ON ACCESS TO PUBLIC ADMINISTRATIVE PROCUREMENT RECORDS (TENDER OPENINGS, PROTOCOLS, REPORTS)

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ABSTRACT. The monitoring of procurement procedures involves both statutory and non-statutory principles. The principle of transparency is inherent in all regulated procurement and is now expressly stated in EC Dir 2004/18 Art 2. The principle of efficiency is equally viable, but is not similarly expressed in black letter law. The European Court of Justice, however, has repeatedly based its rulings on non-codified principles of efficiency, the "La Scala" case C-399/98 perhaps as the most prominent example. The question to be discussed is the extent of transparency and efficiency in matters where bid protesters require access to the public authority's internal records, protocols and reports preceding the award decision. True, the protesters may be well served with detailed reasons for the award under provisions on "up front" criteria and sub-criteria such as the Dir 2004/18 Art 53, cf Article 41 on duty to inform and justify award decision to non-successful candidates. A further going full scale review of the internal procedure based on access to documentation short of trade secrets will improve the review prospects for assessing whether the procedure has at all times complied with procurement law principles. True, trade secrets should not be revealed to competitors in the disguise of a bid protester, but should the public authority be permitted to reject disclosure of all internal documentation in the same way as in a regular private negotiation of commercial contract? A Norwegian 2005 law reform on the matter will illustrate the general topic.

A QUESTION OF ENHANCED TRANSPARENCY – OPENNESS IN TERMS OF FREEDOM OF INFORMATION

The topic for this paper is whether a rejected or passed-over candidate to a public contract for supplies, services or construction works

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is entitled to access, read and therefore should be availed of the possibility to invoke information on the actual award procedure. Such information could be a right to attend the opening up of tender bids in a construction works tender procedure, access to internal protocols, records and reports preceding the actual award decision. The paper will show that the current procurement regimes vary and that the EC European procurement procedural and remedies' directives currently do not address such issues although the general principle of transparency is not expressly stated in Dir 2004/18 Article 2. The forthcoming amended Dir 1989/665/EC (Dir 2007/66/EC) will not change this.

One aspect is the protection of business and trade secrets in the simultaneous dealing with a number of tender bids under evaluation followed by the subsequent review bid protests. Another is the need to regulate potential conflict of interests when contracting officers have personal relations or acquaintances with the market operators. A third is the topic for this paper: Transparency taken literally in the shape of securing a further going access to existing internal records and reports within the contracting authority preceding the actual award decision. True, the contracting authority is under the obligation to justify its decisions in communicating the objective evaluation of the tender bids (Dir 04/18 Article 41 No 1 and No 2, cf Article 53). But since this communication is phrased subsequent to the preceding internal preparation, possibly even with legal assistance to avoid dispute over the award, then the bid protester will not be able to check that the internal step-by-step preparation of the award has in all respects been in compliance with mandatory requirements and up front design of the intended award. Open ended issues might be: Possible communications with certain market operators on the drafting of the contract documentation prior to the time limit for submittal of tender bids, mandate for the consultants solicited to recommend which award to select, substance to illuminate the actual assessment within given matrices, discretionary comparisons and others.

CONCEPTS – VARIOUS ASPECTS

Access to certain documentation goes further than the question of confidentiality. Contracting authorities have obligations concerning trade secrets contained in the received material from candidates and must see to it that such matters are not communicated improperly. The issue of

freedom of information goes further and concerns whether or not non-confidential matters in the internal administration preceding the award may be barred from external access. In statutory public administrative law it is common ground to distinguish between confidentiality in the stricter sense as opposed to options to keep internal documents protected from access.

Another distinction must be drawn between the general public access to public documents and the right for a person or undertaking that is directly affected by the public decision-making. Many jurisdictions allow for a party's access in matters where for instance media may be barred.

Access can also be measured as relative in a time axis: Reasons to deny access may be relevant in the earlier stages whereas the policy assessments may change when the decision has been made and therefore open for challenge or protest.

Relativity is also possible according to the scenario for disputes, surveillance or litigation. A surveillance authority or a dispute panel may have to access more of the administrative details as compared to the private parties affected, and in civil litigation the law on access becomes matter of producing and requiring evidence in court.

WORDS ABOUT THE SETTING

Objectives and ambitions of regulated procurement in public contracting have changed over the times. National regimes on public contracting may have targeted domestic policies such as "best buy" and directing public resources for the support of national or regional objectives. The balancing of public administration legal cultures to the need for adaptation of contract law to the public sector has probably been a 20th century challenge in both European and US scenarios.

