Lett Law Firm
Raadhuspladsen 4
DK-1550 Copenhagen V
Phone **+45 33 34 00 00**
Fax +45 33 34 00 01

Torkil Høg, Lawyer, Partner, Ph. D
Johnnie Schmidt, Lawyer

THE EUROPEAN SOCIETY FOR CONSTRUCTION LAW CONFERENCE 28 AUGUST 2009

1. Public procurement - Danish law

1.1 Implementation of EC procurement directives in Danish law

The EC Directive 2004/18/EC on public works, supplies and services ("the Procurement Directive") was implemented into Danish law by Governmental Order no 937 of 16 September 2004. The Procurement Directive is an annex to the Governmental Order. Thus, the actual text of the directive constitutes the current legislation in Denmark. The utilities directive 2004/17/EC was implemented into Danish law in a similar way.

1.2 Complaints regarding procurement proceedings

The Remedies Directives (Council Directives 89/665/EEC and 92/13/EEC) were implemented into Danish law by Act No. 415 of 30 May 2000 (as later amended) establishing the Complaints Board for Public Procurement ("the Complaints Board"). Governmental Order No. 602 of 26 June 2000 contains further specified rules concerning the Complaints Board, its competence and organisation, the procedures before the board, etc. For English versions of the Act and the Governmental Order, please see http://www.ks.dk. The new Public Procurement Remedies Directive 2007/66/EC has not yet been implemented into Danish law.

The Complaints Board is competent to rule on review applications regarding procurement procedures in Denmark. A review proceeding is initiated by filing a complaint with the Complaints Board. The fee for filing a complaint is currently DKK 4,000.

A complainant may also choose to institute legal proceedings for review before the Danish courts. However, the complainant in question would normally benefit from filing the review application with the Complaints Board because as an administrative body the board is bound by the inquisitorial procedure and in general, the proceedings are faster than in the courts.

Furthermore, if a complainant claims damages, the costs of the case would usually be lower before the Complaints Board in that before the courts, the complainant is to pay a court fee which is based on the damages claimed. Finally, contrary to what applies in court proceedings, a complainant does not face any risk of having to pay costs to the contracting authority if the complaint in question to the Complaints Board proves unsuccessful.

Review proceedings before the Complaints Board usually take about three to four months and further three to four months in case of a possible claim for damages. Legal proceedings before the courts are lengthier and would normally take about one to two years.

There are no deadlines for submitting a complaint to the Complaints Board. However, complaints should be submitted as quickly as possible if the applicant wishes to have the procurement procedure annulled.

The Complaints Board is entitled to annul unlawful decisions or order the contracting authority to bring the award process in compliance with the procurement rules. The Complaints Board, however, is not entitled to cancel or terminate a signed contract.

If the contracting authority has infringed the procurement rules, the contracting authority will usually be ordered to pay the costs incurred by the complainant in connection with the case.

Decisions of the Complaints Board can be appealed to the courts within eight weeks after the Complaints Board has notified the parties of its decision.

1.3 Award of damages

The Complaints Board is entitled to order the contracting authority to pay damages to the complainant for losses suffered as a result of the infringement of public procurement law. Such claims may concern loss of profit or recovery of tender costs.

The complainant may be awarded damages for loss of profit in the event the complainant is able to prove that on the balance of probabilities, the complainant would have been awarded the contract in question if the contracting authority had not infringed public procurement law. It has been discussed whether such damages should be based on loss of contribution margin (in Danish, “dækningsbidrag”), i.e. the tender price less variable costs, or on loss of net profit – that is, tender price less variable and fixed costs. It seems that the Complaints Board and the courts are now awarding damages on the basis of lost contribution margin.

However, damages are most often awarded on a discretionary basis by the Complaints Board or the courts, and it is not possible to clearly identify the factors having been taken into account in each specific case.

Calculations prepared by the complainant of the likely contribution margin are the usual starting point for awarding damages, and calculations prepared prior to the tender procedure are more likely to be taken into account than calculations prepared for the purpose of the review proceedings. Furthermore, available information regarding the average contribution margins in the relevant industry and information regarding the claimant’s financial results in previous years are likely to be

taken into account in the award of damages, as well as the fact that the claimant – by not having to fulfil the contract in order to gain profit – avoids the risk related to fulfilling the contract.

