The Complaints Board for Public Procurement

# Annual Report 2020

# CONTENTS

# PREFACE

The Complaints Board for Public Procurement hereby publishes its eighth annual report setting out the Complaints Board's decisions in its leading cases in accordance with the Danish Executive Order on the Complaints Board for Public Procurement (*klagenævnsbekendtgørelsen*).

Chapter 1 provides an explanation of the Complaints Board's legal basis, establishment and composition, including the presidency, experts and secretariat.

Chapter 2 contains summaries of the Board's cases from 2020 that are regarded as leading cases or are otherwise of particular interest. These include a number of decisions concerning the interpretation of key provisions of the Danish Public Procurement Act (*udbudsloven*). This report focuses on the aspects that the Complaints Board found particularly interesting. The Complaints Board's decisions are published on an ongoing basis on its website at www.klfu.dk. This applies to decisions concerning violation of the public procurement rules, decisions awarding compensation and a selection of decisions regarding suspensive effect and access to documents. Based on decisions from 2020, the Complaints Board's case law in cases concerning access is described in chapter 3.

Chapter 4 gives an account of the Danish judicial decisions in cases that were previously heard by the Complaints Board.

Chapter 5 contains statistics on the Complaints Board's activities with comments. In 2020, the Complaints Board received 117 complaints, which is more than the number of complaints received in 2018 and 2019. The Complaints Board found fully or partly in favour of the complainant in approx. 25% of all cases, which is the lowest percentage for 2011-2020. However, add to this that in 12% of the Complaints Board's decisions regarding suspensive effect, where the Board applied the prima facie case test (examined whether the complaint seemed to be well-founded on a preliminary assessment), it considered the case to be a prima facia case. This typically led the parties to find a solution, and the complaint was withdrawn.

In 2020, the Complaints Board's average length of proceedings increased to 5 months, which is on a level with the two previous years.

Nikolaj Aarø-Hansen, President

Viborg, July 2021

# 1. THE COMPLAINTS BOARD FOR PUBLIC PRO- CUREMENT

## 1.1 Legal basis and establishment

The Complaints Board for Public Procurement is a quasi-judicial complaints board. The Complaints Board was established in 1992 for the purpose of meeting Denmark's obligations under the Control Directives (Directive 89/665/EEC and Directive 92/123/EEC). The Board's activities are governed by the Danish Act on the Complaints Board for Public Procurement (the Complaints Board Act), see Consolidated Act no. 593 of 2 June 2016, which sets out the rules on the Complaints Board's jurisdiction and activities. The Act is supplemented by Executive Order no. 887 of 11 August 2011 on the Complaints Board for Public Procurement (the Complaints Board Order), most recently amended by Executive Order no. 178 of 11 February 2016. The Complaints Board Order regulates, *i.a.*, the submission of complaints and the Complaints Board's procedure. The history of the law governing the Board's work was described in detail in chapter 1 of the Board's 2016 Annual Report, to which reference is made.

## 1.2 The Complaints Board's composition

The Complaints Board's organisation is set out in Section 9 of the Complaints Board Act and Section 1 of the Complaints Board Order.

The Complaints Board consists of a President and a number of Vice-Presidents (the presidency) as well as a number of expert members. The presidency and the expert members are appointed by the Minister for Industry, Business and Financial Affairs for a period of up to four years. They are eligible for re-appointment.

The presidency consists of six High Court judges and four District Court judges.

The President organises the work of the Complaints Board and its secretariat and appoints a president of the individual case from among the members of the presidency. The president of the case then appoints the expert to assist in the procedure. In special cases, the Complaints Board's President may decide to let more members from the presidency and experts participate in the adjudication of a case. Please see section 1.5 below.

The Complaints Board's expert members are people with knowledge within fields such as construction, public procurement, transport, utilities and law. The Complaints Board's 20 expert members are appointed on the recommendation of the ministries and organisations that have been given a right of nomination under the Complaints Board Order. The expert members are independent in their duties as experts of the Complaints Board and are thus not subject to powers of direction or the supervision of the authority or organisation where they have their principal occupation or that has the right of nomination.

In 2020, the members of the Complaints Board's chairmanship were:

President of the Complaints Board for Public Procurement:

Nikolaj Aarø-Hansen, High Court Judge

Other members of the Complaints Board's presidency:

- Kirsten Thorup, High Court Judge
- Michael Ellehauge High Court Judge, PhD
- Niels Feilberg Jørgensen, Judge
- Erik P. Bentzen, High Court Judge
- Katja Høegh High Court Judge, LLM
- Hanne Aagaard, High Court Judge (until 31 August 2020)
- Jesper Stage Thusholt, Judge
- Charlotte Hove Lasthein, Judge
- Jakob O. Ebbensgaard, High Court Judge
- Anders Aagaard, Judge (from 7 December 2020)

On 15 April 2020, a new term started for the Complaints Board's expert members. The names of the Complaints Board's expert members in the previous term are listed in the 2019 Annual Report. After the expiry of the appointment period, some of the former expert members still had cases pending before the Complaints Board, and their appointments therefore ran until these cases had been completed. From 15 April 2020, the following expert members were appointed/reappointed:

- Pernille Hollerup, Senior Director
- Jan Eske Schmidt, Knowledge Partner
- Lene Ravnholt, Legal Advisor
- Preben Dahl, General Counsel
- Steen Treumer, Professor, PhD
- Stephan Falsner, Lawyer
- Palle Skaarup, Director, Legal & Compliance
- Jeanet Vandling, CPO
- Ole Helby Petersen, Professor with Special Responsibilities, PhD
- Christina Kønig Mejl, Chief Advisor, LLM
- Claus Pedersen, Lawyer
- Birgitte Nellemann, Office Head
- Kurt Helles Bardeleben, Lawyer
- Maria Haugaard, Team Manager
- Carina Risvig Hamer, Associate Professor
- Trine Kronbøl, Chief Advisor
- Johan Iversen Møller, Lawyer
- Mikael Kenno Fogde, Lawyer
- Rikke Fog Bach, Sales Manager
- Louise Kirkegaard Folling, Chief Advisor

## 1.3 The Complaints Board's secretariat

The Complaints Board's secretariat is located in the offices of the Danish Appeals Boards Authority, which is an agency under the Ministry of Industry, Business and Financial Affairs.

The President of the Complaints Board is the head of the secretariat, which had two lawyers and two secretaries for the major part of 2020, in addition to a junior clerk during parts of 2020.

The Complaints Board's lawyers prepare the cases and help the relevant president in selected cases prepare a draft decision. In addition, the lawyers assist the Complaints Board's president with various management tasks. The Complaints Board's secretaries participate in case preparation, answer written inquiries regarding questions on whether a complaint of a completed procurement procedure has been filed within the standstill period, perform a number of administrative tasks and provide telephone support. In addition, they perform joint duties for the Danish Appeals Boards Authority.

In 2020, the secretariat consisted of:

- Dorthe Hylleberg, Administrative Officer
- Heidi Thorsen, Administrative Officer
- Julie Just O'Donnell, Legal Special Advisor, LLM
- Maiken Nielsen, Legal Special Advisor, MSc in Business Administration and Commercial Law
- Tanja Bøtker Lindgren, Legal Administrative Officer, LLM
- Iben Lütje Andreasen, Junior Clerk (until 31 August 2020)

As was the case with the rest of society, the Complaints Board was marked by the COVID-19 pandemic in 2020. Since the lockdown in March 2020, the Complaints Board's secretariat has primarily been working from home. As proceedings at the Complaints Board are mainly based on written records, it has not, however, been necessary to adjourn proceedings or to implement special measures to consider cases from home.

## 1.4 The Complaints Board's tasks, including possible actions and sanctions

In accordance with the first sentence of Section 10(1) of the Complaints Board Act, the Complaints Board considers whether a contracting authority has violated the rules referred to in Section 1(2) and (3) of the Act.

The Complaints Board thus primarily deals with complaints of public contracting authorities' violations of:

- The Public Procurement Act and rules adopted under it, except for violations of Sections 1 and 193 of the Public Procurement Act.
- EU law on the award of public contracts and supply contracts (the EU public procurement rules).
- The Act on Invitations to Tender in the Construction Sector (the Act on Invitations to Tender) (*tilbudsloven*).

Pursuant to Section 37 of the Danish Access to Public Administration Files Act (*offentlighedsloven*), the Complaints Board is charged with the consideration of complaints of other authorities' decisions on access to documents in public procurement cases. Reference is made to chapter 3 of the 2016 Annual Report for a detailed description of this part of the Complaints Board's work. The Complaints Board is the final appeals body for local and regional governments' violations of the Control Bid Order (Order no. 607 of 24 June 2008) (*kontrolbudsbekendtgørelsen*) as well as in particular areas where the Complaints Board has status as appeals body by law or in accordance with law.

The majority of the cases heard by the Complaints Board concern the Public Procurement Act, which mainly implements the Public Procurement Directive (Directive 2014/24/EU) and the other EU public procurement rules, while only a small number of cases concern the Act on Invitations to Tender.

The Complaints Board's primary task is to make specific decisions in specific complaints cases. When the Complaints Board makes decisions in leading cases, it often makes general statements on the rule of law, and care should be taken not to over-interpret the Complaints Board's decisions and not to attach too much significance where it is not warranted by the relevant decision. Please see the article in the Danish weekly law reports 2013 B, pages 241 et seq. (U.2013B.241, Michael Ellehauge: Erfaringer med håndhævelsen af EU's udbudsregler (*Experiences with the application of the EU public procurement rules*), section 1).

As a source of law, the Complaints Board's decisions are subordinate to judgments from Danish courts of law and the EU Court of Justice. However, only a small share of the Board's decisions is brought before the courts of law; in 2020, only 7 out of 44 decisions. The Complaints Board's case law, and perhaps particularly decisions made within the past ten years, must be regarded as an important source of law in the application of the public procurement rules in Denmark. The Complaints Board also has the advantage of being able to act faster than the courts of law. In 2020, the average length of proceedings for public procurement cases was five months, and to this should be added that a very large portion – approx. 63% – of the cases are brought to a conclusion within the first three months of receipt of the complaint (this figure includes both settled and rejected cases). Please see chapter 5 of the Annual Report.

*The Complaints Board's actions and sanctions*

Sections 12-14 a, Sections 16-19 and Section 24(2) of the Complaints Board Act set out the Complaints Board's possible sanctions to ensure effective enforcement of the procurement rules.

*Suspensive effect*

In standstill cases (Section 12(2) and (3) of the Complaints Board Act) and in other cases on request (Section 12(1) of the Complaints Board Act), the Complaints Board may grant suspensive effect to a complaint if justified by special reasons.

According to the Complaints Board's established case law, the conditions for granting suspensive effect to a complaint are:

1. The initial examination of the complaint suggests that it is well-founded ("prima facie case test"). If the complaint seems futile, this condition is not met.

