URGENT NEEDS – DEROGATORY PROCUREMENT LAW SCENARIOS: REFLECTIONS OVER *IUS NECESSITATIS* IN THE AREA OF PUBLIC CONTRACTING – *Á PROPOS* THE EC DIRECTIVE 2007/66, AMENDING DIRECTIVE 89/655/EC ON REMEDIES IN PUBLIC CONTRACTING

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ABSTRACT. Mandatory procurement procedures allow for less formal purchases when unforeseen events so indicate. One example is the EC Dir 2004/18 Article 31 (1) (c), allowing for summary contracting of construction works, services and supplies for reasons of extreme urgency. The paper will discuss various aspects of this and similar exceptions in the GPA and UNCITRAL settings, such as the substance of "extreme urgency" as well as the condition that the impediment must not be attributable to the contracting authority. In a more general setting, there is also a question of whether more general "law of emergency" supersedes procurement principles such as statutory or non-codified principles of transparency, equal treatment, call for competition. Since direct purchasing is now about to become a procurement violation subject to pecuniary and contractual remedies (EC Directive 07/66), it is a paramount challenge to draw the line between "bad" summary purchases and lawful exceptions from procurement basic principles. A Norwegian 2007 maritime incident to illustrate the problem is taken as a case in the matter.

A CASE – ISSUES FOR DISCUSSION

The Cypriot tanker "Server" ran aground in western Norway coast archipelago under extreme weather conditions in January 2007. Local municipal resources and rescue teams assisted to save the crew and secure property – and succeeded in the former but literally only half the

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way in the latter since the wreck broke in two and only the front part was brought to a safe haven. In the aftermath of the incident, local media brought up the fact that persons within the municipality had been contracted informally to provide maritime equipment such as vessels – and that nothing had been done to establish any call for competition in search for professional service providers. Media's critical attention was partly directed to the lack of proper shore facilities for the combat of oil pollution on the vulnerable Atlantic coast of western Norway, but also to the possible disqualification of a municipal servant with private commercial facilities to earn remuneration for these services and even to the fact that other potential private contractors might have been competitive, even in the short span of time available. The incident has so far not resulted in any procurement complaints or court suits. But it has inspired the following reflections over EU and EEA law on emergency measures in the interaction between public and private sector.

The "Server" case displays certain public procurement implications: When will *ad hoc* emergency justify exceptions from otherwise applicable rules and principles of proper call for competition and transparent procedures in the selection of service providers?

This paper will discuss select aspects of this topic;[1]

(1) Exemption altogether from duty to publish emergency measures to be purchased from the private sector;

(2) Shortening of normal time limits for submittal of tender bids ("accelerated procedure");

(3) Disqualification aspects of direct purchase in a small local environment;

(4) Procurement regime scope questions when semi-public or purely private operators are contracted to sub-contract services from others;

(5) The implication of aggravated remedies for direct purchasing under the forthcoming amended European Remedies Directives 89/665 and 92/13 (amended by Directive 07/66 to be made effective in Member and EEA states at latest by December 2009).

Observations to be made will generally be addressed to EC procurement law, with certain comparative comments on procurement regimes other than the EU law.

The EC dimension has become somewhat dramatic. If the award of a contract for a certain service is not found subject to exceptions from publication, the public authority might be found to have committed an unlawful direct purchase, eventually subject to forthcoming severe remedies under the EC Directive 07/66 amendments to the public Directive 89/665 and the Utilities 92/13 directives. The 2007 law reform goes dramatically further than the preceding legal status in requiring the EC and EEA Member States to make such contracts "ineffective" (Directive 89/665 Article 2d).[2]

CALL FOR COMPETITION ALSO FOR EMERGENCY SITUATIONS IN THE PUBLIC SECTOR

The task of rescue measures is normally a public obligation, either statutory or inherent in governmental or municipal administrative preparedness. At the outset, that would entail a duty to do the regular procurement *liturgy* to ensure that the most cost-effective measures are taken whenever such measures are to be acquired in a private market. Even if the contracting authority may be exempted through emergency from following normal procurement procedures, one may require a certain element of competitive cost-effective awareness within the available time window. In major disasters as the Asian 2005 tsunami, the Burma 2008 cyclone and the China 2008 earthquake efficient measures involve not only cross border logistics but speedy organisation of joint public and private resources.[3]

Award of contracts by emergency may amount to figures below EC and EEA threshold values. In such cases, the directives may not apply even if the remedy regimes are assumed to monitor Treaty or EEA Agreement general principles in the area of public contracting. The Commission has launched an interpretative communication on extra-legislative contract awards (2000/C 179/02 – (2006) O J No C 179 1.8.2006), challenged by Germany in case T-258/06 on grounds for lack of legal authority to issue *de facto* legislation.[4]

While Denmark has only fragmented legislation on sub-threshold legislation, the Norwegian approach has been to provide for "procurement light" principles in current 2006 regulations. The 1999 (amended 2006) short Act on Procurement ("Offentlige anskaffelser") has been interpreted to be applicable to contracts which are expressly

excepted from the EC directives altogether (such as contracts for renting real estate facilities for public use). As for urgent measures, the 2006 provisions apply to both EEA contracts and sub-EEA contracts – down to a limit of 500.000 NOK. However, the general principles (Chap I) shall apply even where the national *replica* of the Directive 04/18 Article 31 "extreme urgency" provision exempts from normal call for competition.[5]

EXTREME URGENCY JUSTIFICATION FOR CONTRACTING WITHOUT PRIOR PUBLICATION OF CONTRACT NOTICE – A COMPARATIVE OUTLOOK

Summary *ad hoc* purchase of emergency services is dealt with both in EU, in the WTO GPA and the UNCITRAL procurement regimes, either allowing for purchase without prior call for competition or as justification for "accelerated procedures" under shortened time windows.