The opening up of cross border markets in the original GATT setting eventually lead to the WTO GPA (Government Procurement Agreement) 1979/1987/1994 ambition to achieve "…a greater liberalization and expansion of world trade and improving the international framework for the conduct of world trade" for government purchasing of goods and services. Prior to this and originating in the 1970s, the objective of the first European EEC procurement directives was to dictate enhanced inner market trans border movement of supplies and services also for public

contracts – thus extending the private sector free movement objectives into the realm of public .

Bringing down trade restrictions to public purchases is of course still the underlying philosophy of procurement law, wherefore the GPA Preamble for that purpose expressly states "transparency of …procedures and practices regarding government procurement" mirrored in the EC public sector Directive 2004/18 Article 2 *mantra*: "Government authorities shall treat economic operators equally and don-discriminatorily *and shall act in a transparent way*" (emphasis added).

The approach of to-day reaches beyond the cross border dimension. It is about the enhancing of transparency and openness in order to combat bad procurement such as corruption and fraud, nepotism, improper manipulation of contracts awards as well as impartiality or conflict of interests in the decision-making process. One might say that there is a shift from traditional inner market objectives towards a regime based on traditional good practices in the public administration of steadily growing interaction between public and private sector – both governmental and municipal.

The current EU public contract regimes imply a mixture of procurement directives, overriding principles embodied in the EC Treaty (to be replaced by the forthcoming Lisboa Treaty) – and supplementary national legislation of public administrative law not ruled out by procurement law.[1]

In this paper, the intention is to explore and discuss the question of stakeholders' access to internal governmental or municipal procurement records, reports and protocols beyond the obligatory communication to candidates on indicating in details the grounds for the actual award decision.[2]-

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1 If the money to finance the purchase is not government funding, the contributor is of course primarily concerned with proper spending – IBRD World Bank extensive regime in the combat of fraud and corruption – IBRD (World Bank Guidelines Procurement under IBRD Loans and IDA Credits) (2004) Para 1.14.

2 Dir 2004/18 Art 41 No 1 and No 2.

Access to internal matters has more than one dimension. One is the possibility for general public such as media to read documents on any particular award procedure in order to bring possible law infringements to the general, public attention. Another is access for surveillance authorities such as the Commission or the EFTA Surveillance Authority[3] or national accountability authorities to monitor decisions taken in relation to filed complaints - or even *ex officio* on suspected infringements of procurement law. A third dimension is the court dispute scenario where a passed-over candidate calls for injunction or brings action for damages in allegedly erroneous award decision taken – or about to be taken - by the contracting authority. The court dispute would turn on loss of contract (positive interest) or claims for wasted time and costs spent to prepare the rejected bid (negative interest).

This paper will only address the issue of bid protesting by way of complaints as addressed in the amended EC Directives on remedies – Dir 89/665 and Dir 92/13 (with amendments 07/66 to be implemented before end of 2009).

Justification Displayed in the Express Reasons for the Contract Award Communication

A public contract regime based on commercial contract culture would assume a large degree of pre-contractual confidentiality. A private party negotiating a possible purchase would never have to display to the other party its internal tactical considerations or reasons for selecting a candidate other than the one engaged in active negotiations. Transparency simply does not belong to commercial contract law except for the quasi-contractual obligation to play be the rules of the game agreed upon between the parties – in many jurisdictions even obligations to observe code of conduct such as the 2000 Principles of European Contract law (PECL) Article 1:201.[4]

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[3] ESA in charge of matters within the Norway/Iceland/Lichtenstein EEA European Economical Agreement with the EU.

[4] Prepared by the (private) The Commission on European Contract Law (ed *O Lando* and *H Beale* (2000).

The public contracting authority subject to transparency regimes such as GPA or EU will have to justify both the observance of procurement law in the publication of the contract, the subsequent step-by-step decision making procedure leading up to the award decision thereby rejecting non-successful candidates. It will also be required to demonstrate that there is strict accordance between the "up front" publication of the concept for the contract, the "rules of the game" and the coherent final decision on the outcome.