2. There must be urgency. This means that it is necessary to grant suspensive effect to avoid serious and irreparable damage to the complainant.

3. Granting suspensive effect must be justified by a balancing of interests. The complainant's interest in being granted suspensive effect must outweigh the respondent's interest in finalising the process.

Reference is made to the articles on this subject in the Danish weekly law report 2010 B, pages 303 et seq., and 2016 B, pages 403 et seq. (U.2010B.303, Mette Frimodt Hansen and Kirsten Thorup: Standstill og opsættende virkning i udbudsretten (*Standstill and suspensive effect in public procurement law*) and U.2016B.403, Katja Høegh and Kirsten Thorup: Standstill og opsættende virkning inden for udbudsretten – endnu engang (*Standstill and suspensive effect in public procurement law - revisited*)) and the same in the chapter Standstill og opsættende virkning i udbudsretten (*Standstill and suspensive effect in public procurement law*) in Treumer (ed.) Udbudsretten 2019 (*Procurement Law 2019*).

The Complaints Board's assessment of whether to grant suspensive effect to a complaint is a preliminary assessment of the fulfilment of the three conditions based on the written material received. The conditions are cumulative, meaning that suspensive effect will not be granted if one of the conditions is not fulfilled. The decision to grant suspensive effect does not prejudice the final decision in the case.

The Complaints Board's case law shows that it is common practice to provide a detailed explanation in relation to the first "prima facie case test". The objective is to explain to the complainant and the respondent that, on the present basis, 1) no serious violation of the public procurement rules has been committed, and the complainant cannot expect to succeed in the complaint unless important new information is produced, or 2) that infringements have been committed which in the circumstances should cause the respondent to consider cancelling the procurement procedure or reversing its award decision, if possible.

Although a decision to grant suspensive effect is not a final assessment and thus a substantive decision in the case, the Complaints Board's "prima facie decision" will in practice often serve to inform the party adversely affected that it must bring new evidence in the case to have a chance of the Complaints Board finding in its favour in the subsequent substantive decision in the case. In 2020, the Complaints Board granted suspensive effect to one complaint, see the Complaints Board's interim decision of 12 October 2020, NIRAS A/S v Ejendomsfonden Vandkulturhuset Papirøen. The substantive decision is discussed in chapter 2 of the Annual Report.

Sometimes, complainants will request that the complaint be granted suspensive effect even after the contract has been concluded. In these cases, the procurement procedure is already completed, which means that suspensive effect will be pointless, unless the complainant's purpose is to declare the contract ineffective.

If the Complaints Board assesses that a case may be adjudicated on the written record, it may instead decide to settle the case and not decide on whether to grant suspensive effect. The parties will then

be allowed to submit supplemental pleadings. Two such decisions were made in 2020: Decision of 19 August 2020, EG A/S v the Municipality of Egedal, and decision of 7 October 2020, Remondis A/S v the Municipality of Hedensted. The decisions are discussed in chapter 2 of the Annual Report.

*Other sanctions*

When the Complaints Board has ascertained that the public procurement rules have been violated, its sanctions include the following, depending on the complainant's claim (Sections 13-14 a and Sections 16-19 of the Complaints Board Act):

- to suspend the contracting authority's procurement procedure or decisions made in connection with a procurement procedure.
- to cancel the contracting authority's unlawful decisions or a procurement procedure.
- to declare a contract ineffective and order that it be terminated.
- to impose an alternative sanction on the contracting authority.
- to order the contracting authority to pay compensation.

"Ineffective contract" in combination with the rules on alternative sanctions are the most far-reaching sanctions. "Ineffective contract" is only used for the most serious violations of the public procurement rules and in particular in connection with direct award of contracts and conclusion of contracts during a standstill period or during the period in which the complaint has been granted suspensive effect by the Complaints Board. The sanction is statutory and must therefore be used although no claim has been made, see the decision of 19 May 2020, Alsvognen I/S v Fynbus, Sydtrafik and Midttrafik, and the decision of 27 October 2020, Øens Taxa v Fynbus, Sydtrafik and Midttrafik. The decisions are discussed in chapter 2 of the Annual Report.

Section 185(2) of the Public Procurement Act dictates that if an award decision is cancelled by a final decision or judgment, the contracting authority must terminate a contract or framework agreement concluded based on this decision giving a reasonable notice unless there are special circumstances justifying continuation of the contract. This provision does not cover situations where the "ineffective contract" sanction applies, see the first and second sentences of Section 185(2) of the Public Procurement Act. According to the explanatory notes to the Act, "final decision or judgment" means a final decision from the Complaints Board or a judgment from the ordinary courts which may no longer be appealed.

The "ineffective contract" sanction may be used against the contracting authority even though it is justified in believing that no complaint has been made to the Complaints Board within the standstill period because the complainant has neglected to inform the contracting authority of the complaint to the Complaints Board contrary to Section 6(4) of the Complaints Board Act. Reference is made to the above-mentioned article by Katja Høegh and Kirsten Thorup in U.2016B.403, referring to the Complaint Board's decision of 7 May 2015, Rengoering.com A/S v the Municipality of Ringsted. However, the contracting authority may write to the Complaints Board's secretariat to ask whether a complaint has been filed against a procurement procedure, stating the contract notice number, before concluding a contract with the successful tenderer. The Complaints Board's secretariat will as far as possible answer such written enquiries after 1 p.m. (weekdays) on the day that they are received.

If the contracting authority is not part of the public administration and hence not covered by Section 19(1) of the Act, the Complaints Board may not impose a financial sanction on the contracting authority. The Complaints Board will instead report the case to the police if an alternative sanction in the form of a penalty is to be imposed on the contracting authority, see Section 18(3) of the Act. Reference is made to the Complaints Board's decision of 24 April 2019, Sagemcom Energy & Telecom SAS v Vores Elnet A/S, and the decision of 15 February 2019, KONE A/S v Staten og Kommunernes Indkøbsservice A/S (discussed in chapter 4 of the Annual Report) where the Complaints Board filed a police report in both cases.

The case law overview shown at the Complaints Board's website under "Årsberetninger" (*Annual reports*) contains other examples of the Complaints Board's application of the sanctions provided in the Complaints Board Act.

## 1.5 Decisions by the Board and by the President

The rules on the composition of the Complaints Board in individual cases are set out in Section 10(4) and (6) of the Complaints Board Act.

*Decisions by the Board*

When the Complaints Board hears a case, it is generally composed of one member of the presidency and one expert member. The President of the Complaints Board appoints the president of each case.

In special cases, as mentioned above in section 1.2, the President of the Complaints Board may decide to let more members from the presidency, thus also more experts, participate in the adjudication of a case. These cases include leading cases, particularly large or complex cases, where two members of the presidency and two expert members will participate.

In 2020, this happened in four cases: the decision of 16 January 2020 on referring a question for a preliminary ruling to the EU Court of Justice in Simonsen & Weel A/S v the North Denmark Region and the Region of Southern Denmark, the decision of 24 January 2020, Elbit Systems Ltd. v the Danish Ministry of Defence's Acquisition and Logistics Organisation, the decision of 16 September 2020, Stadsing A/S v Staten og Kommunernes Indkøbsservice A/S and the decision of 14 December 2020, MAN Truck & Bus Danmark A/S v the Danish Emergency Management Agency (*Beredskabsstyrelsen*).

*Decisions by the president*

The president of the case may decide to adjudicate cases without the involvement of an expert if they may be assessed based on the written record and are not leading cases. This option is hardly ever used as the expert members' assistance is essential to cases.

The president of the case may also decide to settle procedural issues without the involvement of an expert such as decisions on suspensive effect and access to documents as well as rejection of ineligible complaints, see the Complaint Board's decision of 30 March 2020, the Danish Construction Association v the Municipality of Tårnby which is discussed below in chapter 2.

## 1.6 Eligibility conditions for complaints and complaint guidelines

The eligibility conditions for complaints are set out in Sections 6-7 and Section 10 of the Complaints Board Act and in Sections 4-5 of the Complaints Board Order.

In cooperation with the president of the case, the secretariat is responsible for checking whether the complainant fulfils the formal requirements for filing a complaint. Complaint guidelines in Danish and English setting out the requirements for a complaint mainly directed at complainants who are not represented by a lawyer or other professional advisor are available on the Complaints Board's website at www.klfu.dk. In addition, the secretariat offers telephone support on the complaints procedure.

A complaint to the Complaints Board must be filed in writing. When filing the complaint, the complainant must also notify the contracting authority in writing of the complaint, stating whether the complaint has been filed in the standstill period. If the complaint has not been filed in the standstill period, the complainant must state whether it has requested that suspensive effect be granted pursuant to Section 12(1) of the Complaints Board Act. The complainant must enclose a copy of this notification with the complaint. In addition, the complainant must state whether there is information in the statement of claim that may, in the complainant's view, be excluded from access under the rules of the Danish Access to Public Administration Files Act.

Complaints of violations of Titles I-III of the Public Procurement Act, the Utilities Directive, the Concession Directive and the Directive on Security and Defence Procurement are subject to a fee of DKK 20,000 while other complaints, including of violations of the Act on Invitations to Tender, are subject to a fee of DKK 10,000. If the fee is not paid on the filing of the complaint or before the expiry of the time for payment fixed by the Complaints Board, the complaint will be rejected.

The complaint must describe the claims of violations that the Complaints Board is requested to consider. The Complaints Board is bound by the parties' claims and allegations (arguments), which means that it is not allowed to award more than the party has claimed or take into account arguments that were not included in the parties' submissions (Section 10(1) of the Complaints Board Act). This means that the Complaints Board will not help the complainant with the formulation of appropriate claims, but it may offer guidance to the complainant, If, after such guidance, the claims can still not be used as basis for consideration of the case, the Complaints Board will reject the claims or the entire complaint, see the decision of 21 March 2018, Scientia Ltd. v Aarhus University.

It is also a condition that the complainant has a cause of action. Companies that had an interest in winning a certain contract are eligible to complain. Typically, complainants will be companies that have applied for preselection or submitted a tender, but companies that would have had access to applying for preselection or submitting a tender (potential candidates/tenderers) may also have a cause action. If the complainant is not able to prove that it has a cause of action, the complaint will be rejected. The Complaints Board has made a number of decisions that illustrate the cause of action requirement. Some of these decisions are shown in the case law overview at the Complaints Board's website under "Årsberetninger" (*Annual reports*).

The Danish Competition and Consumer Authority and certain organisations and public authorities mentioned in the annex to the Complaints Board Order have been granted a special cause of action.

The complainant must also observe the time limits for filing complaints set out in Section 7 of the Complaints Board Act, to which reference is made.

**In general**, the time limits for filing complaints are:

No preselection: 20 calendar days.