UNCITRAL 1994 Model Law on Procurement[6] Article 22 reads:

> Conditions for use of single-source procurement
> (1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity may engage in single-source procurement in accordance with article 51 when:
> (a) The goods, construction or services are available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the goods, construction or services, and no reasonable alternative or substitute exists;
> (b) There is an urgent need for the goods, construction or services, and engaging in tendering proceedings or any other method of procurement would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;
> (c) Owing to a catastrophic event, there is an urgent need for the goods, construction or services, making it impractical to use other methods of procurement because of the time involved in using those methods;

Similarly, the WTO GPA regime provides:

(a) on summary purchase:

> Article XV: Limited Tendering back to top

1. The provisions of Articles VII through XIV governing open and selective tendering procedures need not apply in the following conditions, provided that limited tendering is not used with a view to avoiding maximum possible competition or in a manner which would constitute a means of discrimination among suppliers of other Parties or protection to domestic producers or suppliers:
[---]
(c) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the entity, the products or services could not be obtained in time by means of open or selective tendering procedures;

(b) on the accelerated procedure

Article XI: Time-limits for Tendering and Delivery back to top
General
[---]
Deadlines
[---]
3. The periods referred to in paragraph 2 may be reduced in the circumstances set out below:
[---]
(c) where a state of urgency duly substantiated by the entity renders impracticable the periods in question, the periods specified in paragraph 2 may be reduced but shall in no case be less than 10 days from the date of the publication referred to in paragraph 1 of Article IX; or

The US Federal Acquisition Regulations System (FAR) is (since 1984) a comprehensive regime for all US federal contracting of supplies and services,[7] currently on web site www.arnet.gov\far\. There are provisions on "unusual and compelling urgency" exceptions in the regulated contracting procedures, such as FAR 6.302-2 (cf. 10 U.S.C. 2304 (c)) non-competitive "single source" exception from Competition Requirements (FAR Part 6).[8]

The Chinese 2003 Government Procurement Law of the People's Republic (Order of the President No 68) similarly provides for single source procurement in Article 31 -

"__

(2) where goods or services can not be procured from other suppliers due to an unforeseeable emergencies."[9]

Turning to European EU/EEA law, the EC 2004 Directives 04/18 and 04/17 Article 31 (1)(c) provide for exceptional direct purchasing through negotiated procedure in cases -

"…insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time limit for the open, restricted or negotiated procedures with publication of a contract notice as referred to in Article 30 cannot be complied with. The *circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority (Directive 04/18 Art 31 (1)(d) and similarly Directive 04/17 Art 40 (3)(d), succeeding similar provisions in the previous directives on supplies, services and works.*

Case law and legal doctrine emphasize that like other exceptions under EU law, these derogatory provisions must be interpreted narrowly and with the burden of proof to be lifted by the contracting authority in four respects: (1) the existence of an unforeseeable event, (2) the extreme quality of the urgency invoked, (3) the absence of self induced necessity – and (4) the casual link between the unforeseeable event and the urgency in question.

Informal contracting said to have been urgent and therefore short of call for competition has been dealt with in a number of rulings by the EC European Court of Justice (ECJ).

The cases fall in different categories.

First, cases deal with the time factor: There might have been enough time to prepare and implement the necessary measures for a proper contracting. The option to apply the shorter time limits now expressed in Directive 04/18 Article 38 No 8 may in itself exclude the plea for urgency.

Some of these cases deal with threats from nature, others are about political circumstances said to justify a direct purchase. However, no reported cases so far have come out in favour of the contracting authority.[10]

C-107/92 (2 August 1993)[11] rejected the Italian argument that the speeding up of an avalanche barrier construction in the Italian Alps fell under the exception. The Court, however, endorsed the Commission's argument that a three months' lapse from the relevant geological report recommendation before the barrier project was actually initiated did not prove that the accelerated procedure under (now) Directive 04/18 Article 38 might not have sufficed. In this, both the Advocate General and the Court evaded the otherwise obvious argument that mandatory procurement procedures should not lead to personal injury or damage to property where contracting entities are to blame.

Setting up facilities for a future potential risk not presently imminent will not justify the derogation – C-382/92 (3 May 1994 – Spanish security purchase of pharmaceutical hospital depots), possibly excepting a sudden or unexpected increase of a given risk such as environmental, epidemical or terrorist threats to the community.

In the day-to-day procurement life, public authorities often invoke external obstacles of a political nature, such as parliamentary, ministerial or municipality's dictate on deadlines or time schedules. The rule seems to be that such arguments do not succeed. The Spanish C-24/91 (18 March 1992) "Madrid" case was won by the Commission on arguments similar to the Italian case: The option to apply the shortened time limits in the directive itself would have enabled the university construction works to be concluded before an academic year, thus coping with forthcoming student overpopulation. Such was also the outcome of C-126/03 (18 November 2004), rejecting the argument that the municipality of Munich was barred from sub-contracting since the option of the accelerated procedure in Directive 92/50 was available (Fruhmann, 2005).