Provisions safeguarding a basis for challenging the award/rejection decisions are about reasoned decisions to be communicated, cf. GPA Article XIX Paragraph 2;

> 2. The government of an unsuccessful tenderer which is a Party to this Agreement may seek, without prejudice to the provisions under Article XXII, such additional information on the contract award as may be necessary to ensure that the procurement was made fairly and impartially. To this end, the procuring government shall provide information on both the characteristics and relative advantages of the winning tender and the contract price. Normally this latter information may be disclosed by the government of the unsuccessful tenderer provided it exercises this right with discretion. In cases where release of this information would prejudice competition in future tenders, this information shall not be disclosed except after consultation with and agreement of the Party which gave the information to the government of the unsuccessful tenderer.

In the EU setting, the core provision on reasons for award/rejecting is Dir 2004/18 Article 41:

> Informing candidates and tenderers
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> 1. Contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure or implement a dynamic purchasing system; that information shall be given in writing upon request to the contracting authorities.

2. On request from the party concerned, the contracting authority shall as quickly as possible inform:

- any unsuccessful candidate of the reasons for the rejection of his application,

- any unsuccessful tenderer of the reasons for the rejection of his tender, including, for the cases referred to in Article 23, paragraphs 4 and 5, the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements,

- any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement.

The time taken may in no circumstances exceed 15 days from receipt of the written request.

ACCESS TO THE OPENING OF COMPETITORS' TENDER BIDS

An offer to supply the required contract object (supplies, services or construction works) for a lump sum price in response to the contracting authority's invitation would in itself not amount to a trade secret to be kept confidential. Details in the tender bid should be viewed differently, such as technical merits, unit prices from listed sub-contractors in the contract schedule.

If a tender or negotiated procedure has been terminated without any award, the contracting authority may reassume the competition on slightly different specifications, for instance with the intention to slim the budgeted project. The fact that the previously tendered prices may now have been made known to the operators would not in itself be a matter for objections. The principle of equal treatment is not violated by the fact that all tenderers have to redraft their price quotations in order to win the contract in the second round.

Access to current tender prices in the on-going procedure is a different matter. Arguable, one must distinguish between a tender

procedure and procedures where offers are subject to subsequent negotiations.

The administrative **tender procedure** starts with the simultaneous opening of the offered tender prices. The formalities are actually not addressed expressly neither in the previous nor in the current 2004/18 public contract directive. In the 93/37 works directive, the Annex IV Model Contract Notices No 6 on attendance only states on attendance

> 7. (a) Where applicable, the persons authorized to be present at the opening of tenders

- now succeeded by the 2004/18 Annex VIIA form

> 13. In the case of open procedures:
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> (a) persons authorised to be present at the opening of tenders.

- which in lack of mandatory requirements could be said to leave the issue to the discretion of the contracting authority. *S Arrowsmith*[5] therefore argues that there is no obligation to admit the bidders to attend the opening up of tender bids, in this opposing Advocate General *Tesauro's* opinion in the C-359/93 Unix case[6] assuming that transparency and openness require the right for operators to be present.[7]

The various procurement regimes seem to adopt differing approaches to the matter of attending the opening of tender bids. The majority seems to support the transparency argument of Advocate General *Tesauro*:

> It is therefore understandable that it may be important for suppliers participating in an award procedure to be present when the tenders are opened, if only as the Commission observes, to discover the identity of their competitors and to be able to check,

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5 *S Arrowsmith* 7.77 (pp 484-85).

6 [1995] E.C.R. I pp 164-165. The Court did not address the issue.

7 Similarly Hjelmborg and others Public Procurement Law – the EU directive on pu blic contracts (2006) p 33 in contrast to Section 7 of the national Danish 1966 Tender Invitation Act, which state that tenderers are entitled to be present at the opening of tender bids.

> even at this stage, whether they meet the criteria for qualitative selection [---] of the directive. It is clear, therefore, that their opportunity to do so would be completely thwarted if the practical conditions attached to opening (in public as well) were not disclosed.
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> UNCITRAL Model Law 1994 favours attendance:
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> (2) All suppliers or contractors that have submitted tenders, or their representatives, shall be permitted by the procuring entity to be present at the opening of tenders.[8]
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> - with supplementary comments in the official Guide to enactment:
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> 2. Paragraph (2) sets forth the rule that the procuring entity must permit all suppliers or contractors that have submitted tenders, or their representatives, to be present at the opening of tenders. This rule contributes to transparency of the tendering proceedings. It enables suppliers and contractors to observe that the procurement laws and regulations are being complied with and helps to promote confidence that decisions will not be taken on an arbitrary or improper basis. For similar reasons, paragraph (3) requires that at such an opening the names of suppliers or contractors that have submitted tenders, as well as the prices of their tenders, are to be announced to those present. With the same objectives in view, provision is also made for the communication of that information to participating suppliers or contractors that were not present or represented at the opening of tenders.