Contracts based on a framework agreement with reopening of the contract to competition or a dynamic purchasing system: 30 calendar days (only applies to complaints about EU procedures).

"Ordinary contracts": 45 calendar days.

Framework agreements: 6 months.

Contracts directly awarded where the Section 4 procedure has been followed (notice for voluntary ex ante transparency): 30 calendar days

A special time limit of two years from the day after the publication of a notice of contract applies to the Danish Competition and Consumer Authority.

The time limits set out in the Complaints Board Act are calculated in accordance with the Regulation on Time Limits (Council Regulation no. 1182/71 of 3 June 1971 on determining the rules applicable to periods, dates and time limits).

## 1.7 Preparation and adjudication of cases, including costs

The rules on the preparation and adjudication of cases are set out in Sections 6 and 10-11 of the Complaints Board Act and in Sections 6-9 of the Complaints Board Order.

The Complaints Board's secretariat prepares the cases in cooperation with the president of the individual case. During the case preparations, the parties exchange pleadings, and the Complaints Board may request clarification of specific aspects of the case.

After the initial review of whether the complaint/statement of claim meets the necessary conditions (see section 1.6), the Complaints Board will ask the respondent to submit an account of the factual and legal circumstances of the case and the exhibits in the case within a prescribed time limit (defence). After this time, additional pleadings (reply and rejoinder etc.) will generally be exchanged between the parties. The length of this part of the proceedings depends on the nature of the case. During the hearing of the case, the Complaints Board will decide on any disputes between the parties as to the complainant's right of access to documents as a party. Such decisions are made in accordance with the relevant rules in the Danish Public Administration Act (*forvaltningsloven*), see chapter 3 of the 2016 Annual Report. The complainant will normally be given the opportunity to make additional submissions when the Complaints Board has settled the issue of access and before the Complaints Board makes the substantive decision in the case. In any case, thus regardless of the complainant's restricted access,

the Complaints Board will have access to all documents and may use them in its assessment of whether any violations have been committed.

The Complaints Board may allow a third party to intervene in the case for the complainant or the contracting authority (Section 6(3) of the Complaints Board Act). This is most commonly the case when a claim for cancellation of the award decision has been made and where cancellation under Section 185(2) of the Public Procurement Act would generally oblige the contracting authority to terminate the contract giving a reasonable notice. If the issue is whether a contract is ineffective, the party with whom the contract was concluded has an unconditional right to intervene and to be informed hereof, see Section 6(5) of the Complaints Board Act. Pursuant to Section 6(3) of the Act, it is a condition for intervention that the case is of significant importance to the party wishing to intervene. Intervention under the Complaints Board Act corresponds to non-party intervention under the Danish Administration of Justice Act (*retsplejeloven*). This means that the intervener is not allowed to make separate claims or raise its own allegations and can thus not be ordered to pay costs.

The Complaints Board is responsible for ensuring that the case is sufficiently cleared up. The Complaints Board may request that the complainant, the respondent or a third party acting as intervener provide information deemed to be important to the case (Section 6(2) of the Complaints Board Order). By contrast, the Complaints Board is not entitled to raise any issues of errors for consideration in the case as the parties' claims and allegations provide the framework for the Complaints Board's hearing (Section 10(1) of the Complaints Board Act). Here, the Complaints Board operates under the adversarial system, which, for example, was evident in the decision of 3 November 2020, Euformatics Oy v the Danish National Genome Center, which is discussed in chapter 2.

When the exchange of pleadings is completed, the case will generally be adjudicated on the written record unless the president of the case decides to conduct a hearing, which, however, only occurs in a few cases.

Whether a case requires a hearing is assessed on a case-by-case basis considering, *i.a.*, whether the case is a leading case or complex and whether statements are necessary or desirable, including if the parties agree that the case should be considered in a hearing.

Hearings are held in the offices of the Danish Appeals Boards Authority in Viborg and will generally start with a review of the parties' claims and the key documents. It is possible to supplement the information in the case with statements given at the hearing, but written statements submitted in advance to the Complaints Board and the opposing party will normally be preferred. In some cases, the Complaints Board deems the initial presentation of the documents in the case to be unnecessary. In that case, the Complaints Board will announce that it is acquainted with the documents in the case and the parties' positions in the pleadings. The Complaints Board may have questions that need clarification or ask for a demonstration of the issue in dispute, see for example the decision of 15 March 2019, Leo Nielsen Trading ApS and Glock Ges.m.b.H. V the Danish Ministry of Defence's Acquisition and Logistics Organisation. The hearing ends with the parties' or their counsel's closing statements after which the case is set down for decision. Deliberations normally start immediately thereafter. Hearings will normally take 4-5 hours, but in major cases, they may take up to 1-2 days. No hearings were conducted in 2020.

The Complaints Board makes its decisions on a majority of votes. In case of an equality of votes, the President has the casting vote.

When the president of the case and the expert have deliberated, their draft decision will be discussed by the presidency before the decision is delivered. This applies in particular if the case is a leading case.

In connection with substantive decisions and decisions on compensation, the Complaints Board will consider the issue of costs. The Complaints Board may order that the unsuccessful party fully or partly cover the other party's costs for the complaints procedure based on a specific assessment of, among other things, the nature and extent of the case and the proceedings.

As a general rule, costs are limited to a maximum of DKK 75,000 (Section 9(5) of the Complaints Board Order), but the Complaints Board may order the respondent to pay a higher amount if justified by the amount of the contract or special circumstances, see Section 9(6) of the Order. In the Complaints Board's decision of 9 February 2018, Dansk Cater A/S v Staten og Kommunernes Indkøbsservice A/S, costs were set at DKK 100,000 for the successful party.

As set out in section 1.4, the Complaints Board's case law shows that it is common practice to provide a detailed explanation in relation to the first "prima facie case test" when considering when to grant a complaint suspensive effect. If the interim decision is the final decision in the case and the pleadings in the case were as substantial as they would have been if the Complaints Board had made a final decision in the case, the Complaints Board will issue a separate decision awarding costs to the successful party as if the case had been closed with a substantive decision.

The Complaints Board's decisions may be brought before the courts within eight weeks of notification of the decision to the parties. Cases where compensation is awarded will generally be divided into two parts: the substantive assessment and the award of compensation. The time limit for bringing the substantive decision before the courts starts to run when the decision on the award of compensation has been notified to the parties. The Complaints Board's decision is binding on the parties if not brought before the courts within the statutory time limit.

## 1.8 Cases on access pursuant to the Access to the Public Administration Files Act

The Complaints Board's access cases pursuant to the Danish Access to Public Administration Files Act comprise:

- Complaints of contracting authorities' refusal to grant access to documents in a procurement procedure where the Complaints Board is the appeals body according to Section 37 of the Access to Public Administration Files Act. However, the Complaints Board is not the appeals body in cases concerning refusal to grant access to cases on the performance of agreements concluded as a result of a procurement procedure, see chapter 3.
- Cases where a third party, e.g. a journalist, applies for access pursuant to the Access to Public Administration Files Act to documents executed or received in a complaints case that is or has been pending before the Complaints Board. In these cases, the decision whether to grant access

generally lies with the Complaints Board and not the respondent contracting authority. As the respondent contracting authority naturally also has the documents in its possession, it will normally also be possible to apply for access directly to this authority.

Cases on access pursuant to the Access to Public Administration Files Act differ significantly from the cases concerning violations of the public procurement rules that are heard by the Complaints Board in accordance with the Complaints Board Act. Reference is made to chapter 3 of the 2016, 2017, 2018 and 2019 Annual Reports as well as chapter 3 of this Annual Report for a detailed description of this part of the Complaints Board's case law in access cases.

# 2. DECISIONS IN SELECTED AREAS

## 2.1 Introduction

All substantive decisions and decisions on compensation are published on the Complaints Board's website at www.klfu.dk. Interim decisions granting suspensive effect and decisions on access to documents are also published if they are of general interest. Below follows a description of a number of decisions from 2020 that have all been published at the Complaints Board's website. Some of the cases were leading cases. Others deal with issues that, regardless of their specific nature, are likely to be of interest to a wider audience.

The decisions are categorised as follows:

- Competitive tendering obligation, direct award and modification of contracts
- Requirements for specifications, including minimum requirements, and organisation of procurement procedures
- Admissibility and reservations of tenders
- Abnormally low tenders
- Evaluation, including choice of evaluation model
- Obtaining further information
- Framework agreements
- The Complaints Board Act, including suspensive effect and the Complaints Board's sanctions

## 2.2 Selected interim decisions and decisions

### 2.2.1 Competitive tendering obligation, direct award and modification of contracts

*Decision of 19 May 2020, Alsvognen I/S v Fynbus, Sydtrafik and Midttrafik, and decision of 27 October 2020, Øens Taxa v Fynbus, Sydtrafik and Midttrafik*

*The two closely connected cases concerned open procurement procedures under the Utilities Directive of i.a. flex transportation. The decision of 19 May 2020 concerned the procurement for "FV6-FlexVariabel" transport using, i.a., vehicle types 5 and 6, while the decision of 27 October 2020 concerned the procurement for "FG6-Flexgaranti" transport with the same vehicle types with the difference in relation to the FV6 procurement procedure that the vehicle owner was guaranteed a certain turnover. The requirements for specifications, including minimum requirements for vehicle types, were virtually identical in the two procurement procedures. The transport services organisations concluded framework agreements with a number of vehicle owners. The owners were awarded routes in the coordination system "Planet" based on tendered prices.*

Under the FV6 procurement procedure, the transport services organisations directly waived a minimum requirement following a request from Alsvognen according to which vehicle types 5 and 6 needed "room for two large wheelchairs". Alsvognen, whose vehicles of that type allegedly met the minimum

requirement, complained to the Complaints Board claiming that the modification was contrary to Article 36(1) of the Directive as well as Article 89(4), read with (5) on modifications of fundamental requirements.

The Complaints Board ruled that compliance with the minimum requirement must be assumed to have caused additional costs for the purchase and operation of the vehicles and that tenders that met the minimum requirement, including the one from Alsvognen, therefore must be assumed to have been less competitive when awarding routes in the Planet system. The minimum requirement was suitable to keep potential tenderers from submitting tenders, and there was no basis for concluding that such was not the case. Thus, this amounted to a substantial modification which partially "introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure", see Article 89(4)(a) of the Utilities Directive, partially "changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement", see Article 89(4)(b). Such modifications may not occur without a new procurement procedure, see Article 89(5).

As no new procurement procedure had occurred for transport with vehicle types 5 and 6, transport awarded after the waiver of the minimum requirement had been awarded directly contrary to the public procurement rules.

In its decision of 19 May 2020, the Complaints Board declared all concluded FV6 framework agreements on transport with vehicle types 5 and 6 ineffective as from 1 August 2020 and ordered the transport services organisations to pay an economic sanction of DKK 3 million under Section 18(2) of the Complaints Board Act.