As mentioned, it is also possible to be awarded damages for lost tender costs if by its infringement of the Procurement Directive, the contracting authority has caused a tenderer to lose resources on preparing a tender, e.g. in a tender procedure which is *pro forma* because the contracting authority has – prior to the tender procedure – already decided on the tenderer to be awarded the contract. However, it should be noted that if the tenderer is or should be able to identify the infringement of procurement law (e.g. because it appears from the tender documents) but nevertheless decides to participate in the proceedings, the tenderer in not in a position to claim damages for the lost tender costs at a later time.

As it applies to claims for lost profit, damages are most often rewarded on a discretionary basis by the Complaints Board or the courts. Damages are usually rewarded on the basis of the tenderer's calculations of the tenderer's time expenditure and external costs incurred by the tenderer and related to the tender procedure.

2. Case 1 – the floors

2.1 Did the Contracting Authority act in accordance with the national implementation of the EC Directive 2004/18/EC of 31 March 2004? If not – which articles in the national implementation of the EC Directive were not complied with?

In this case, the Complaints Board would conclude that the contracting authority did not act in compliance with Danish law.

When evaluating the received tenders, the contracting authority is obliged only to take into account information found in the specifications and the tenders at the tender deadline.

In this case the award criterion was "the lowest price". The contracting authority knew Tenderer 2's price for product "A" and the reduction per square meter if product "B or similar product" was chosen instead of product "A". However, the case description does not suggest that the tender did include information on exactly how many square meters of floor Tenderer 2 had incorporated in the calculation of the price for product "A". Consequently, the contracting authority was not able to establish Tenderer 2's exact price for product "B or similar product" and was therefore obliged not to take this part of Tenderer 2's tender into consideration when awarding the contract.

The evaluation should have been limited to a comparison of Tenderer 1's and Tenderer 2's price for product "A". The case description suggests that in this case Tenderer 1's price was the lowest price. Based on this assumption, it can be concluded that the award of the contract did not comply with the contract award criterion, cf. Article 53, 1. (b) of the Procurement Directive.

The behaviour of the contracting authority after the tender deadline would probably also be subject to independent critics for not fulfilling the principles of equal treatment and transparency.

2.2 Which measures would be appropriate if the rules in the national implementation of the Directive were not complied with?

The infringements described above would most likely be characterised as material by the Complaints Board in which case the Board would normally annul the award decision. An annulment would only have a real impact if the complaint has been filed before the contract had been signed by the contracting authority and Tenderer 2 and if the Complaints Board had given the complaint suspensive effect.

2.3 Would the contractor be awarded any kind of compensation? In the affirmative, please state the legal "frame of the compensation" and "the amount awarded".

The Complaints Board is competent to order the contracting authority to pay damages to Tenderer 1.

Under Danish law, Tenderer 1 may choose to claim damages for loss of profits. Typically, the major obstacle for a claimant is to prove that the contracting authority's negligence in fact deprived the claimant of a profitable contract. This test of causation, however, is less of a burden when the award criterion is "the lowest price" as in this case. The contracting authority would probably argue that had the contracting authority not chosen Tenderer 2's tender for product "B or similar product", the hypothetical outcome would have been not to enter into any contract at all, since both tenders for product "A" were too high. This type of defence is normally disregarded unless it is substantiated by convincing evidence concerning the authority's budgetary limits.

The amount rewarded will be discretionary determined. It appears from the case description that an 18% margin was supposedly included in the claimant's price and that a margin of this size could not be regarded as extraordinarily high, since the average margins for companies similar to the claimant's in the previous year were 19.5%. The claimant's average margin for the last three years, however, was only 13% which for a contract worth DKK 3.2m would result in a DKK 416,000 profit. Based on this information damages in the range of DKK 350,000 to 400,000 would be realistic.

3. Case 2 – The waterfront

3.1 Did the Contracting Authority act in accordance with the national implementation of the EC Directive 2004/18/EC of 31 March 2004? If not – which articles in the national implementation of the EC Directive were not complied with?

According to the announcement, no bids containing "major reservations" would be considered. Accordingly, bids with reservations, which are not major, would be taken into consideration. However, in the event of such (non-major) reservations, the contracting authority is obliged to calculate the economic consequences of the reservation.