Similarly, the US FAR regime Paragraph 14.402-1 provides for attendance of "interested persons" in the opening of unclassified bids and Paragraph 14.402-2 on attendance for "bidders or its representatives" in the case of classified bids.

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[8] The 2007 draft amendments to the 1994 UNCITRAL Model Law add --- (2) --- Suppliers or contractors shall be deemed to have been permitted to be present at the opening of the tenders if they are fully and contemporaneously apprised of the opening of the tenders.

Somewhat more restrictive GPA Article XII on contracting authorities' discretion over attendance:

> 1. [---]
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> 2. Tender documentation provided to suppliers shall contain all information necessary to permit them to submit responsive tenders, including information required to be published in the notice of intended procurement, except for paragraph 6(g) of Article IX, and the following: (a) the address of the entity to which tenders should be sent;
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> (e) the persons authorized to be present at the opening of tenders and the date, time and place of this opening;
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> and further Article XIII No 3
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> 3. All tenders solicited under open or selective procedures by entities shall be received and opened under procedures and conditions guaranteeing the regularity of the openings. The receipt and opening of tenders shall also be consistent with the national treatment and non-discrimination provisions of this Agreement. Information on the opening of tenders shall remain with the entity concerned at the disposal of the government authorities responsible for the entity in order that it may be used if required under the procedures of Articles XVIII, XIX, XX and XXII.

A Norwegian 2006 law reform expected to be effective as from summer/fall of 2008 compromises on the rule that bidders may be excluded from attendance in the opening of bids, but in stead are granted full access to the (non-confidential) prices as from the initial award decision has been taken in the "Alcatel" standstill period and onwards.[9]

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[9] Act 2006-05-19 No 16: On right to access to public documents (”offentleglova”) Section 23: ”Exceptions may be made for tender offers and protocols under regulations issued under 16 July Act on public procurement, until award decision has been made.”

A Danish law reform 2001 states that bidders for public construction works have the right to be present under the opening of the bids.[10]

Enhanced focus on openness and transparency policies in both regional and global awards of contracts and concessions[11] together with the ECJ's[12] repeatedly assumption that efficiency must be observed in the translation of black letter procurement provisions,[13] could be said to support Advocate *Tesauro's* arguments in the 1995 Unix case. If the passed-over candidates to the contract are not allowed to observe the initial tender price bids, it could be argued that this would constitute an obstacle in the checking that the subsequent evaluation procedure has not been infected by collusive price amendments in violation of the procurement ban-on-negotiations rule such as UNCITRAL Model Law Article 35.[14]

If the award is a **negotiated procedure**, any submitted initial tender bids are preliminary and subject to contracting authority's persuasive bargaining in the simultaneous communication with the bidders. The degree of pressure on the bidders to reduce their prices or increase their commitments has not dealt with directly in the EC Dir 04/18, except for the rule in Article 30 No 3 and similarly the competitive dialogue Article 29 No 3;

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10 Act 2001-06-07 No 450 § 7, applicable both for contracts above and under the EU threshold values, Danish KARNOV Commentary on statutes 2003 p 6152.

11 C-324/98 Telaustria, C-458/04 Parking Brixen and C-231/03 Coname.

12 European Court of Justice (EC).

13 Cf as an example both the Alcatel case C-81/98 and the La Scala case C-399/98 (recital 55).

14 Neither the present nor the preceding EC public procurement directives state expressly the rule on non-negotiations in tender procedures, but the principle has been assumed to be evident in the "statements" issued by the Council and the Commission in the 1990s, published in [1994] Official Journal No L 111/114 (1994-04-30).

> During the negotiations, contracting authorities shall ensure the equal treatment of all tenderers. In particular, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others.

This would mean that the contracting authority should not communicate information on current prices in order to make any candidate cut his offer. In practice, it would also considered unacceptable to publish initial tentative price offers prior to commencement of negotiations with each of the candidates.