In its decision of 27 October 2020, the Complaints Board established, referring to the close connection between the two procurement procedures, that the transport services organisations were to be considered as having waived the fundamental minimum requirement for vehicle size in the FG6 procurement procedure as well. The fact that after the May decision, the transport services organisations had terminated the majority of the concluded FG6 framework agreements with vehicle types 5 and 6 expiring on 31 October 2020 and on 16 July 2020 and launched a new procurement procedure with no minimum requirement in terms of size with anticipated contract commencement on 1 November 2020 did not take away the direct award nature from the continuous awards. In those regards, the Complaints Board noted that the new procurement procedure was not initiated as in August 2019 at the latest, the minimum requirement was waived contrary to Article 36(1) and Article 89(4) of the Utilities Directive, and the requirement in Article 89(5) according to which a modification as the one having occurred cannot occur without a new procurement procedure cannot be understood to mean that the far later FG7 procurement procedure so to speak removed the transport services organisations' previous breaches of the Utilities Directive.

Referring to the decisive legal differences between the legal effect of terminating a contract and the legal effect of declaring a contract ineffective, the transport services organisations' termination of the

majority of the contracts did not prevent the Complaints Board from declaring the contracts ineffective, even from that same date, if the conditions had been met. All of the framework agreements with vehicle types 5 and 6 were subsequently declared ineffective as of 1 November 2020. Under Section 18(2) of the Complaints Board Act, the Complaints Board ordered the transport services organisations to pay an economic sanction of DKK 7 million.

About the "ineffective contract" sanction, the Complaints Board stated in its decision of 19 May 2020 that it was a matter of a statutory sanction which must, if necessary, be ordered even without a claim having been made. There was no reason to repeat that in the decision of 27 October 2020 as the claim had been made.

The decisions have been referred to the courts, and the cases have subsequently been closed by the Complaints Board.

*Decision of 19 August 2020, EG A/S v the Municipality of Egedal*

*An individual, negotiated price reduction of 75% in connection with a direct award based on a framework agreement had no legal basis in the framework agreement and constituted a modification of fundamental elements. The contract declared partly ineffective.*

In 2019, Staten og Kommunernes Indkøbsservice A/S ("SKI") launched framework agreement "02.19 SaaS-Cloud" ("the Framework Agreement"). In February 2020, the Municipality of Egedal made a direct award in favour of KMD A/S ("KMD") referring to the Framework Agreement as the Municipality wanted to purchase a new salary and staff system. The Municipality of KMD then concluded a contract through a written supplier agreement and a separate addendum containing a price reduction. Both documents were dated 20 February 2020 (the combined agreement "the Contract").

The case concerned whether the direct award had made the Municipality of Egedal act contrary to the principles of equal treatment and transparency in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) and to Section 99 of the Act (Article 33(4)(a) of Directive 2014/24/EU). The question was whether the direct award and the price reduction were a legal way of using the provisions in the Framework Agreement relating to negotiation and pricing or whether the provisions of the Framework Agreement and the public procurement rules on modification of a fundamental element were set aside in connection with the direct award that was combined with a considerable price reduction. In more detail, the complainant had, *i.a.*, claimed that in connection with the direct award, the Municipality had negotiated with KMD and that the Municipality and KMD had thus agreed on a price reduction of approx. 75% compared to the prices which KMD had tendered in the original procurement for the Framework Agreement. The complainant stated that instead, the Municipality had applied Section 100 of the Public Procurement Act (Article 33(5) of Directive 2014/24/EU) on reopening of the competition. The Municipality denied that negotiation had occurred and stated that the award and the price reduction were legal.

The Complaints Board explained that based on information from SKI, the Municipality considered a direct award to KMD possible at a price that was considered competitive and that it was regarded as being the intention that KMD was able to "adapt" - in the meaning reduce - the price through individual pricing in relation to the Municipality in connection with the intended direct award and conclusion of

contract. Against this background and following an overall assessment of the circumstances and the process of the case, the Complaints Board was satisfied that negotiations had occurred between the Municipality and KMD and that the negotiation partly had concerned a direct award of the contract, partly caused a modification of the intended price for the services which was reduced by approx. 75 % in those regards. Furthermore, the Complaints Board assessed that no such negotiation and individual pricing were possible according to the provisions of the Framework Agreement.

The Complaints Board added that on the one hand, the price that must be paid by the contracting authority usually is one of the most important elements in an agreement, and price modifications will therefore often be substantial. That also applies to modifications of or deviations from an agreed structure for prices, price levels and price modifications when such modifications or deviations are not pursuant to a legal modification provision in the agreement. On the other hand, any modification of previously agreed remuneration provisions however little should not necessarily be considered a substantial contract modification as the extent of the price modification as compared to the significance of the contract in its entirety must also form part. When assessing whether the procedure chosen for negotiation and price reduction harmonised with the general public procurement law on the right to modify contracts, it was considered, *i.a.*, which party the modification was in favour of. In those regards, the Complaints Board took into account a number of other factors and concluded that the price modification negotiation meant that the economic balance of the Framework Agreement was also changed to the advantage of the supplier in a way which was not provided for by the original Framework Agreement, see Section 178(2) item 2 of the Public Procurement Act (Article 72(4) and (5) of Directive 2014/24/EU). The Complaints Board found that the change was based on negotiations between the parties and therefore showed that the parties' intention was to renegotiate a fundamental element in the Framework Agreement, see also paragraph 34 of C-454/06, Pressetext. On that background, the changed use of the Framework Agreement with the individual price negotiation and price reduction were considered to mean a modification of fundamental elements. This was not changed by the modification also being to the advantage of the contracting authority, see the explanatory notes to Section 178(2) item 2 (Article 72(4) and (5) of Directive 2014/24/EU).

The contract was declared ineffective as of 1 January 2021, see Section 17(1) item 1 of the Complaints Board Act, as there was no basis to apply the derogation in Section 17(3). According to Section 18(2) item 3, an alternative (statutory) sanction was to be established as the contract had merely been declared partly ineffective. The sanction was set at DKK 90,000.

*Decision of 3 November 2020, Euformatics Oy v the Danish National Genome Center*

*Direct award of a contract on the purchase of software for genetic analysis. The derogation in Section 80(3) item 2 of the Public Procurement Act (Article 32(2) of Directive 2014/24/EU) on the lack of competition for technical reasons had not been met, and the procurement procedure obligation had thus been set aside.*

The Danish National Genome Center ("NGC") is an agency under the Danish Ministry of Health. On 8 July 2019, NGC published a notice for voluntary ex ante transparency, see Section 4 of the Complaints Board Act, on purchases in case of direct award of software for tertiary data analysis for the purpose of genetic analysis. The contract was awarded on 4 July 2019. The standstill period expired on 18 July

2019, and on 22 July 2019, NGC concluded a contract with Golden Helix, USA. Following the expiry of the standstill period, Euformatics Oy, Finland, (”Euformatics”), filed a complaint. The Complaints Board explained that as a general rule, the purchase of software was subject to a competitive tendering obligation. The only real reason for the direct award in the notice for voluntary ex ante transparency was a description of Golden Helix software and its use on NGC's data and that “the combination of all features in one software suite is unique”.

The Complaints Board noted that for the legal basis for the direct award, NGC had only stated that technical reasons had meant a lack of competition, see Section 80(3) item 2 of the Public Procurement Act (Article 32(2) of Directive 2014/24/EU) and that NGC had stated only summarily why the derogation conditions had been met. In contrast, the agency had not stated that direct award was necessary due to the protection of exclusive rights, including intellectual property rights such as exclusive rights or licensing rights etc. for software, see Section 80(3) item 3 of the Public Procurement Act (Article 32(2) of Directive 2014/24/EU) which could make it difficult or impossible to get the software or similar software from other suppliers. NGC had conducted a market survey among hospitals and clinics in Denmark, but the Complaints Board did not find that the information presented about the market survey or any other basis had established that due to technical impossibility or major technical difficulties, only the chosen supplier, who was able to deliver software, was able to meet the demand. Thus, NGC had not carefully defined and documented its opinion that only Golden Helix was able to deliver as required according to the explanatory notes. Neither had it been established that there was such interoperability between the chosen solution and the solutions that already existed at Danish hospitals and clinics so that the strict conditions to apply the derogation concerning the lack of competition of technical reasons had been met.

The decision shows that the scope of application for derogation concerning lack of competition of technical reasons is narrow and that a summary reason stating that, allegedly, the conditions for a direct award have been met can be insufficient.

### 2.2.2 Requirements for specifications, including minimum requirements, and organisation of procurement procedures

*Decision of 24 January 2020, Elbit Systems Ltc. v the Danish Ministry of Defence’s Acquisition and Logistics Organisation*

The Danish Ministry of Defence’s Acquisition and Logistics Organisation *(”FMI”) received final tenders from Elbit and from Nexter Systems in a restricted negotiated procedure under the Directive on Security and Defence Procurement for a contract at an estimated value of between EUR 66 million and 133 million on the supply of self-propelled artillery. Following the conclusion of the contract with Nexter, the unsuccessful tenderer, Elbit, filed a complaint. The consideration of the matter was postponed several times due to extensive issues regarding access to documents and due to new claims. One of the complainant’s claims was upheld. No cancellation of the award decision.*

In a number of claims (1a to 1g), Elbit claimed that FMI had acted contrary to Article 4 of the Directive on Security and Defence Procurement, i.a. as FMI had not informed Elbit of the possibility of basing delivery on a special weapon platform although this had not been possible in previous procurement

procedures, that FMI had not observed the requirements in the procurement documents during the evaluation stating that it must be possible to qualify the chosen solution as a MOTS/COTS solution, that the evaluation in several other respects was not according to the tender requirements, that the evaluation model in terms of spare parts was unfit, that Nexter's tender was abnormally low (calculation of Life Cycle Costs), that Nexter's tender deviated from a tender requirement, that the contract concluded deviated from the tender requirements to such a degree that it was a matter of a modification of fundamental requirements that required a new procurement procedure.

The Complaints Board only upheld part of claim 1d on the calculation of Life Cycle Costs. That claim concerned whether FMI had assessed the two tenders in different ways and whether Nexter's tender was abnormally low. The tender requirements allowed FMI to adjust the tenderer's stated "MTBF" and "MTTR" data ("mean time before failure" and "mean time to repair"). The right to change the tenderers' data rendered it uncertain how the LCC calculations would take place. FMI had reduced Elbit's calculation by 1% and increased Nexter's calculation of operating and maintenance costs by 426%. The changes made constituted an extensive change which increased the lack of transparency of the evaluation.