The Munich case also raised a question on subcontracting as an obstacle to timely overarching contracting. Munich as a municipal entity would have to award a subcontract subject to the procurement rules in order to provide the services under the main contract. The coordination between joint contracts assumes that the outgoing subcontract to be awarded under procurement regulations must be awarded and signed under a pending condition that the main contract is also awarded.[12]

In C-394/02 (2 June 2005), the contracting authority invoked a statutory 12 months' timetable for the establishing of a conveyor belt for

the transportation of ashes and solid waste from a power station to a neighbouring deposit compound. The Court simply stated that

> "42 The need to carry out the works in question within the time-limits imposed by the competent authority for the environmental impact assessment cannot be regarded as extreme urgency resulting from an unforeseeable event."[13]

In Case 194/99R "La Spezia", the Court suspended order (27 September 1988) ruled that the need to renovate certain technical equipment had been apparent for a long time, thus precluding urgency action. Similarly, in C-385/02 (14 September 2004) (Brown, 2005), the Court rejected the urgency plea whereas it had been anticipated in the initial 1980s contract awards that subsequent flood protection in contract lots would be needed, so that the subsequent "last minute" release of proper funding was not of relevance.[14]

More directly on foreseeability is the German C-318/94 (28 March 1996) "Ems" case. Following a contract notice for dredging of the river Ems, the project was not approved by competent environmental authorities. To facilitate timely delivery from a local shipyard, dependent on downstream navigability, the competent contracting authority awarded a contract for temporary dredging invoking the urgency provision. The Court rejected the argument:

> " 18 The possibility that a body which must approve a project might, before expiry of the period laid down for this purpose, raise objections for reasons which it is entitled to put forward is, consequently, something which is foreseeable in plan approval procedure
> "19 The refusal of the Weser-Ems Regional Authority to approve the project for dredging the lower Ems, thereby obliging the competent authorities to amend that project, cannot therefore be regarded as an event unforeseen by the contracting authorities within the meaning of Article 5(3)(c) of the Directive."

The Norwegian complaint board established 2003 under the EEA relevant Directive 89/665 Article 1 ("Klagenemnda for offentlige anskaffelser" – KOFA) has dealt with various arguments by contracting authorities to employ the "extreme urgency" procedure, both for contracts above threshold values and under national level.[15] None of the cases have so far accepted the urgency plea.[16]

> Case 2007/77 22 October 2007 was about the establishment of a radio emergency network (TETRA) within time limits set by the Norwegian Parliament. That argument was duly rejected and the Board pointed to the risk for circumvention of ordinary procurement procedures.

Directive 04/18 Article 31 (1) (b) also allows for exception from duty to publish the contract

> (b) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator

The provision seems to assume a legal exclusiveness preventing a call for market competition. The mere fact that time does not allow for inviting any other than an available local technically equipped service provider being the only one in position to help out should still be considered under the (c) exception.

In short, failure to publish a call for competition under the extreme urgency rule has not been excepted in any of the Norwegian Complaint Board case in the matter, whereof three above EEA threshold value[17] and three under that level.[18]

JUSTIFICATION OF NEGOTIATED PROCEDURES AND DISPENSATION FROM NORMAL TIME LIMITS

Lack of time for proper planning may justify an exception from the main rule on tender procedure, under Directive 04/18 Article 30 No 1 (b) where circumstances listed do not permit overall pricing.

Directive 04/18 Article 38 maintains the rule on "accelerated procedure" and allows for shortening of time limits for restricted procedures and negotiated procedures

> 8. In the case of restricted procedures and negotiated procedures with publication of a contract notice referred to in Article 30, where urgency renders impracticable the time limits laid down in this Article, contracting authorities may fix:
> (a) a time limit for the receipt of requests to participate which may not be less than 15 days from the date on which the contract notice was sent, or less than 10 days if the notice was sent by electronic

means, in accordance with the format and procedure for sending notices indicated in point 3 of Annex VIII;
(b) and, in the case of restricted procedures, a time limit for the receipt of tenders which shall be not less than 10 days from the date of the invitation to tender.

The wording is less strict than in Article 31 (1)(c) in that the urgency may not be "extreme" and that the shortening of time limits for submittal of bids is justified by the fact that the normal time limit would be "impractible".

The Danish Complaint Board[19] *"Glostrup Kommune"* case 23. January 1996 stated that the municipality Glostrup (a Copenhagen suburb) had incorrectly applied the accelerated procedure short time limits (Directive 92/50 Article 20 – now Directive 04/18 Article 38) since mere political decisions on hastened progress to meet a new school year could not justify the derogation of normal time limits for a regular tender procedure.[20]

The Norwegian Complaint Board has dealt with sub-EEA threshold level cases and has accepted shorter time limits than normal justified by circumstances not attributable to the contracting authority.[21] Failure to substantiate urgency to justify shorter time limits has been rejected in one case.[22]

DISQUALIFICATION ASPECTS

The Norwegian "Server" incident 2007 introducing this article raised a question of disqualification, highlighted by critical local media in the aftermath of the grounding.

Impartiality in public procurement is not directly addressed in any of the directives, except for the possible implication of Directive 04/18 Article 2 on fundamental principles of non-discrimination (Treaty Article 12, EEA Agreement Article 4), equal treatment and – in particular - transparency.[23]

These issues relate to risk of biased handling of procedures, such as where there are personal ties between the decision-makers and the persons or undertakings in position for the service about to be contracted.