ACCESS TO PROTOCOLS, RECORDS AND REPORTS

A formal novelty in the 2004/18 EC Directive is the Article 2, stating that contract authorities shall treat economic operators equally and non-discriminatorily *and shall act in a transparent way*. The principle of transparency has been pronounced by the Court of Justice in a number of procurement cases – and even by analogy in cases not squarely within the area of procurement.[15]

In the combat of corruption, transparency has gained attention and relevance. The UN Convention against Corruption 2003 states in Article 10 on Public reporting:

> Article 10
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> Public reporting
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> Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia:
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> [---]

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[15] On the so called ”leverage” principle applied on the award of concessions, cf *S Treumer* and *E Werlauff* European Law Review (2003) p 124.

> (b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities;

Council of Europe (Committee of Ministers) have issued a Recommendation Ref (2002)2 to Member States on access to official documents with a supplementary Explanatory Memorandum.

> III. General principle on access to official documents
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> Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.

However, the 2004 directive package does not state directly any right for a passed over or rejected tenderer – let alone the general public – to acquire access to government or municipal internal records or reports on the assessments and decision-making leading up to the conclusive award or non-award. Nor has the Court of Justice dealt with cases over denied access to such documents.

Dir 04/18 Article 35 No 4 last Paragraph (cf similarly Article 41 No 3) states

> Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where release of such information would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of economic operators, public or private, or might prejudice fair competition between them.

- Which does not really solve exhaustively the practical question concerning a bid protester's request to ascertain whether the contracting authority's internal handling of qualification and award criteria (cf the meticulous matrices now required under Dir Article 53) is in line with the conclusive reasons for the award/rejection/non-award to the winner prior to the actual contract signing after the "Alcatel" standstill period required by the forthcoming amended Dir 89/665 Article 2a..

It would seem as if the question of access to administrative records and reports is basically a matter for national law within the Member States.

In England, the law falls within the scope of the Freedom of Information Act 2000, supplemented by extensive secondary codes of practices and guidelines, including the procurement-specific Civil Procurement Policy and Guidance (Office of Government Commerce).[16]

Under the US FAR regime release of information is dealt with in Subpart 5.4. with references to restrictions in 24…1 on protection of Individual privacy and Subpart 24.2 – reference to US Freedom of Information Act (5 U.S.C. 552) – 24.203 Policy with certain exceptions, *inter alia* "A proposal in the possession or control of the Government".

In the Nordic countries, the question of access has been a controversial issue for some time.

A distinction is drawn between statutory duty not to disclose information in confidential matters ("taushetsplikt"), access to public documents for the general public most practical for media's critical investigations ("offentlighet") and access for a party affected by public exercise of authority ("partsoffentlighet").

Generally, the award of a public contract is not viewed as exercise of public authority, as opposed to for instance the award/non-award of concessions. Consequently, the rules and principles do not distinguish between access for bid protesting candidates to the contract and access for the general public. This is possible since the current EC procurement regime is silent on access to documents in the award procedure as such.

The traditional Scandinavian rule has been to exclude access for procurement candidates not only to confidential information such as trade secrets in the submittals, but to the whole range of internal documents under contracting authority's evaluation. The main rule is access to all internal documents, but the catalogue over optional exceptions is comprehensive and has up until recently allowed for denied access into administration of public contracts. One often heard objection

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[16] Explored and explained by *S Arrowsmith* The Law of Public and Urtilities Procurement (2005) 14. pp 98-107.

to access has been the workload in the separation of protected confidential matters from non-protected matters in the procedure.

Scandinavian law dealing with access to internal records has generally been dealt with in terms of public administrative law and not as part of statutory procurement law.[17] The rules are about the general public access to internal material without distinction between media representing the general public as opposed to access for the candidates in a current award procedure (Norwegian "offentlighet", Swedish "sekretess").

Swedish public administrative law ("sekretesslagen"), the rule Section 2 of the "sekretesslagen" 6th Chap Section 2 states that tender bids and internal protocols are to be kept confidential until the result of the procedure has been made public – or the award decision has been taken.[18] In Denmark public access to documents is governed by the Act on Public Access to Documents in Public Files No 572 1985-12-19 and the Public Administration Act No 571 with same date.[19] An executive order dated 1993 denying access has been repealed and replaced 2002-05-24.

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[17] The fact that many semi-public contracting authorities subject to procurement law is not necessarily covered by statutory public administrative law is a problem so far not fully observed in Member States, similarly in the area of private utility entities operating under public licences ant therefore subject to procurement law but not necessarily also to public administrative law.

[18] *G Regner – M Eliason – S Heuman* Sekretesslagen (looseleaf) Suppl 18 January 2007, also NOU 2003:30 pp 192-193.