According to the available evidence, there was no basis to assume that the uncertainty regarding Nexter's operating costs was caused by Nexter having submitted an abnormally low tender, see Article 49 of the Directive. However, when preparing the procurement documents and when using the LCC calculation model, FMI had not made sure that all relevant operating and maintenance costs were to be stated by the tenderers and formed part of the LCC calculation.

The other claims, including the part of claim 1d which concerned the lack of a procurement procedure for spare parts, were not upheld as there was no basis. The Complaints Board stated that the nature of the breach could not be compared with the breach in the Complaints Board's decision of 15 February 2019, KONE AS v SKI.

A claim for cancellation of the award decision was dismissed as the breach re claim 1d concerned the evaluation of a minor part of the combined service, and the adjustment during the evaluation had been to the advantage of Elbit and had therefore not affected the outcome of the procurement procedure.

Elbit referred the matter to the courts.

*Decision of 22 April 2020, Hydrema Denmark A/S v the Danish Ministry of Defence's Acquisition and Logistics Organisation (" FMI")*

*Error in the contracting authority's granting of access to the successful tenderer's tender gave a competitor access to unit prices. As a consequence of this error, a new procurement procedure for roughly the same contract had to be launched.*

Reference is made to the interim decision in the Complaints Board's 2019 Annual Report. A final decision was made on 22 April 2020 in which the Complaints Board maintained that there was no basis to uphold Hydrema's claims.

*Decision of 30 April 2020, Fayard A/S v the Danish Ministry of Defence's Acquisition and Logistics Organisation (" FMI") and decision of 1 May 2020, Karstensens Skibsværft A/S v FMI*

*The contracting authority's security clearance requirement which had, i.a., been established to live up to Denmark's international obligations was proportionate. The tenderer had to live up to the requirements whether or not the contracting authority had previously enforced the requirements in a more lenient way.*

The cases concerned a mini competition for shipyard work, repair and maintenance of one of the inspection vessels of the Royal Danish Navy according to a framework agreement regarding standard shipyard work including service and maintenance of ships of a tonnage of between 3,000 and 4,000 tonnes.

In accordance with the framework agreement, FMI stipulated for the procurement procedure that the supplier had to have the necessary security clearance and that only the supplier's and subsuppliers' employees who had the necessary security clearance could gain access to classified material and information according to a specified NATO safety regulation. When submitting the tender, the supplier was to make a declaration in those regards and enclose a list of names of its own employees who were expected to have a security clearance and names of the subsuppliers who were known when submitting the tender.

Concurrently with the procurement procedure, FMI issued a briefing note stating that over an extended period, FMI had found cause and basis to generally define and emphasise the requirements for the suppliers' security clearances resulting from the framework agreement. FMI also published a notice concerning prior voluntary transparency in the Official Journal of the European Union regarding the definition and clarification of the security requirements that already resulted from the framework agreement and that would be enforced in future.

FMI received tenders from three tenderers. FMI decided to contract with one tenderer and to simultaneously reject the two other tenders as being non-compliant. The tenders were rejected on the grounds that they did not contain a declaration about the use of security-cleared staff.

Fayard complained to the Complaints Board and claimed, *i.a.*, that it was not realistic for any shipyard to have a number of employees and subsuppliers who all the necessary security clearance within the time limit notified. The security clearance requirement for all persons involved was therefore disproportionate weighed against FMI's security clearance need. Furthermore, Fayard had previously submitted a tender to FMI that had been found non-compliant due to the security clearance requirement, and the security clearance requirement therefore was to be considered a substantial modification of the framework agreement.

Karstensens Skibsværft also complained to the Complaints Board and claimed, *i.a.*, that the requirements for security clearance and additional documentation had not been clearly announced. Furthermore, as was the case with Fayard, Karstensens Skibsværft claimed that the company had participated in several procurement procedures under the framework agreement without the security clearance requirement having been practised and that the claim was unrealistic to live up to, thus disproportionate.

The Complaints Board stated that the security clearance requirements were clearly stated in the procurement documents and that the requirements, which had been set to live up to Denmark's international obligations, including obligations within NATO, were not found to go beyond anything necessary to meet FMI's needs. FMI therefore was not obliged to make sure that the tenderer who was awarded the contract in the mini competition lived up to the security clearance requirements. This applied whether or not FMI had enforced the security clearance requirements in a more lenient way during prior mini competitions under the framework agreement. FMI was therefore entitled and obliged to reject the tenders from Fayard and Karstensens Skibsværft as non-compliant.

*Interim decision of 6 May 2020, Dansk PersonTransport v the Municipality of Næstved*

*At a procurement procedure for special transport of children from schools and daycare centres, the existing supplier had a competitive advantage in that it knew the prior users' addresses. The contracting authority had stated some information in a spreadsheet, but by refusing to state further information referring to the personal data protection rules, it had not reduced the existing supplier's competitive advantage to the greatest possible extent as it was considered likely that the contracting authority essentially could have reduced that competitive advantage in a simple and fair way and without stating the specific addresses in accordance with the personal data protection rules. Furthermore, the contracting authority had acted contrary to Section 137(1) of the Public Procurement Act (Article 57(4)(a)-(d), (g) and (i) of Directive 2014/24/EU). The case was thus considered to be a prima facie case. However, the case was not granted suspensive effect as the complainant, which was a trade organisation, had not established that the condition of urgency had been met*.

The case concerned a public procurement procedure according to Title II of the Public Procurement Act for a contract divided into five lots regarding special transport of children from schools and daycare centres.

The award criterion was lowest price, and the tenders were to merely state a price per kilometre for each lot when submitting tenders. Transport typically involved transport between the users' officially registered addresses and the school/institution or between institutions, and the supplier personally had to plan and arrange routes considering the users' special needs, including the need for wheelchairs. Transport was to be settled as "price per km per passenger for the shortest direct route by car between to-and-from addresses."

In connection with questions/answers, a request was submitted for anonymised transport lists and user addresses and information about the use of aids. The reasons for the request was that the previous supplier held that information and that the previous supplier would have an unfair competitive advantage if the information was not given. The Municipality of Næstved refused giving that information noting that it was very sensitive data, and handing it out would be contrary to the personal data protection rules. Instead, the Municipality referred to a spreadsheet handed out with information about the number of pupils and meeting times and the time of collection at each school/institution as well as information about the postal code in which each pupil lived.

Before the expiry of the deadline for the submission of tenders, the trade organisation, Dansk PersonTransport, which is eligible to complain pursuant to Section 6(1) item 3 of the Complaints Board Act,

complained to the Complaints Board. Referring to the judgment of the General Court of 12 March 2008 in T-345/03, Europaïki Dynamiki v the Commission, paragraphs 73-76, Dansk PersonTransport claimed, *i.a.*, that the Municipality of Næstved had not done what was necessary to offset the previous supplier's competitive advantage. Furthermore, Dansk PersonTransport claimed, *i.a.*, that the Municipality of Næstved could have set aside Section 137(1) of the Public Procurement Act (Article 57(4)(a)-(d), (g) and (i) of Directive 2014/24/EU).

The Complaints Board stated that a contracting authority is obliged to attempt to reduce the impact of the competitive advantage which the previous supplier may have in connection with a procurement procedure to the greatest possible extent. The calculation method applied in the procurement procedure gave a previous supplier an obvious competitive advantage in that it knew the addresses of the children who had previously used the special transport. The circumstance that the previous supplier did not tender the lowest price in any of the lots did not mean per se that the previous supplier did not have such an advantage. During the procurement procedure, the Municipality of Næstved had, *i.a.*, when presenting the spreadsheet, attempted to reduce the significance of the previous supplier's competitive advantage. However, the Complaints Board found it likely that according to the personal data protection rules, the Municipality essentially could have reduced the competitive advantage in a simple and fair way and without stating the specific addresses. On that basis, the Municipality had not established that the previous supplier's competitive advantage had been reduced to the greatest extent possible.

Furthermore, the Complaints Board stated that the Municipality of Næstved had set aside the principle of transparency and had acted contrary to Section 137(1) of the Public Procurement Act (Article 57(4)(a)-(d), (g) and (i) of Directive 2014/24/EU) having stated in the tender requirements that the voluntary grounds for exclusion in Section 137(1) items 1-6 of the Public Procurement Act (Article 57(4)(a)-(d), (g) and (i) of Directive 2014/24/EU) applied while that was not stated in the contract notice.

The Complaints Board subsequently found that according to the nature of the breaches and considering the fact that there were 13 interested potential tenderers during the procurement procedure of which 8 did not submit tenders, it was not likely, based on a specific assessment of this case, that the complainant's claim for cancellation would be upheld. The case was thus considered to be a prima facie case.

The complaint had been filed by an organisation eligible to complain, and the Complaints Board then went on to consider whether there was urgency. During the complaints procedure, Dansk PersonTransport had stated that the organisation would suffer no financial damage from the complaint not being granted suspensive effect. As DanskTransport had stated no other circumstances which meant that the condition for granting suspensive effect to the complaint was present, the complaint was not granted suspensive effect.

The Municipality of Næstved then cancelled the procedure after which the complaint was withdrawn.

Thus, the interim decision was the Complaints Board's final decision in the case.

*Interim decision of 29 May 2020, Audio Visionary Music A/S v Staten og Kommunernes Indkøbsservice A/S (SKI)*

*A procurement procedure for a framework agreement divided into eight lots of which two of the lots were "subject to" a so-called East/West model which meant that as a general rule, one lot was not awarded to the tenderer with the lowest price but rather to the tenderer with the second lowest price on the condition that the tenderer with the second lowest price would supply the service at the same price as tendered by the tenderer with the lowest price. Prima facie decision that the model was not legal and that it was likely for the award decision to be cancelled. Not granted suspensive effect as the urgency condition was not satisfied.*

SKI launched a framework agreement on the supply of library materials etc. to a number of contracting authorities. The framework agreement was divided into eight lots, and a contract had to be concluded with one supplier for each lot. Tenders could be submitted for one or more lots. The case specifically concerned lot 1 and lot 2 that involved identical services, but the services under lot 1 were to be supplied to contracting authorities in Eastern Denmark and the services under lot 2 to contracting authorities in Western Denmark. The award criterion was "Price". The combined estimated value of the framework agreement was DKK 1.021 billion of which the value of lot 1 was estimated at DKK 253 million while lot 2 was estimated at DKK 475 million.

In the tender requirements, SKI had established a so-called East/West model for lots 1 and 2 (Danish books and notes). The model meant that lot 1 (Eastern Denmark) was to be awarded to one supplier and lot 2 (Western Denmark) to a different supplier, but the same prices would apply to all customers regardless of whether the customers were in Eastern Denmark or Western Denmark. Thus, tenders could not be submitted for only one of the two lots, and the tenderers had to state prices for profit and preparation which were to be the same for lot 1 as well as lot 2. The tenderer who tendered the lowest price was awarded lot 2. The tenderer who tendered the second lowest price was offered to be the supplier for lot 1. However, that tenderer had to accept that the award depended on the tenderer supplying the products and services of the lot to customers in Eastern Denmark at the same prices as tendered by the tenderer with the lowest price and to supply customers in Western Denmark. If the tenderer with the second lowest price would not accept that, the possibility would pass on to the next tenderer and so on. If no tenderer was willing to supply under lot 1 at the same prices as the tenderer for lot 2, that tenderer would also be awarded lot 1.