At the outset, and without prejudice to the procurement arguments of equal treatment and transparency, the question of disqualification will be

a matter for national administrative law. In Norway, the procurement regulations make express references to provisions in a 1967 Statute on Public Administration (Section 6), stating that a public decision-maker must step down in situations expressly stated as well as in any case where

> § 6. (requirements as to impartiality)
> A public official shall be disqualified from preparing the basis for a decision or from making any decision in an administrative case
> [a-e
> --- Express provisions on personal relationship, corporate involvement etc]
>
> He is similarly disqualified if there are any other special circumstances which are apt to impair confidence in his impartiality; due regard shall inter alia be paid to whether the decision in the case may entail any special advantage, loss or inconvenience for him personally or for anyone with whom he has a close personal association. Due regard shall also be paid to whether any objection to the official's impartiality has been raised by one of the parties.
> [---].

The cases listed under a)-e) are not very practical in procurement scenarios. The more relevant alternative seems to be the second paragraph reference to "special circumstances which are apt to impair confidence in his impartiality".

In a small country such as Norway, and even more in small and medium district municipal social environment, it is inevitable that one has to apply plain common sense in the balancing of personal acquaintances with principles of unbiased objectivity in the award of urgent municipal contracts. In the "Server" incident, it turned out that a municipal employee within the community was in fact hired to provide vessels and equipment to rescue crew and property. The media turbulence over this silenced after some time. The question was never raised in litigation or in a bid protest before the Complaint board. Arguably, the combination of urgency, shortage of time and the fact that the decision had to be taken with no apparent available alternatives within the time window, seems to justify the action.

PROCUREMENT REGIME SCOPE QUESTIONS WHEN SEMI-PUBLIC OR PURELY PRIVATE OPERATORS ARE CONTRACTED TO SUB-CONTRACT SERVICES FROM OTHERS

In national schemes for emergency preparedness facilities on sea or on land one will normally envisage joint venture operations involving government, military forces, local police and municipal entities as well as private voluntary entities such as Red Cross rescue teams, humanitarian institutions with various degrees of public funding.

Private operators as these may very well initiate actions without having been expressly contracted to do so. Normally, any efforts will be welcome since local alertness enables quick and effective response in cases of earthquakes, hurricanes, forest fires, landslides, avalanches, major traffic accidents and others. In rugged mountainous areas of Norway one has abundant experience in this, but this also applies in scenarios like the "Server" shipwreck introducing this paper. Resources set ups for the refunds of expenses incurred according to statute or local regulations fall outside the scope of regulated procurement.[24]

Major disasters of the *tsunami* dimension raise not only challenges on proper contracting of service providers but even the need for administration and logistics adapted to a situation where a management system based on transparency and accountability must avoid abuse and manipulations from different stakeholders.[25]

More prosaic procurement issues are about defining the actual scope of procurement regimes in the joint public-private efforts to contract for effective but still most advantageous services even when time is of essence. One can not rule out the possibility of a competitive market for supplies and services in demand.

Inter-administrative co-operation agreements concluded between separate public entities will not necessarily exclude the obligation to publish contracts. One municipality may not award service contracts to another municipality without a call for competition, except where the "control" and "market" extended in-house criteria under the C-107/98 "Teckal" test are met, as stated by ECJ in the C-84/03 13 January 2005 case Recital 39 in a case raised by the Commission over a devious provision in a Spanish statute (Dischendorfer, 2005).

In maritime law, relevant in shipwreck scenarios, the well established Law of Salvage applies. That law originates in international Conventions on Salvage, the latest being dated 1989 (replacing a Convention from 1910). Salvage money is a matter of law and is stipulated according to principles of encouragement and therefore entails a profit well above remuneration of costs incurred by the salvor. The prerequisite for earning salvage money is a ship in danger and basically (with certain exceptions) the remunerations is earned on a "no cure no pay" basis. In other words, if the danger is avoided by saving the ship, the service provider will be paid generously. The concept of "economically most advantageous offer" is therefore ruled out in such cases, but the question of fair competitive positioning for the job remains.

The procurement dimension in salvage operations is the fact that there may very well be a competitive market for professional salvage operations, leading to the imminent question: Who is put in the position to earn salvage money?[26]

In traditional maritime law, the decision to award a salvage contract lies with the shipowner (or his *alter ego* the ship's captain), which would obviously rule out the law of procurement.

However, the present maritime salvage regime includes the possibility of government operations such as in major pollution incidents risking harm to the environment (such as the Amoco Cadiz 1978 and Exxon Valdez 1989 disasters). Government contracts may be awarded from or on behalf of public authorities – or controlled by the public. The law of salvage entitles also salvors contracted by the public to earn salvage money.

Since such operations normally would take place in "extreme urgency" scenarios, the excepted publishing rule dealt with in Directive 04/18 Article 31 would apply, although a certain call for competition might indicate comparative considerations to select the best – definitely not necessarily the lowest price - service provider. In these cases, the rule on selecting the *economically* most advantageous supplier (Article 53) seems to be rather out of place.[27] Or in other words: *ius necessitates* prevails.

In the North Sea offshore oil and gas industry, disaster scenarios may involve blow outs, terror attacks or maritime casualties. The Norwegian

Maritime Act 1994 Sect 442 last paragraph excludes permanent installations and pipelines from the scope of statutory salvage provisions.[28]

In not-so-urgent cases, the scope of procurement law may gain attention. Does the EC/EEA regime require a formal public principal or will it suffice that the service in question is contracted by an intermediary party acting in the public interest? That question is relevant when the private person or entity actually contracting the service is acting to the assistance of the public. We shall assume that the person or entity is not itself a contracting authority within the meaning of Directive 04/18 Article 1 No 9. It might be a humanitarian institution not funded by the public to the extent that it becomes a "body governed by public law" according to Article 1 No 9.