Here, the decisive issue is whether a reservation for winter weather conditions could be a "major reservation". It is very likely that such a reservation will indeed be considered major; at least if the construction work is to be carried out during the winter. Whether or not the reservation is to be considered major depends on several factors. If, for example, the tender documents state that it is considered a fundamental term of the tender that the bidder is to carry the risk for weather conditions during the construction period and that all weather-related measures are to be included in the price, this would itself mean that the reservation is major. Based on the information available, and if it is correct that it is not possible to foresee the likely costs of winter measures, it is likely that the reservation is to be considered major. Therefore, by accepting the bid, which should have been rejected, the contracting authority did not act in compliance with the Procurement Directive. The contracting authority infringed the principle on equal treatment.

3.2 Which measures would be appropriate if the rules in the national implementation of the Directive were not complied with?

The infringement described above would most likely be characterised as material by the Complaints Board in which case the Board would annul the award decision. As mentioned in relation to case 1, an annulment would only have a real impact if the complaint was filed before the contract was signed and if the Board had given the complaint suspensive effect.

3.3 Would the contractor be awarded any kind of compensation? In the affirmative, please state the legal "frame of the compensation" and "the amount awarded".

In order to be awarded damages for the loss of profits, the claimant is to prove that on the balance of probabilities the claimant would have been awarded the contract if the contracting authority had complied with procurement law (prove of causation). Without further knowledge to the pricing and other terms in the claimant's bid compared to other bids, it is not possible in this case to conclude that the claimant should have been awarded the contract.

Based on the assumption that the claimant would have been awarded the contract, had the contracting authority complied with procurement law, the claimant would be entitled to damages for loss of profits. Such damages should be equal to the loss of contribution margin which the claimant would have earned by performing the contract, in this case – as a starting point – DKK 20m (based on the assumption that the costs of DKK 170m are variable). However, usually the Complaints Board and the Danish courts award damages on the basis of a discretionary assessment. Factors such as avoided risks and the claimant's financial results in previous years will most likely be taken into account.

Based on these factors, a discretionary assessment is likely to result in the award of damages of up to DKK 5 – 10m.

4. Case 3 – The carpets

4.1 Did the Contracting Authority act in accordance with the national implementation of the EC Directive 2004/18/EC of 31 March 2004? If not – which articles in the national implementation of the EC Directive were not complied with?

The case description indicates that the contracting authority failed to specify the underlying criteria that form part of the identification of "the most economically advantageous tender". The Complaints Board has made it clear that contracting authorities fail to comply with Art. 53(1) in the Procurement Directive if the underlying criteria are not specified in an accurate and understandable manner. It is not sufficient to state that the evaluation would involve an "overall estimate of the tender".

4.2 Which measures would be appropriate if the rules in the national implementation of the Directive were not complied with?

In a recent case (5 November 2008: Brøndum A/S vs Boligforeningen Ringgården), the Complaints Board stated that a contracting authority is obliged to cancel the procedure when the authority realises that it is not possible to identify "the most economically advantageous tender" either because no underlying criteria are specified or (some of) the specified criteria are ambiguous and thereby inapplicable. In this case, there were two underlying criteria: price and a further criterion which was unclear. The Board thereby overruled one of its earlier decisions in which the contracting authorities were required to award the contract to the tenderer having "the lowest price" in a situation where the only other specified criterion besides price was found to be inapplicable.

The award decision would most likely be annulled by the Board if such a claim had been submitted by the claimant. As set out above regarding case 1 an annulment would only have a real impact if the complaint had been filed before the contract had been signed by the contracting authority and winning tenderer.

4.3 Would the contractor be awarded any kind of compensation? In the affirmative, please state the legal "frame of the compensation" and "the amount awarded".

The Complaints Board would deny a claim for damages for loss of profits. The contracting authority ought to have cancelled the procedure and the complainant would subsequently not be able to prove that on the balance of probabilities the complainant would had been awarded the contract if the contracting authority had not infringed procurement law.

Most likely, the claimant would also be denied damages for its tender costs. First of all the contracting authority's failure to specify the underlying criteria should have been noticeable from an

early stage in the procedure; probably before the claimant incurred any tender costs. Therefore, the contracting authority's violation of procurement law would probably not be considered the cause for the claimant's loss. Secondly, according to the case description, the tenderer was required to document its ability to supply the material in proper quantities and install it in accordance with a fixed time schedule. If the contracting authority is able to show that the claimant's tender did not comprise all the required documentation, this would constitute a separate lack of causation precluding any award of damages.