SKI received tenders from Audio Visionary Music A/S ("AVM") and BibMedia A/S, and SKI stated during the case that the two companies were in fact the only ones on the market. Both companies submitted tenders for all lots.

BibMedia tendered the lowest price for the two lots and was therefore awarded lot 2 while AVM tendered the second lowest price. According to the East/West model established, SKI offered AVM lot 1 on the condition that AVM would supply at the same lower prices as tendered by BibMedia. AVM accepted.

AVM complained to the Complaints Board and claimed, *i.a.*, that SKI had violated the principle of equality and Section 56 of the Public Procurement Act (the first paragraph of Article 27(1) of Directive

2014/24/EU) (on public procurement) by using the East/West model as the tenderer with the second lowest price thus could change its tender after the expiry of the deadline for the submission of tenders. The complaint contained further claims, including about the evaluation model applied, but they are not further discussed here.

SKI claimed that the East/West model was not contrary to the public procurement rules. The model was carefully described in the tender requirements, and SKI's tender to AVM for the award of lot 1 involved no negotiation.

In the interim decision, the Complaints Board stated that it was a public procurement procedure, and once the tenderer had submitted its tender, the tender may in principle not be changed, neither on the initiative of the contracting authority or on the initiative of the tenderer. In connection with a public procurement procedure, the principles of equal treatment and transparency thus do not prevent any form of negotiation between the contracting authority and a tenderer. If a tenderer following a request from the contracting authority is able to change (reduce) the tendered price to a specified, lower price, it involves the possibility for the tenderer to change a significant term in its tender, i.e. the tender sum contained in the original tender in a way that is in favour of the contracting authority and which enables the tenderer to improve its price, thus its tender, for the purpose of being awarded the contract. According to usual practice, such procedure is contrary to the negotiation prohibition. The Complaints Board found that the negotiation prohibition in a public procurement procedure could not be deviated from merely on the basis that SKI had described the East/West model in the tender requirements. Furthermore, SKI had not rendered it probable that it was not possible to obtain the necessary flexibility and in that way accommodate the considerations which SKI had claimed formed the basis for the model.

Subsequently, it looked as if that part of AVM's complaint would be upheld, thus a claim for cancellation, but the Complaints Board did not grant the complaint suspensive effect as the requirement for urgency was not satisfied.

The final decision was made on 14 January 2021. In the further consideration of the case, SKI specified its reason for the East/West model. However, the Complaints Board maintained, although with some additions, that the model was not legal, and the award decision regarding claims 1 and 2 was cancelled.

*Decision of 10 September 2020, E.K. Entreprise A/S v Post Danmark A/S and Lokesvej 18 ApS*

Post Danmark A/S and Lokesvej 18 ApS, in the following PostNord, invited nine turnkey contractors to construct a distribution hub in Hillerød in a procurement procedure. According to the procurement documents, PostNord anticipated the construction to cost DKK 35 million. As the lowest tender was DKK 40.3 million, PostNord cancelled the procedure on the grounds "that the tenders received did not meet our quality and price expectations."

PostNord subsequently awarded the contract to DS Flexhal A/S that had not submitted a tender. E.K. Entreprise, which had submitted the lowest tender in the procurement procedure, filed a complaint to the Complaints Board complaining about PostNord.

The complainant claimed that PostNord had violated Section 8 of the Act on Invitations to Tender by cancelling the procurement process, setting aside the principles of equal treatment and impartiality, just as the company had violated Section 2 of the Act on Invitations to Tender by having awarded the contract to the complainant.

The Complaints Board found no basis to establish that the cancellation was contrary to the principles mentioned or in any other way pursued an unfair purpose.

Furthermore, the complainant had claimed that PostNord had violated Section 2 of the Act on Invitations to Tender in having contracted with DS Flexhal A/S, which had not submitted a tender in the procurement procedure, without a restricted or public procurement procedure. PostNord claimed to not be subject to the Act on Invitations to Tender as PostNord is neither an authority nor a public law body subject to Section 1(2) item 1 of the Act.

The Complaints Board established that although PostNord is considered a public law body, the company is not subject to the restrictions in the right to obtain private tenders in Section 12(3) of the Act on Invitations to Tender as the restrictions do not apply to public law bodies, see Section 1 in Order No. 817 of 23 August 2005 on certain contracting authorities' use of private tenders according to the Act on Invitations to Tender in the Construction Sector, issued in pursuance of Section 12(7) of the Act on Invitations to Tender. Such contracting authorities are thus generally not obliged to arrange a public or restricted procedure.

Subsequently, it was not necessary for the Complaints Board to consider whether PostNord is a public law body subject to the Act on Invitations to Tender.

*Decision of 11 November 2020, NIRAS A/S v Ejendomsfonden Vandkulturhuset Papirøen*

Vandkulturhuset Papirøen is a foundation, a public law body subject to the contracting authority concept of the Act on Invitations to Tender. The case concerned the construction of a 5,600 m² new water and community centre with club facilities at Christiansholm in Copenhagen. A design competition was won by the Japanese architectural firm, Kengo Kuma, with subconsultants.

A negotiated procedure was arranged under Title II of the Public Procurement Act for developer consultancy for building and construction works. The award criterion was best price-quality ratio based on the subcriterion Price with a weight of 40% and the subcriterion Organisation, staffing and process with a weight of 60%. Three of nine candidates were preselected and submitted initial tenders.

Vandkulturhuset conducted negotiations with the three tenderers. The three tenderers submitted final tenders, and the contracting authority decided to contract with one of them, COWI A/S, that had submitted the tender with the highest price but at the same time obtained the highest score for the subcriterion Organisation, staffing and process.

One of the unsuccessful tenderers complained to the Complaints Board in the standstill period. The Complaints Board granted the complaint suspensive effect, referring to, *i.a.*, the nature of the claims pursuant to Section 12(2) of the Complaints Board Act, until the Board had made a final decision.

The complainant claimed that Vandkulturhuset Papirøen had violated the principles on equal treatment, transparency and proportionality in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) as COWI A/S had been deeply involved in the project already prior to the procurement procedure, thus had had a competitive advantage that had not been offset in relation to the other tenderers. The company had been the developer consultant during the design competition as well as under the procurement procedure for the turnkey contract.

The claim was dismissed as COWI A/S had not been involved in arranging the procurement for the developer consultancy and had not been aware of the procurement documents prior to the publication of the procurement procedure. COWI A/S participated in all negotiation meetings regarding the turnkey contract, but according to the information provided, it had to be assumed that the company's role was of a secondary nature although it referred to the work for Vandkulturhuset Papirøen in its tender.

The Complaints Board did not find that the circumstance that a tenderer has had a contractual relationship with the contracting authority prior to a procurement procedure involves disqualification, even if that contractual relationship is connected to the task put out to tender when the work does not directly relate to the task put out to tender. The complainant was not able to lift the burden of proving that such prior relations to the contracting authority should involve disqualification.

Nor was the Complaints Board satisfied that prior to the procurement procedure, COWI A/S had obtained knowledge which could mean that the company could not participate in the procurement. It was found important that the developer consultancy procurement differed significantly from the preceding procurement procedure in setup and content as there was competition for general developer consultant services, and the company's prior knowledge of the project was therefore of minor importance. It was also found important that all of the preselected companies were given access to the procurement documents from the turnkey contract procurement procedure and finally that the deadline for submitting tenders was extended.

Finally, the Complaints Board was not satisfied that the changes/adjustments which the contracting authority made after the negotiation meetings were for the purpose of awarding the contract to COWI A/S.

The complainant claimed that the contracting authority had violated Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) and Section 160 in that its evaluation attached more importance to COWI A/S' tender, and too many scores had been given for the subcriterion Organisation etc., and different elements had been evaluated in the various tenders, and elements had been included that had not been described in the procurement.

The Complaints Board dismissed the claim, *i.a.*, because the complainant had not lifted its burden of proving that the contracting authority's evaluation had been unfair, and furthermore, the Complaints Board referred to the contracting authority's opinion.

During the procurement procedure, Vandkulturhuset Papirøen made changes and additions regarding the subcriterion Organisation etc., and the complainant claimed that the contracting authority had changed the evaluation criteria contrary to Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU). The Complaints Board dismissed the claim, partly because notice had been

given during the negotiation meetings that the tender requirements would be changed towards the situation occurring later on, partly because the content of the changes could be contained within the qualitative subcriterion.

The claim for cancellation was therefore dismissed.

*Decision of 14 December 2020, MAN Truck & Bus Danmark A/S v the Danish Emergency Management Agency*

*Technical requirements for special purpose vehicles not considered contrary to Section 40(4) of the Public Procurement Act (Article 42(1) of Directive 2014/24/EU), the principles of equal treatment and proportionality in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) and Section 42 of the Public Procurement Act (Article 42(2) of Directive 2014/24/EU). Thus, the circumstances differed significantly from the procurement in the Board's decision of 11 October 2019, Kinnarps A/S v the Capital Region of Denmark, in which the rules had been violated.*

Due to its complexity, the case was heard by two members of the Complaints Board's presidency and two expert members, see Section 10(4) of the Complaints Board Act.

The Danish Emergency Management Agency launched three framework agreements (lots) on the purchase of lorry chassis above 7.5 tonnes to build special purpose vehicles for the Agency and for municipal emergency services. Only two tenderers submitted tenders for Framework Agreement 1, one tenderer submitted a tender for Framework Agreement 2, and two tenderers submitted tenders for Framework Agreement 3. MAN Truck & Bus Danmark A/S (”MAN Truck”) did not submit a tender as the company allegedly could not meet the technical specifications. The Danish Emergency Management Agency made a decision regarding the award of two of the framework agreements and decided to launch a negotiated procedure pursuant to Section 61(1) item 2 of the Public Procurement Act (see subsection (4)) (Article 26(4)(a) and (b) and subarticle (6) of Directive 2014/24/EU) for the third framework agreement as the tender submitted for that framework agreement was non-compliant.

MAN Truck claimed that the Danish Emergency Management Agency had acted contrary to Section 40(4) of the Public Procurement Act (Article 42(1) of Directive 2014/24/EU) and the principles on equal treatment and proportionality in Section 2 of the Public Procurement Act (Article 18(1) of Directive 22014/24/EU) as the technical specifications allegedly were not suitable to narrow or hinder the competition which was not objectively justified and/or proportionate. MAN Truck raised questions about referring questions for a preliminary ruling to the EU Court of Justice, but the Complaints Board found that the interpretation of EU law which was of importance to the decision of the case did not give rise to doubt that would form the basis for a reference for a preliminary ruling.