The European Court of Justice addressed the issue in C-399/98 (12 July 2001)*"La Scala"*. That ruling made procurement law applicable to a Milan urban construction project where a private contractor not selected through tender procedure undertook to integrate municipal infrastructure elements in the project and was therefore exempted from financial duties to pay the municipality that would otherwise have had to undertake the infrastructure works. The core recital No 55 is the one most often quoted from the case, more than suggesting that evasion to undermine procurement efficiency could not be accepted. But in Recital 100, the Court commented on the intermediary role of the private contractor:

> That does not mean that, in cases concerning the execution of infrastructure works, the Directive is complied with only if the municipal authorities themselves apply the award-of-contract procedures laid down therein**.** *The Directive would still be given full effect if the national legislation allowed the municipal authorities to require the developer holding the building permit, under the agreements concluded with them, to carry out the work contracted for in accordance with the procedures laid down in the Directive so as to discharge their own obligations under the Directive*. In such a case, the developer must be regarded, by virtue of the agreements concluded with the municipality exempting him from the infrastructure contribution in return for the execution of public infrastructure works, *as the holder of an express mandate granted by the municipality for the construction of that work.* Article 3(4) of the Directive expressly allows for the possibility of the rules concerning

publicity to be applied by persons other than the contracting authority in cases where public works are contracted out [emphasis added].

In rescue operations or in the implementation to set up facilities to cope with possible disasters, one might very well arrange for private mandates to contract services when so required. The *La Scala* Recital 100 argument might then mean not only that services formally contracted as the *agent* holder of mandate for the public (in which case the Directive Article 1 No 9 is apparently directly applicable), but also situations where the services are contracted in the name of the private party subject to arrangements for subsequent indemnification of costs by the public.[29]

THE IMPLICATIONS OF THE AMENDED EC DIRECTIVE 89/665 (DIRECTIVE 07/66) ON UN-AUTHORISED DIRECT PURCHASES

Whereas the GPA and UNCITRAL procurement regimes do not contain express provisions on bid protest challenges of award decisions (court reviews and injunction orders, complaint board surveillance),[30] national law may address dispute handling more in detail. One such is the US federal bid protest regime under the Government Accountability Office (GAO) already referred to.

The European remedies' directives on public and utilities procurement remedies deal expressly with such matters, supplementary to ECJ competences according to EC Treaty Articles 226 og 234[31] and in addition administrative surveillance of public contracting in the 27 Member States and the 3 EEA member states Iceland, Lichtenstein and Norway.[32] The general philosophy in EU/EEA is that the monitoring of procurement law compliance is dealt with in a "flat" model similar to the US GAO functions, basically leaving the matters to dispute handling of private suppliers seeking to correct or reverse a procedure going astray or – alternatively if the preclusive contract has been concluded – to claim for damages in terms of financial losses (loss of contract "positive interest" - or loss of time and costs in preparing the offer – "negative interest").

European case law shows hardly any examples where a contracting authority has been duly exempted from publishing a contract due to urgency. The cases are about alleged *force majeure* where ECJ, national courts or complaint boards have found that the event could have been

foreseen and managed – or that the critical event was due to governmental, parliamentary or municipal decision-making which would not excuse the contracting authority even if *in casu* subjectively impeccable (shortage of funding, subject approvals, unrealistic time schedules etc).

However, *true* emergencies such as nature disasters must be dealt with irrespective of procurement bureaucratic "red tape". No one will question this, and there is no need for litigation or bid protests to accept speedy, direct and *ad hoc* action, allowing for any improvisation in mobilising or soliciting supplies and services. Market competition is then not the priority.

Disregarding the duty to advertise where the statutory exceptions do *not* apply, means on the other hand that the contract could be said to be a *direct purchase* and therefore subject to procurement remedies under Directive 89/665 or Directive 92/13.

If time allows, passed-over candidates to the service may file requests for standstill of the award, either by way of court injunctions or through bid protests filed with complaint boards authorised to order suspension of the award.[33] The amended Directive 89/665 Article 2d on ineffective contracting rules out contracts awarded in disregard of a proper standstill period prior to actually concluding the contract (Article 2d No 1 (a), cf Article 2a No 2 and Article 2 No 3.

Claims for damages where bid protesters argue that they were wrongfully excluded from assisting in an emergency might in theory be a case for negative interests. A case for positive interest (loss of contract) would make the protester carry a heavy burden to prove that a better planning or foresight would have put the protester in the position to earn the contract (or part of the contract). In cases where the *alter ego* argument places the risk of government, municipal or parliamentary decision-making on to contracting authority, a case for loss of contract seems less probable.

A more dramatic implication is brought up by the 2007 aggravated remedies to be transposed by 20 December 2009 (Directive 07/66 on Directive 89/665 Article 3, on Directive 92/13 Article 3).

The Directive 07/66 inserts two important amendments in both the remedies directives, Directive 89/665 (public sector) and Directive 92/13 (utilities).

The *first* is the statutory mandatory 10 days' standstill period inserted in both directives as Article 2a. The provision codifies in black letter law the "Alcatel" rule launched by ECJ in C-81/98. Article 2b deals with Member States' derogation from the standstill period (similar in both public and utilities)

> Article 2b
>
> Derogations from the standstill period
>
> Member States may provide that the periods referred to in Article 2a(2) of this Directive do not apply in the following cases:
>
> (a) if Directive 2004/18/EC does not require prior publication of a contract notice in the Official Journal of the European Union;

- which would cover situations where *inter alia* the *extreme urgency* provision in Directive 04/18 Article 31 (1)(c) applies.