[19] *Hjelmborg and others* Public Procurement Law (2006) p 360.

In, the current Norwegian[20] procurement regulations mirroring the EC directives and extending into a sub-threshold "procurement light" regime, references are made to public administrative statute on access to public information in general. Complainants and bid protesters are entitled to access under a regime which does not distinguish between the public in general and a particular stakeholder in the actual award procedure. The 2006 law reform on access to the public domain ("offentleglova") has compromised crossing interests in this area. As for public contracts, the forthcoming provision in Section 23 expected in force as from 2008-07-01 will be similar to the Swedish and Danish rule already effective: The tender bids as well as the internal protocol will be accessible once the decision on award prior to the final conclusion of contract has been taken.

One remaining problem will be the time factor in the submitting of a complaint. The forthcoming amended Dir 89/665 (Dir 07/66) standstill period in Article 2a No 2 will enable the bid protester(s) to explore the intended award/non-award decision, protected by a new rule that contract conclusion disregarding the period will be ineffective. However, the procedure directive does not secure a full scale record of the intended award within the standstill period. Dir 2004/18 Article 41 No 1 states that the losers in the competition shall receive information

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[20] Norway is not a member of the EU, but associates with EU through the ancillary 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 implement the EC *acquis* so that all EEA relevant secondary legislation applies as if Norway (and the other EEA states) had been an EU member. Consequently, procurement law as stated in the current and forthcoming EC directives apply similarly in the EEA states as in the EU. ECJ rulings are not formally binding, but are generally accepted as effective 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.

> of decisions reached [---] including the grounds for any decision not to conclude [---] that information shall be given in writing upon request to the contracting authorities

This will apparently start the standstill period. However, the more in-depth reasons for award/non-award according to No 2 of the provision states:

> 2. On request from the party concerned, the contracting authority shall as quickly as possible inform:
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> - any unsuccessful candidate of the reasons for the rejection of his application,
> - any unsuccessful tenderer of the reasons for the rejection of his tender, including, for the cases referred to in Article 23, paragraphs 4 and 5, the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements,
> - any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement.
> - The time taken may in no circumstances exceed 15 days from receipt of the written request.

With no access to the internal procedure, the provision might be insufficient for a candidate which in the standstill period will mobilise a viable arsenal of arguments to challenge the decision about to be followed by an immediate conclusion of contract. In jurisdictions with complaint boards the protesters may be helped by interim measures by the boards, but in jurisdictions based on court review of contract awards, the time to prepare an injunctions and the possibility to succeed in court seems negatively affected by the fact the contracting authority may suspend the reasons for its award as long as 5 days beyond the standstill period.[21]

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[21] On critical comments on the draft amended directive, also *R Williams* (2006) 15 PPLR NA141.

COURTS AND COMPLAINT BOARDS

In court litigation, civil procedural law on evidence rules on matters of requiring and producing evidence. In procurement disputes, the questioning of public servants involved in the handling of contract awards might produce information exceeding the restrictions otherwise applicable when the candidate simply approaches the contracting authority. The witness may refuse to disclose confidential information such as vulnerable trade secrets in the evaluation of the bids, but may have to answer on the preparation, reporting of preparatory suggestions and deliberations in the process.

The situation for complaint boards is somewhat complicated. Whereas the complaint board must have a full scale written record of the scenario for handling of all communication with the contract candidates, the defendant contracting authority is under the obligation to transmit possible restrictions on confidential matters from the candidates other than the complainant – in practice most often the preferred suggested winner of the procedure. This can only be done by eliminating information in the files so that whereas the complain board panel must have access, the complainant – and its legal representative – must be denied access to the same matters. A more liberal approach would create the risk that a bid protester could cave his way to sensitive material from his competitors in the disguise of a request to perform an up hill bid protest.

CONCLUSION

The amended EC 89/665 directive is highly welcomed and will improve the remedies available in bid protesting both in jurisdictions with complaint boards and where award disputes are litigated in courts. However, and seen in a broader perspective, the combined procedural directive 2004/18 and amended remedies' Dir 89/665 (Dir 07/66) could be said to suffer from insufficiencies. This is particularly so if one looks beyond traditional inner market and non-discrimination policies and include the deplorable fact that transparency and full investigation of public contracting seems very relevant in a Europe where bribes, fraud and corruption too soon and too optimistically were ruled out of existence.