5. Case 4 – the cleaning

5.1 Did the Contracting Authority act in accordance with the national implementation of the EC Directive 2004/18/EC of 31 March 2004? If not – which articles in the national implementation of the EC Directive were not complied with?

The contracting authority annulled the tender procedure due to the unsubstantiated presumption that the most economically advantageous tenderer would not be able to fulfil its obligations. The other reason for annulment mentioned in the case (being reorganisation of the public authorities) was not considered by the contracting authority during the tender procedure but submitted after the challenge of the annulment decision.

It is most likely that the annulment is not in accordance with the Procurement Directive. It is generally assumed in Danish law that procurement proceedings may only be annulled if there are substantive reasons for such annulment. The reason for annulment in this case indicates a general lack of willingness to award the contract to one specific bidder – particularly taking into account that the presumption regarding lack of ability to fulfil obligations was unsubstantiated. It is contrary to the national implementation of the Procurement Directive to annul a procurement procedure based on a general lack of willingness to award the contract to a specific bidder, as this would not be considered a "substantive reason".

In this respect, it should be noted, that there is no information as to why the contracting authority did not accept a bid from one of the other tenderers. The fact that a bid from one tenderer has been rejected is no sufficient reason to reject bids from all other tenderers.

The annulment was most likely contrary to the principle of equal treatment, see Article 2 of the Procurement Directive.

5.2 Which measures would be appropriate if the rules in the national implementation of the Directive were not complied with?

If the case was brought before the Complaints Board, it is most likely that the Complaints Board would hold that the annulment was an infringement of the principle of equal treatment and contrary

to Article 2 of the Procurement Directive. The Complaints Board, however, has no authority to decide that the contracting authority is to award the contract to a specific tenderer.

5.3 Would the contractor be awarded any kind of compensation? In the affirmative, please state the legal "frame of the compensation" and "the amount awarded".

In order for the most economically advantageous tenderer to be awarded damages for the loss of profits, the claimant is to prove that on the balance of probabilities, the tenderer would have been awarded the contract if the contracting authority had complied with procurement law.

In this case, the contracting authority argued during the challenge procedure that the procurement procedure could have been annulled due to a general reorganisation of the public authorities after the initiation of the procurement proceedings but before the annulment. It would be sufficient reason for the annulment of procurement proceedings if based on e.g. such reorganisations, the contracting authority, decides to annul procurement proceedings and continue to carry out the work itself.

As regards causation, the decisive factor is therefore whether – in order to avoid paying damages for loss of profits – it is sufficient for the contracting authority to prove that it would have had the possibility to annul the procurement proceeding with reference to the reorganisation of public authorities (even though the contracting authority did not itself realize this possibility during the procurement proceedings), or if it is necessary to prove that on the balance of probabilities, the contracting authority would actually have annulled the procurement proceedings based on this line of argumentation. The relevant test most likely is whether the contracting authority can prove that on the balance of probabilities it would have annulled the procurement proceedings based in this line of argumentation.

It would depend on a specific assessment of all relevant facts whether in the absence of the Procurement Directive infringement, the contracting authority would in fact have identified the right to cancel the proceedings based on the reorganisation-argument.

If it is assumed that the contracting authority would have identified this right to cancel on the basis of other reasons, the tenderers would not be entitled to damages for loss of profits or tender costs.

If it is assumed that on the balance of probabilities and in the absence of the infringement of the Procurement Directive the contracting authority would have awarded the contract to the economically most advantageous tenderer, such a tenderer would be entitled to damages for loss of profits. There is no substantive evidence that the contracting authority would be entitled to "set aside" the bid due to it being unreasonably low.

The damages should be equal to the loss of the contribution margin that the claimant would have earned by performing the contract, in this case – as a starting point – the amount of DKK 9m (a margin of 13 %). However, as mentioned above, usually the Complaints Board and the Danish courts

award damages on the basis of a discretionary assessment. It is rather likely that it will be taken into account that average margins for the industry in previous years were significantly lower than 13 % (rather 3 – 7 %) and that the claimant's financial reports show a margin of only 1.3 – 4.5 %. Furthermore, it will be taken into account that the claimant avoids the risk of fulfilling the contract. Based on this, it should be expected that the compensation would be in the amount of approximately DKK 1.5 – 3m.