The *second* amendment is a rule on ineffective contracts to be inserted in Directive 89/665 as Article 2d (similarly Directive 92/13);[35]

> Article 2d
>
> Ineffectiveness
>
> 1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:
>
> (a) if the contracting authority has awarded a contract without prior publication of a contract notice in the Official Journal of the European Union without this being permissible in accordance with Directive 2004/18/EC

The directive does not elaborate on the exact contents of the concept "ineffective", but leaves this to national law:

> 2. The consequences of a contract being considered ineffective shall be provided for by national law.
>
> National law may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed. In the latter case, Member States shall provide for the application of other penalties within the meaning of Article 2e(2).

In this, the amended directive makes an exception from a fundamental rule laid down in the 1989 public procurement remedies' regime, namely that the conclusion of the contract excludes any corrective or reversely measure on the concluded contract (Directive 89/665 Article 2 No 6).

The new contract law measure is subject to exception. The amended Directive 89/665 Article 2d No 3 accepts national legislation authorising review bodies (courts or complain boards) to -

> not consider a contract ineffective, even though it has been awarded illegally on the grounds mentioned in paragraph 1, if the review body finds, after having examined all relevant aspects, that overriding reasons relating to a general interest require that the effects of the contract should be maintained.
>
> In such cases -
>
> Member States shall provide for alternative penalties within the meaning of Article 2e(2), which shall be applied instead.

These alternative penalties are dealt with in Article 2e(2), also allowing for wide discretionary powers for the review bodies -

> 2. Alternative penalties must be effective, proportionate and dissuasive. Alternative penalties shall be:
>
> - the imposition of fines on the contracting authority; or,
>
> - the shortening of the duration of the contract.
>
> Member States may confer on the review body broad discretion to take into account all the relevant factors, including the seriousness of the infringement, the behaviour of the contracting authority and, in the cases referred to in Article 2d(2), the extent to which the contract remains in force.

The blatant deliberate failure to public a regulated contract is a clear case of direct purchase, subject to remedies under Article 2d. The setting for the forthcoming tightened remedies is the discouraging observations made by ECJ and the Commission that the most serious and widespread infringements of EU procurement law is at the same time the violation which has carried with it the least deterrent sanctions.[36]

But not all direct contracting amounts to deliberate disregard of procurement transparency requirements. True, corruptive contracting and

improper trading in influence deserve harsh remedies. One may even question whether the private party inducing the contracting officer into a violation should be protected by the rule that procurement law only applies to the public domain and not to the private competitors.[37]

But then on the other hand and most often in bid protest handling according to law reports, these cases vary – from open disregard of procurement time-consuming suspension of a project down to rather excusable misinterpretation of often complicated provisions attempting to mirror the original directives' provisions.

Such cases may deal with acquisition of supplies or services after time limits for binding offers, questionable call off under framework agreements properly published, informal awards effectuated in complicated extended in-house scenarios which subsequently are found by review bodies to be caught by the ECJ Teckal (C-107/98) control rule – and others.

The main rule in the amended 89/665 remedy directive's is to disintegrate any contract awarded in violation of the law, however opening for discretion as to

- legislator's choice between retroactive *ex tunc* and non-retroactive *ex nunc* effect on the contract;
- review body's overriding public policy considerations as to whether the contract should stand unaffected, in which case the dissuasive pecuniary penalty should (must) be imposed;
- discretion on the assessment of the alternative penalty based on seriousness of the infringement, the behaviour of the contracting authority and (in the Article 2d (2) case) the extent to which the contract remains in force.

Emergency contracting not authorised by the "extreme urgency" exceptions in public and utilities' directives would apparently fall under both of these amendments. This seems sensible where the *ad hoc* measures to be taken could have been taken without risks of harming environment, personal injury or private property such as by the accelerated negotiated procedure. In other cases, the remedies now about to enter procurement law could be questioned. If the contracting authority has failed to do a proper planning of the measure or to take measures to avoid the urgency or emergency, such as in the numerous

ECJ rulings, it seems as if the restore of a call for competition should be dealt with in terms of damages for bad public administration and not in sanctions which actually obstructs *ad hoc* imminent needs to take immediate action. The historic setting for measures now immediately required should really not be seen as a direct contracting in violation of Directive 2004/18 Article 31. It seems similarly questionable whether necessary measures by way of contracting private service providers should be done in a climate which undermines a normal *pacta sunt servanda* since this might dissuade contractors to respond to urgent public policy needs. Whereas the proper sanction in case of lack of planning on part of the contracting authority should be damages to harmed interests, the same should apply in the *alter ego* scenarios where government interference or political complications not attributable to the contracting authority itself impedes a proper time schedule for the project.[38]

One could draw an analogy to cases where the contracting authority has failed to prepare a tender documentation sufficiently precise to facilitate a proper evaluation of disparate tender bids.[38] One should not question the contracting authority's option to cancel the tender procedure, reserving the bidders the right to claim for damages, *not* because the procedure was duly terminated, but for having mislead the market though unsuitable tender documents which made the bidders spend futile time and costs in preparing their tender bids.

The Danish Complaint Board is authorised to award damages, always subject to subsequent judicial review by the courts.

In Norway, claims for standstill and damages are at present matters for ordinary court litigation. The Norwegian Complaint Board has currently only one available remedy for procurement infringements: As from 2007 it may impose a pecuniary penalty for unauthorised direct purchasing ("overtredelsesgebyr"). However, the penalty is subject to discretionary assessment, taking into account the graveness of the infringement, the degree of fault as well as other facts in the case. So far, the penalty has only been applied in one cases. One concerned the failure of a national subordinate road authority to publish a counter-competitive framework agreement after a series of renewals (cf now a four year time limit in Directive 04/18 Article 32 No 2 4th paragraph). The argument that the Ministry superior to the contracting detached authority had instructed on the suspension of the overdue publication of the contract

was not accepted by the Complaint Board (Case 2007/19 13 August 2007).