The Complaints Board referred to its prima facie decision and stated that according to Section 40(4) (Article 42(1) of Directive 2014/24/EU), the technical specifications must give economic operators equal access to the procurement and may not have the effect of creating unjustified obstacles to prevent the opening up of a public procurement to competition. According to the explanatory notes, the contracting authority can establish the technical specifications so that only certain economic operators have access to the public procurement if the requirements are fair. However, similar economic operators must have equal access to the procurement procedure. The contracting authority may not use the

technical specifications to create unjustified obstacles to the competition or in other way restrict it artificially. It will therefore only be possible for the contracting authority to establish technical specifications which have an anti-competitive effect if the contracting authority can state reasonable grounds to make the requirements.

The Complaints Board considered that the procurement concerned the purchase of lorry chassis for a number of various special purpose vehicles for fire-fighting equipment and staff, including water tenders and tank vehicles where, *i.a.*, manned pressurised volumes are part of the construction of the lorry chassis. The special purpose vehicles were to form part of the fire and emergency services for tasks according to the Emergency Management Act (*beredskabsloven*). The Board assessed that the requirements that the Danish Emergency Management Agency had deemed necessary and sufficient to meet the purchase need were not unjustified. Nor was it a matter of economic operators not having equal access to the procurement procedure, see the explanatory notes to Section 40(4) of the Public Procurement Act (Article 42(1) of Directive 2014/24/EU) or of the disputed minimum requirements in the technical specifications meaning unjustified obstacles to the competition or having restricted it artificially. Finally, the Board assessed that the requirements established were not disproportionate, see Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU).

The Board stated that it was an EU procedure for lorry chassis for diverse, specialised and demanding tasks. There is no basis to assume that the EU procedure did in fact only target a small number of Danish lorry dealers. On the contrary, there was a presumption that the procedure targeted a European market, and the presumption had not been disproved. The field of tenderers under the procedure and the tenders submitted did not change that. There was no basis to restrict the Danish Emergency Management Agency's estimate as the contracting authority by ordering the Agency to arrange the procedure so that to a greater or lesser extent, adjustments of the lorry chassis did not have to be made until after they had been purchased and delivered. The division of the procedure into three lots had enabled the companies to submit tenders for one or two lots rather than tenders for one combined framework agreement which one of the tenderers had also done. According to the Board's assessment, the procedure was not an expression of circumvention of Section 42 of the Public Procurement Act (Article 42(4) of Directive 2014/24/EU). Furthermore, the purchase put out to tender differed significantly from the purchase and requirements in the Board's decision of 11 October 2019, Kinnarps A/S v the Capital Region of Denmark. Furthermore, the Complaints Board noted that contracting authorities have wide discretion when calculating their purchase needs and when establishing the requirements for how to meet them. The area which the procedure concerned was of a technical nature, and not only through MAN Truck’s claims and other information had it been established that the Agency's needs could just as well have been met in a different way. Nor could it be applied that only two specific companies were previous suppliers to the Danish Emergency Management Company or - considering the anticipated market in the EU - that it was in fact only those two companies that were able to submit tenders for the framework agreements. For these reasons, the Complaints Board dismissed that claim.

However, the Complaints Board allowed a claim that one of the successful tenders contained reservations for minimum requirements and therefore should have been rejected as non-compliant. The Complaints Board considered that in the Danish Emergency Management Company’s opinion, other tenders also contained reservations for minimum requirements, and in those cases, the Agency had not

found basis for clarification but had declared the tenders non-complaint. The Complaints Board cancelled the award decision considering the relevant framework agreement.

Some claims concerning launching a negotiated procedure were dismissed. The company that had submitted a non-compliant tender had subsequently submitted a new tender according to Section 61(1) item 2 and subsections (2) and (4) of the Public Procurement Act (Article 26(4)(a) and (b) and subarticle (6) of Directive 2014/24/EU) based on the original procurement documents, and the new tender contained no reservations.

The decision has been referred to the courts.

### 2.2.3 Admissibility and reservations of tenders

*Interim decision of 2 July 2020, Ørslev Servicetrafik A/S v the Municipality of Høje-Taastrup*

*The Municipality of Høje-Taastrup had considered a parent company of the complainant, Ørslev Servicetrafik A/S, to be the tenderer when evaluating a tender under a procurement procedure according to Title II on the execution of transport.*

As required in the tender requirements, the tender had been submitted via the EU-Supply portal and appeared - because it had been submitted by an employee at the parent company when using the profile of that company on EU-Supply - as having been submitted by the parent company.

The Municipality rejected the tender as non-compliant as the parent company did not meet the suitability requirements.

Ørslev Servicetrafik A/S complained of the rejection and claimed that the Municipality had to realise and should have realised that it rightfully was Ørslev Servicetrafik A/S that was the tenderer and not the parent company which would indisputably mean that the tenderer met its own suitability requirements.

The Complaints Board dismissed the complaint. Thus, the Complaints Board did not consider the Municipality obliged to consider Ørslev Servicetrafik A/S to be the tenderer although the parent company (after the submission of tenders) had responded to a request from the Municipality regarding an ambiguity in the tender and had stated that Ørslev Servicetrafik A/S was the tenderer.

The complaint was withdrawn after the announcement of the interim decision which is subsequently the final decision.

The decision is a reflection of the general principle that tenderers bear the risk of ambiguities in their tenders - including making sure to let the company in a group which is in fact meant to be the tenderer be in charge of submitting the tender via EU-Supply and similar electronic platforms. The fact that the Complaints Board expressly mentions that there was no obligation for the tenderer to consider the tender submitted by Ørslev Servicetrafik A/S (and not also that there was no right to do so) is connected with the content of the tenderer's claim.

*Decision of 29 September 2020, Offcon GmbH v Femern A/S*

*A minimum requirement was clearly stated in the tender requirements. The circumstance that as part of the evaluation of the tender, the contracting authority had asked for a risk assessment and suggested solutions to counter risks discovered did not remove the minimum requirements. The contracting authority could not have asked the tenderer to supplement, clarify or complete the tender within the framework of Section 159(5) of the Public Procurement Act (Article 56(1) and (3) of Directive 2014/24/EU).*

The case was about a restricted procedure according to Title II of the Public Procurement Act on making available so-called authority persons who were to participate in ensuring and efficiently handle maritime traffic in the Fehmarnbelt during the construction of the fixed link between Denmark and Germany.

The tender requirements contained, *i.a.*, a minimum requirement for authority persons to be available and participate in training for a specified period. Furthermore, it was stated in the procurement documents that the evaluation of the tender will consider the extent of which the tender contained a detailed, strong and realistic description of how the tenderer would ensure the necessary staffing during the design stage and that it would mean a positive evaluation if, *i.a.*, the solution description in that context addressed potential and relevant risks and came up with proposals for ways to reduce such risks. It was also stated in the tender requirements that submitting alternative tenders was not permitted.

Offcon GmbH, whose tender was rejected as non-compliant referring to the fact that it did not meet the stated minimum requirement, complained to the Complaints Board. Offcon claimed, *i.a.*, that it was clearly stated in the tender that Offcon offered to follow the training schedule proposed by Femern A/S and that the tender was thus compliant. The split training schedule offered by Offcon was merely an alternative reduction of risk initiative which was optional to Femern A/S. Furthermore, Offcon stated that if Femern A/S had had doubts about the tender, Femern A/S had had the possibility of asking for clarification, see Section 159(5) of the Public Procurement Act (Article 56(1) and (3) of Directive 2014/24/EU).

The Complaints Board stated that it was clearly stated as a minimum requirement that the authority persons were to be available to and participate in training at the time specified in the tender requirements. The circumstance that at the evaluation, the solution description would mean a positive assessment if the solution description contained proposals as to how to reduce risks associated with ensuring sufficient staffing during the design stage could not cause doubt or uncertainty for the general tenderer as to whether the tender lived up to the minimum requirement. As the Split training schedule offered by Offcon did not live up to the minimum requirement stated and as alternative tenders were excluded, the tender was non-compliant.

Furthermore, the Complaints Board stated that Femern A/S could not have asked Offcon GmbH to supplement, clarify or complete the tender within the framework of Section 159(5) of the Public Procurement Act (Article 56(1) and (3) of Directive 2014/24/EU).

The complaint was thus not upheld.

### 2.2.4 Abnormally low tenders

*Interim decision of 23 April 2020, MMEC Mannesmann GmbH v Energinet Gas TSO A/S*

*There was no basis to assume that Energinet Gas had disregarded an obligation to examine whether the tendered price was abnormally low and to reject the tender due to an abnormally low price.*

Energinet Gas TSO A/S (”Energinet Gas”) launched construction work as a negotiated procedure according to the Utilities Directive. MMEC Mannesmann GmbH, one of the two companies that submitted a final tender but that was not awarded the contract, complained about the award decision claiming that Energinet Gas prior to the award decision should have examined whether the successful tender was abnormally low and should have established that that was the case and should therefore have rejected the relevant tender.

In the interim decision on suspensive effect for the prima facie condition, the Complaints Board stated that the preliminary assessment was that that it was not likely that the complaint would be upheld.

In those regards, the Complaints Board stated that Article 84 of the Utilities Directive cannot be understood to mean that - beyond the circumstances covered by the second sentence of subarticle 3 of the provision on applicable obligations within the environmental, social and labour market legislation according to EU law, national legislation or collective agreements or according to international environmental, social and labour market statutory provisions mentioned in Annex XIV to the Directive - there is an obligation for the contracting authorities to reject tenders that must be considered abnormally low.

The Complaints Board's preliminary assessment was that there was no basis to assume that Energinet Gas had disregarded an obligation to examine whether the tendered price was abnormally low and to reject the tender due to an abnormally low price.

During the negotiations with the subsequent successful tenderer, Energinet Gas had thus requested and received detailed, clarifying information about the price composition and had received confirmation that Article 94 of the ILO Convention would be observed and that the information formed part of the revised and final tender. On that basis and according to other information from the company, Energinet Gas had assessed that the price in the final tender did not seem abnormally low.

Against this background, there was no basis to disregard Energinet Gas’ estimate according to which the successful tender did not seem abnormally low. Energinet Gas therefore had no obligation to obtain another account for the purpose of clarifying whether the tender was abnormally low of reasons that would involve an obligation to Energi Gas to reject the tender according to the second sentence of Article 84(3) of the Utilities Directive.

The complaint was withdrawn after the announcement of the interim decision which is subsequently the final decision.

