

DANISH REGULATION OF PUBLIC PROCUREMENTS

Directive 2004/18/EC on the coordination of procedures for the award of public work contracts, public supply contracts and public service contracts, and Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal service sectors are both implemented into Danish law.

In addition hereto, a special military segment is regulated by Directive 2009/81/EC on the coordination of procedures for the award of certain work contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC. Directive 2009/81/EC has not yet been implemented into Danish law.

Notice that procedural differences between Directives 2004/17/EC and 2004/18/EC may occur.

For which contracts must tenders be invited?

The questions of whether tenders must be invited for a contract and according to which rules, are generally answered by looking at the value of the contract in question. If the contract is equal to or exceeds certain thresholds, the rules of the above directives apply.

The thresholds vary according to the type of contract and are also dependent on the authority in question.

In certain situations a contract may be extended without a new tender procedure. Minor amendments may also be agreed upon without initiating a new tender procedure if this is provided in the contract in question.

What is the procurement procedure if the contract is subject to the EU directives?

If a contract exceeds the relevant EU threshold value, the procurement procedure must be in compliance with the rules in the EU public procurement directives.

In order to initiate the procurement process certain information regarding the contract must be released to the public using a specific process. After the release, the public authorities have several different procedures available to invite tenders. Among these, one of the following procedures shall be used:

- The open procedure, where all interested parties are allowed to tender.

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- The restricted procedure, where only those companies invited by the contracting authority may submit a tender.
- The dynamic purchasing system procedure, where any contractor satisfying the selection criteria and having submitted an indicative tender that complies with the specifications is allowed to submit a tender by an electronic process.
- The design contest procedure, where the entry of plans and designs to be judged is invited.
- The negotiated procedure, where the terms of the contract are negotiated between the authority in question and the potential contractor(s) chosen by the authority without any formal tendering procedure. The contractor(s) is either found by way of advertisement or chosen by the authority.
- The competitive dialogue procedure, which may only be used in case of particularly complex contracts. A limited number of potential contractors are invited to a dialogue for the purposes of developing one or more suitable solutions which may address the needs of the contracting authority. Following this dialogue, the chosen candidates are invited to submit a tender.
- The accelerated procedure, which uses shorter time limits than the open, restricted or negotiated procedures, and may only be used if urgency makes the use of restricted or negotiated procedures impractical.

Notice that some of these procedures only apply in specific cases.

Which authorities are subject to the obligations to invite tenders?

The state, regional and local authorities are obliged to invite tenders. Accordingly, private entities are generally not under such obligation. However, in some cases private entities are obliged to follow rules on public procurement, e.g. in cases regarding concessions a private entity must follow rules regarding public procurement when dealing with building and construction work but not when buying goods or services. The obligations of the directives also apply to other bodies governed by public law provided that they

- a) are established for the specific purpose of meeting needs in the public interest, and do not have an industrial or commercial character;
- b) have legal personality; and

- c) are for the greater part financed by the state, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the state, regional or local authorities, or by other bodies governed by public law.

Which criteria may be considered when an authority decides on an offer following a tender procedure?

A public authority may choose the criterion of the lowest price or the most economically advantageous when choosing a contractor. The latter criterion involves a number of criteria other than price, leaving the assessment of other criteria to the public authority.

Is the contracting authority allowed to cancel a tender procedure?

Provided a sufficient reason exists, an authority may cancel the tender procedure and/or decide not to choose any of the offers received.

What is the procurement procedure if the contract is not subject to the EU directives?

If a public work contract is below the threshold value determined by the directives, the procurement procedure is instead regulated by the Danish Act on Tender Procedures for Public Work Contracts. In these cases, more flexible procurement methods are provided by Danish legislation. Of particular importance are the possibilities of using the negotiated procedure or negotiation within other procedures.

As regards service and supply contracts, no specific Danish legislation governs the procedures relating to public procurement for contracts below the EU thresholds.

However the EU provisions and principles on free movement, equal treatment, transparency, proportionality and mutual recognition still apply to such tender procedures. Also, a circular letter provides that central government authorities must invite tenders for contracts above DKK 500,000.

How are violations of the procurement procedures handled in Denmark?

A complaint may be filed with either the Danish Competition Authority or the Complaints Board for Public Procurement.

The Danish Competition Authority handles complaints concerning both Danish and foreign procurements. If a contract has already been awarded, the case is usually referred to the Complaints Board for Public Procurement, which has a number of remedies at its disposal, including the possibility of awarding compensation. A decision

made by an authority may be annulled or the authority may be ordered to make sure that the procurement procedure is changed to conform to the relevant legislation. In connection with the Danish implementation of Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts with effect of 1 July 2010, the Complaints Board for Public Procurement is entitled to cancel a contract already entered into. The decision of the Complaints Board for Public Procurement may be appealed to the courts.

A complaint may also be brought directly before the courts. However, the procedure of the Complaints Board for Public Procurement is generally faster and less costly, often not making it preferable to bring the case directly before the courts but before the Complaints Board for Public Procurement.

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