After implementation of EU/EEA Directive 07/66, both parties to the unauthorised direct award will risk as the primary remedy cancellation of contract– or even invalidation ex tunc if this option is used by the legislator. The present alternative to acquit the penalty for excusable misinterpretation and leave the contract unaffected will apparently not be available. Bid protesters' claims for damages under Directive 89/665 Article, however, will remain unaffected.

The transposition of Directive 07/66 provisions on standstill and ineffective contracts will therefore reopen the question of distribution of competences between the Norwegian Complaint Board and the regular courts. A ministerial report on the matte ris expected in 2008 (amendments in administrative regulations on the matter).

The implication of the EU law reform seems to be somewhat less latitude for national legislator in dealing with remedies in urgency purchases attributable to self induced failing precautions and planning on the part of the public authority, this in combination with somewhat reduced reliance on *pacta sunt servanda* once the *ad hoc* contract has been awarded without call for competition – or with shorter time windows for market responses than prescribed in Directive 04/18 Article 38.

RETURN TO THE NORWEGIAN 2007 "SERVER" INCIDENT – SUMMING UP

The ad hoc coast municipal measures to rescue the remains of the wrecked tanker "Server" as well as the measures to cope with a potential oil spillage in progress might be attributable to lack of foresight in the planning and allocation of emergency facilities. Nevertheless and even if government or municipalities might be blamed for not having put in place preventive measures, this would not and should not amount to a procurement infringement under the current or forthcoming directives' urgency provisions. Even self-induced emergency or bad planning might under the circumstances excuse for failing to observe a call for competition or otherwise applicable minimum time limits. The responsibility for insufficient emergency preparedness is a public administrative liability matter outside the scope of procurement policies.

In short: *Ius necessitates* and common sense should prevail over procurement formalities.

NOTES

1. Certain Danish and Norwegian Procurement Complaint board cases will be discussed in this article. Norway is not a member of the EU, but associates with EU through the European Economic Area Agreement (EEA) dated 1992 and adopted by the remaining EFTA countries Iceland, Lichtenstein and Norway (Switzerland is also an EFTA-country, but has not adopted the EEA Agreement). The EEA Agreement has as its effect a duty to transpose the EC *acquis* so that all EEA relevant 1992 and subsequent secondary legislation applies as if Norway (and the other EEA countries) had been an EU member. Consequently, procurement law as stated in the current and forthcoming EC directives applies similarly in the EEA states as in the EU. EC Court of Justice (ECJ) rulings are not formally binding, but are indisputably accepted as effective EEA case law. The separate EFTA Court (Luxembourg) has not developed procurement law and is no parallel to abundant ECJ procurement law rulings over the last decades.

2. In Norway, a statutory pecuniary penalty ("overtredelsesgebyr") imposed by the national complaint Board ("KOFA" –www.kofa.no) could be the outcome, following a law reform 2006 effective as from 2007.

3. EU emergency operations, cf new provisions in the 2008 Lisbon Consolidated Treaty on the Functioning of the European Union Article 214 on Humanitarian Aid (third countries) and Article 222 on inter-EU solidarity in respect to *inter alia* the case of natural or man-made disasters.

4. Critical comments by *A Brown* (2007) 16 PPLR Issue 3 NA84, cf also *E P Hordijk – M Meulenbelt* (2005) 14 pp 123-130.

5. FOR-2006-04-07-402 Sect 2-1 (2). The US FAR 6.302-2 (2) provision states that the exemption from otherwise applicable duties on full and open competition shall still "request offers from as many potential sources as is practicable under the circumstances", cf also *P Trepte* Regulating Procurement (2004) p 286: "Even in cases of urgency, the purchaser will be interested in a fair price."

6. The July 2007 UNCITRAL Working Group proposed comprehensive revision of the Model Law maintains the 1994 version of Article 22.

7. Administrator of General Services, the Secretary of Defence, the Administrator for the National Aeronautics and Space Administration under policy guidelines of the Administrator, Office of Federal Procurement Policy, Office of Management and Budget. Bid protests/claims under the FAR regime are administered by the Federal Accountability Office (GAO) in Washington DC - www.gao.gov.

8. To illustrate: A US Federal Government Accountability Office (GAO) bid protest 14 November 2005 was sustained under the arguments that the contracting authority (Air Force had not justified unusual and compelling urgency, the urgency in question was a result of lack of advance planning.

9. The quotation is accurate.

10. See further, *S Arrowsmith* The Law of Public and Utilities Procurement (2005) 9.10 – 9.12 (pp 617-620) on public sector and 16.34 (p 975) on utilities' sector and *P Trepte* Regulating Procurement (2004) pp 286.

11. *J M F Martín* (1994) 3 PPLR CS13, referring also to earlier Italian case Case-199/85 (10 March 1987) and the *La Spezia* C-194/88 on interim Court orders for the suspension of the award of the contract in question.

12. In the Munich case, the extraordinary element was the fact that the service provider was itself subject to EC procurement law. Normally, the submittal of main contract tender bids in the public sector will carry with it a variety of relationships to potential subcontractors, ranging from mere price quotation to binding (sub)contract subject to "approval" in the actual award of the tender bid. Turning away from a subcontractor which has no binding commitment from the main contractor (such as when main contractor seeks even more advantageous offers in the market) raises the question of whether or not there is a legally binding promise to act on the pre-contractual communication in preparation of the tender bid. In public contracting, the contracting authority may require a list for approval

of subcontractors to be employed. This, however, may not establish a contractual right for the subcontractor to get on board the project.

