of the tender".

One of the unsuccessful tenderers, who only had very few employees, decided to challenge the award arguing that the contracting authority had not complied with the principle of transparency. Furthermore, the claimant referred to the fact that the quality of the material submitted by the winning tenderer to some extent deviated from the specifications for the material that should be supplied, but not to any considerable degree.

The contracting authority argued that the claimant could never have been awarded the contract since he only had very few employees and therefore had not been able to document that he would be able to supply the required quantities in the required quality and be able to observe the time schedule.

The company's bid for the contract was approximately DKK 1.3 mill, specified as consumption of material 40%, wages for the employees 30%, subcontractors 10%, margin 20%. Consequently the loss was calculated to be DKK 260,000. The claim was substantially documented and supported by an evaluation by a neutral expert witness. Furthermore, it was substantiated that the performance of the contract would have had none or only very little impact on the company's fixed costs.

CASE 4 – THE CLEANING

The procurement procedure concerned the cleaning of office buildings. The award criterion was "the most economically advantageous tender".

The contracting authority presumed, without any substantive reason, that the most economically advantageous tenderer would not be able to fulfil his obligations. On this basis the tender procedure was annulled.

This annulment was challenged as well by the winning tenderer as by other tenderers on grounds of the annulment being unjustified. The winner sought "full compensation for the loss of profit". The others claimed compensation of the costs stemming from the preparation of their respective tenders.

However, the contracting authority now argues that the procedure could have been annulled due to a general reorganisation of the public authorities that had been established after the initiation of the procurement procedure, but before the annulment. The reason being, that reorganisation has "changed the face" of the contracting authority, as it in general has led to the contracting authorities becoming larger entities

The bid for the contract was approximately DKK 70 mill, the second lowest bid approximately DKK 100 mill. The bid was specified as consumption of material, wages for the employees and subcontractors, unforeseen problems and a margin of 13%. The loss was calculated at DKK 9 mill.

The company's organisation had made a report stating the average margin for the industry in the previous years had varied from 3% to 7%, the last year. The company's financial statement for the same period showed a margin between 1.3% and 4.5%. Furthermore, it was alleged by the company that the performance of the contract for this large company would have had no or only very little impact on the company's fixed costs. If this should be the case, no large company would be able to claim compensation on a bid only sufficient to cover fixed costs.

The contracting authority claimed that the bid was "unreasonably low" and consequently could have been "set aside" according to Article 55 in the directive, as implemented in the national legislation. Furthermore, the bid in itself would entail no margin to the company, and the employees could have been employed in other activities.

MONIKA CHAO-DUIVIS

is Director of the Institute of Construction Law and professor of construction law at the Technical University of Delft. Editor of the (Dutch) Magazine for Construction law, the electronic magazine Construction law actualities and a member of the editorial board of The International Construction Law Review. Secretary General of the European Society of Construction law. Honourable judge at the Court of Appeals in the Hague and arbitrates at the Arbitration Institute of the Guaranty Institute for Housing and at the Conflict Committee of the Royal Institute of Engineers. She gives an annual guest lecture at the Technical Universities of Twente and Eindhoven.
MabChao@IBR.NL

PANAGIOTIS VERVENIOTIS

practice is focused on construction & civil engineering, public procurement and energy law. He is author to several publications in this field. Currently he is Secretary General of the Hellenic Society for Technology and Construction Law.
pverveniotis@verveniotis.com

MICHEL HUET

is Vice Président de l'Association Française du Droit de la Construction. Docteur en Droit- Licencié es lettres. Avocat à la Cour. Professeur des Ecoles d'Architecture. Président de la Commission Droit Immobilier de l'Union Internationale des Avocats. Membre de l'Association Littéraire et Artistique Internationale de la Propriété Intellectuelle. Membre de l'Académie d'Architecture.
cabinet.avocats@michel-huet.com

DAVID DVORAK

is attorney-at-law, partner of MT Legal, Law Office, Prague, member of the Board of the Czech Construction Law Society, specializes mainly in public procurement and PPPs (co-author of the Czech Act No. 137/2006 Coll. on Public Contracts, former head of Public Contracts Unit in the Czech Ministry for Regional Development), author of number of publications and articles on public procurement (i.e. co-author of the Commentary to the Czech Concessions Act and "Awarding of the Public Works Contracts"), focuses on lecturing and training on public procurement.
dvorak@mt-legal.com

TOMAS KJELLGREN

Attorney-at-law, is senior associate in MANNHEIMER SWARTLING ADVOKATBYRÅ AB. He advises companies and public authorities in public procurement and competition matters. Tomas Kjellgren is regularly engaged in external seminars dealing with public procurement competition law. He also gives lectures for master classes at the Universities of Uppsala and Stockholm concerning these topics.
tkj@msa.se

JENS JORDAHN

(Chair of conference) is partner in PLESNER Law Firm and member of the board of Danish Society for Construction and Consulting Law and the European Society for Construction Law (President 1994 and 2009). He is also member of Danish Association of Experienced Supreme Court Litigators. Mr. Jordahn's main area of interest is construction law. He conducts a large number of legal and arbitration proceedings.

CONFERENCE INFORMATION

HOMAGE VOLUME

A homage volume with articles by 21 Danish and Norwegian legal experts on different legal construction law subjects will be issued on the date of the conference. All conference participants will receive the homage volume.

DATE

Friday, 28 August 2009 at 9am.

VENUE

Faculty of Life Sciences (LIFE), University of Copenhagen
Bülowsvej 17, DK-2000 Frederiksberg, "Celebration Hall"

FEE

The fee is DKK 1,600 + VAT 25% for members of the Society of Construction Law, and DKK 2,000 + VAT 25% for non-members.
Conference dinner at 7pm DKK 500.

LANGUAGE

The conference proceedings will be in English.

REGISTRATION FORM

Please send your completed registration form by email to ddsb@plesner.com

PAYMENT

Upon the receipt of your registration we will send you an invoice to cover your registration.

CANCELLATIONS

Cancellations cannot be refunded. Substitutions may be made any time.

EXCURSION FOR ACCOMPAGNYING PERSONS

A guided six hours tour in North Seeland, visiting Royal Castles, museums a.s.o., is arranged Friday, 28 August 2009 at 9.30. Price DKK 700 including lunch. The tour will only take place if there is enough participants.

PLEASE NOTE

It may be necessary for reasons beyond the control of the organisers to alter the content and timing of the programme or the identity of the speaker.

Frontpage pictures: To the left: The Danish Operahouse in Copenhagen Harbour. Designed by Henning Larsen. Photo by Lasse Kristensen. In the middle: The refurbished silo in the Copenhagen Harbour, now named "Gemini". Designed by MVRDV (Netherlands) og JJW Arkitekter (Denmark). Photo by ra.photography. To the right: To the right: The Royal Danish Playhouse, Designed by Lundgaard & Tranberg Architects, Photo by Lundgaard & Tranberg

HOW TO CHALLENGE AN AWARD OF A CONTRACT ACCORDING TO THE EU DIRECTIVES IN TEN DIFFERENT EUROPEAN COUNTRIES FRIDAY, 28 AUGUST 2009

PLEASE PRINT CLEARLY

First name: _____ Address: _____
Surname: _____ Town: _____
Position: _____ Country: _____
Name of Company: _____ Postcode: _____
_____ Telephone: _____
Nature of business: _____ Fax: _____
_____ Mail: _____

PRICE

Member DKK 1,600 + VAT 25% = _____
Non-member DKK 2,000 + VAT 25% = _____
Conference Dinner reservation DKK 500 = _____

EXCURSION FOR ACCOMPAGNYING PERSONS, 700 DKK

Upon the receipt of your registration we will send you an invoice to cover your registration.