13. *Brown* 14 PPLR NA111, *P Henty – C Davis*(2006) 15 PPLR NA9 pp NA12-13, in observing that the Court in this case did not make a reference to the alternative accelerated negotiated procedure.

14. These cases fall in line with the US GAO 14 November 2005 (FAR 6.302-2) bid protest case mentioned above in footnote 8.

15. For contracts not subject to EEA obligations, the contracting authorities are free to set short time limits and may therefore be prevented from relying on the exception to public the contract – Case 2003/8 3 February 2003.

16. 2003/163 6 October 2003, 2006/89 23 April 2007.

17. 2005/90 7 August 2006, 2005/98 15 August 2005, 2007/77 22 October 2007.

18. 2003/8 3 February 2003, 2004/309 7 March 2005, , 2006/70 19 February 2007.

19. Klagenævnet for Udbud – *www.klfu.dk*.

20. In Denmark, the text of the EC procurement directives are made directly applicable without transposition into separate statutes or regulations, as the case is in Norway and Sweden, *S E Hjelmborg – P S Jakobsen – S T Poulsen* Procurement Law – the EC directive on public contracts (2006) pp 33-35.

21. 2003/109 26. June 2003.

22. 2006/96 26 March 2007.

23. The EC Directive 2004/ Preamble (8) inspired by GPA Article VI Paragraph 4 excludes the contracting of technical advice by a potentially would-be contract candidate if this has the effect of precluding competition, cf the ECJ Fabricom case C-21/03 – C-34/03.

24. Refund claims against persons who themselves are responsible for accidents or rescue operations is another matter. In Norway, the Norwegian Supreme Court "Trollveggen" case reported in Norsk Retstidende (Rt.) 1986 p 282 was the first precedent in making two Dutch base jump parachuters responsible to the public for gross

negligence in jumping off and barely surviving, due to expensive helicopter rescue operations half way up the rock wall.

25. *R M Tomasini – L N Van Wassenhove* (US) 2004 Journal of Public Procurement Vol 4 Issue 3 pp 437-449 explain such problems taking the El Salvador 2001Richter scale 7.6 earthquake as their case. A Pan American Health Organisation (PAHO) has developed a humanitarian supply management system (SUMA) that records, tracks and report the flow of donations and purchased goods into a disaster area.

26. Joint operations may lead to proportionate distribution of salvage money.

27. Possibly, such services might be said to fall under CPC-ref No 74, cf Dir 04/18 Art 20 reference to Annex II A or Art 21 reference to Annex II B.

28. Selection of professional assistance to combat blowouts such as the offshore 1977 Bravo incident (US Red Adair) did certainly not involve economical considerations at all.

29. The Scandinavian law on intermediaries distinguishes between pure agency ("fullmakt") where the intermediary acts in the name of the openly disclosed principal without being a party to the contract as opposed to an intermediary which acts in his own name, but on the account of the principal ("kommisjon" according to a joint Nordic 1916 statute).

30. On GPA dispute resolving between WTO states, matters are addressed in 1994 Uruguay Round Agreement Marrakesh Agreement Establishing the World Trade Organization Article III Annex 2 "Dispute Settlement Understanding" (DSU).

31. Now Lisbon 2008 Consolidated version of The Treaty on the Functioning of the European Union Articles 258 and 267.

32. EFTA Court established parallel to ECJ and EFTA Surveillance Authority parallel to EU Commission both through EEA Agreement 1992 Article 108 and supplementary internal Agreement 1992 between EFTA states on the Establishment of a Surveillance Authority and a Court of Justice. Whereas national courts and complaint boards deal with bid protests, the EFTA institutions operate in dialogue on government/ministerial level - *ex officio* or

upon request by interested parties - on suspected procurement infringements within the EFTA state.

33. The *Norwegian* Complaint Board has no authority to suspend the award let alone the signing of a contract. The *Danish* Complaint Board may suspend the award or contract, subject to judicial review by the courts, but is very reluctant to exercise this authority, *S E Hjelmborg – P S Jakobsen – S T Poulsen,* Public Procurement Law – the EU directive on public contracts (2006) pp 376-377.

34. EFTA Court established parallel to ECJ and EFTA Surveillance Authority parallel to EU Commission both through EEA Agreement 1992 Article 108 and supplementary internal Agreement 1992 between EFTA states on the Establishment of a Surveillance Authority and a Court of Justice. Whereas national courts and complaint boards deal with bid protests, the EFTA institutions operate in dialogue on government/ministerial level - *ex officio* or upon request by interested parties - on suspected procurement infringements within the EFTA state.

35. On ECJ rulings on the termination of contracts awarded in violation of procurement rules, such as C-503/04 cf *S Treumer* (2007) 16 PPLR Issue 6 pp 371-386.

36. COM(2006)195 final 2 (14 June 2006), quoting ECJ C-26/03 Stadt Halle recital (37) on "… the most serious breach of Community law in the field of public procurement on the part of a contracting authority."

37. Council of Europe 1999 Criminal Law Convention on Corruption Article 2 applies to both the offeror and offeree of improper advantages.

38. Assuming that ban-on-negotiations prevent clarification of each and all of the tender bids and that the tender documentation may not be improved in its contents after time limit for submittal of the tender bids.