The Complaints Board has previously made a similar statement about the parallel provisions in Article 69 of the Procurement Directive as implemented by Section 169 of the Public Procurement Act in the decision of 3 October 2018, Efkon GmbH v Fjordforbindelsen Frederikssund. The Complaints Board has

made a partly similar statement regarding the contracting authority's estimate when assessing whether a tender seems abnormally low, and an account must therefore be obtained in two previous decisions of 6 March 2020, Aktieselskabet Carl Christensen v the Danish Ministry of Defence's Acquisition and Logistics Organisation and Autocentralen.com A/S v the Danish Ministry of Defence's Acquisition and Logistics Organisation.

*Decision of 6 May 2020, Gottlieb Paludan Architects A/S v Aarhus Vand A/S*

*There was no basis to set aside the contracting authority's estimate that the documentation presented by the contracting authority did not satisfactorily counter the contracting authority's doubts whether the tenderer would be able to solve the task put out to tender with the tendered price composition. Thus, nor was there basis to disregard the tenderer's assessment that the tendered prices were abnormally low.*

The case concerned a negotiated procedure according to the Utilities Directive concerning a contract on architectural consultancy in connection with the Aarhus ReWater project which, *i.a.*, concerned the construction of resource facilities. The consultancy concerned the general architectural framework for the entire project and an option enabling Aarhus Vand to let the successful architectural consultant form part of two so-called turnkey contractor teams which were to manage the actual realisation of the project, including the preliminary and final design, planning and design of the facilities. Work in the two teams was to start as an innovative partnership based on partnering cooperation. It was stated in the procurement documents that due to the complexity of the project, it was difficult to establish the final content of the architect consultancy service put out to tender already at the conclusion of contract.

The award criterion was best price-quality ratio. An economic subcriterion weighted 30%, and two qualitative subcriteria each weighted 35%. The tender evaluation according to the economic subcriterion was to be based on the tenderer's hourly rates for further defined categories of key persons to be applied for the project and a contribution margin for persons not covered by the categories stated. It was stated how hourly rates for key persons would be weighted.

The architectural firm, Gottlieb Paludan Architects, that had been preselected together with three other firms, submitted initial tenders. The tender contained prices for key persons and a contribution margin of 0%. During a negotiation meeting with Gottlieb Paludan Architects, Aarhus Vand stated, *i.a.*, that it was a condition for future partnering cooperation that the agreement was good and well-balanced for both parties and that a number of prices in the tender gave rise to concern as the tendered prices deviated significantly from the anticipated market level in Aarhus Vand's opinion. In the final tender, Gottlieb Paludan Architects had made minor adjustments in the tendered hourly rates. Aarhus Vand subsequently informed Gottlieb Paludan Architects that the tendered prices and the contribution margin were abnormally low and requested an account pursuant to Article 69 of the Utilities Directive. Gottlieb Paludan Architects submitted an account to Aarhus Vand.

Aarhus Vand then decided to award the contract to a different tenderer and at the same time rejected Gottlieb Paludan Architect's tender as abnormally low.

Gottlieb Paludan Architects complained to the Complaints Board and claimed, *i.a.*, that Aarhus Vand had not been entitled to reject the tender as abnormally low, especially as it could not be established that the tenderer would suffer a loss from performing the contract and that the tenderer, being a financially strong company, was able to take a loss. Furthermore, Gottlieb Paludan Architects claimed, *i.a.*, that it had been established that the project economy was sound and that Aarhus Vand had chosen an unusual evaluation model which strongly favoured the way in which Gottlieb Paludan Architects had made up the price. If Aarhus Vand had wanted the prices to be different, a more normal evaluation model could have been chosen.

The Complaints Board stated that when assessing the tender from Gottlieb Paludan Architects, Aarhus Vand had followed the procedure described in Article 84(1) and (3) of the Utilities Directive. In those regards, Aarhus Vand stated that a number of items on the list of tenders, including the price of the person responsible for the design and the project manager who were to be considered key persons in connection with the flexible agreement put out to tender, deviated significantly from the expected market level and that the very different prices for each employee type could create a situation which would not be in accordance with the partnering principles requested. Referring to the nature of the task put out to tender, the Complaints Board found that there was no basis to disregard Aarhus Vand's estimate stating that the documentation presented by Gottlieb Paludan Architects did not satisfactorily counter Aarhus Vand's doubts whether Gottlieb Paludan Architects would be able to solve the task put out to tender with the tendered price composition. Thus, nor was there basis to disregard Aarhus Vand's assessment stating that the tendered prices were abnormally low.

*Decision of 13 May 2020, Kongsvang Rengøringsservice A/S v Egaa Gymnasium*

*Restricted procedure under Title II of the Public Procurement Act for the supply of cleaning to an upper secondary school. The complainant whose tender had been rejected as abnormally low claimed that Egaa Gymnasium had acted contrary to Section 169 of the Public Procurement Tender (Article 69 of Directive 2014/24/EU), i.a., by initiating a procedure for abnormally low tenders and by rejecting the tender as abnormally low. Furthermore, the complainant claimed that Egaa Gymnasium had acted contrary to Section 171(4) item 2 of the Public Procurement Act (Article 55(1) and (2) of Directive 2014/24/EU) as the grounds were inadequate. The complaint was not upheld.*

The case concerned a restricted procedure under Title II of the Public Procurement Act for a contract for the supply of cleaning to Egaa Gymnasium. The award criterion was best price-quality ratio where price weighted 50% and quality and organisation weighted 35 % and 15%, respectively. When assessing the price, the contracting authority wanted to attach the greatest importance to the tendered annual remuneration. When assessing quality, the contracting authority would make an overall assessment with the greatest importance being attached to the tendered number of hours. Organisation would be assessed based on the organisation described and the contracting authority's evaluation of its scope and quality. A condition in the contract was for the supplier to commit to "ensuring good terms for the employees", see ILO Convention no. 94 regarding salary and employment conditions.

In addition to Kongsvang Rengøringsservice A/S, there were five tenderers. Kongsvang Rengøringsservice A/S had submitted the second lowest price. Among the five other tenderers, the highest annual number of hours for cleaning including supervision and management was 6,534.75 and the lowest was

4,474.20 hours. Kongsvang Rengøringsservice A/S had tendered 6,106.35 hours of which 1,477.35 hours were for supervision and management. The other tenders had allotted from 66.33 to 402 hours. It appeared from the evaluation note that the number of hours were included with a weight of 70% in the "quality" criterion. Egaa Gymnasium calculated the span in hourly rates for cleaning including supervision and management among the other tenderers to be from DKK 235.35 to DKK 260.50. The average price was at DKK 249.58 while the hourly rate at Kongsvang Rengøringsservice A/S was DKK 205.30. With reference to the tender seeming abnormally low, Kongsvang Rengøringsservice A/S was asked to "submit and document information about the special conditions that made Kongsvang Rengøringsservice believe that they could supply" the service described at the tendered annual remuneration and with the tendered annual number of hours.

Kongsvang Rengøringsservice A/S then submitted an account from which it appeared, *i.a.*, that 763.80 hours for supervision and management were managed by existing functional staff and therefore were not included as a cost. The hourly rate therefore was DKK 234.65. It was also stated that Kongsvang Rengøringsservice A/S wanted to add Egaa Gymnasium to its customer portfolio. The contracting authority then rejected the tender as abnormally low and, *i.a.*, explained the rejection on the grounds that the account was insufficient as the contracting authority was uncertain about the details regarding the hours not included, and the "adjusted" hourly rate could therefore not be considered. Egaa Gymnasium also stated that the account rather took the form of confirmation that the requirements had not been disregarded than being an account that sufficiently and satisfactorily clarified that Kongsvang Rengøringsservice A/S had not disregarded the claims applicable.

With reference to Section 169(1) of the Public Procurement Act (Article 69 of Directive 2014/24/EU), the Complaints Board stated that a contracting authority is obliged to investigate tenders that seem abnormally low and that it depends on the contracting authority's specific estimate considered the area put up for tender, trade conditions and other relevant factors that may influence the price span when a tender seems abnormally low. The Complaints Board also stated that the clearly misleading estimate of DKK 1 could not be an element of importance in relation to that estimate. The Complaints Board then established that according to the information about a uniform procedure, there was no basis to establish that the initial assessment which Egaa Gymnasium had made had not been made in an objective and non-discriminatory way and that there was no basis to set aside the estimate by Egaa Gymnasium as to whether the tender may be abnormally low.

The Complaints Board then established that no special requirements for the request for an account apply according to Section 169(2) of the Public Procurement Act (Article 69 of Directive 2014/24/EU) but that a suitable deadline must be set. Such a deadline had been given considering the limited complexity of the procurement. The Complaints Board then reviewed the account and the subsequent process and found that a number of the clarifying reasons for not including the 763.80 hours as a cost had not been stated until after the account. Against this background and according to the content of the letter of rejection, the Complaints Board found that the discretion made by Egaa Gymnasium when assessing the tender based on the account was not unreasoned and disproportionate. The Complaints Board then found that nor was Egaa Gymnasium precluded from rejecting the tender considering the information about social obligations, see Section 169(2) of the Public Procurement Act (Article 69 of

Directive 2014/24/EU). Finally, the Complaints Board found that the grounds for the rejection were sufficiently adequate, and neither that part of the complaint was upheld.

*Decision of 26 November 2020, EL-TECH TEAM ApS v AAB Vejle*

*In a restricted procedure under the Act on Invitations to Tender, both the qualitative evaluation of a tender and the rejection of a tender as abnormally low were disregarded.*

The tendered contract was a framework agreement on common electrical work at housing organisation properties. The award criterion was "the most economically advantageous tender" with the subcriteria "Price" (60%), "Quality" (20%) and "Cooperation" (20%). EL-TECH TEAM ApS, which was the previous supplier of electrical work, had disputed the evaluation of the tenders. During the evaluation in relation to the subcriterion "Cooperation", 0 out of 10 possible scores was awarded to EL-TECH TEAM ApS. The conditions of the tender established that the score 0 was given for "... a tender which is only just compliant (but where there is no information clarifying the fulfilment of the subcriterion)". However, the tender from EL-TECH TEAM ApS contained specific information to clarify the fulfilment of the subcriterion, and against this background, the Complaints Board found that AAB Vejle had violated the principles of equal treatment and transparency at the evaluation. The decision is one of relatively few examples of the Complaints Board having disregarded a qualitative evaluation of tenders.

Once EL-TECH TEAM ApS had been informed of the award decision in connection with the evaluation mentioned, the company requested an explanation for the evaluation, including in relation to the subcriterion "Cooperation". AAB Vejle announced that "due to a renewed review of the tender", the housing organisation now assessed that it seemed abnormally low. However, after having obtained accounts from EL-TECH TEAM ApS of the pricing and following a prolonged correspondence, the housing organisation decided to cancel the award decision for the purpose of awarding the contract again. The housing organisation then rejected the tender from EL-TECH TEAM ApS as abnormally low and once again awarded the framework agreement to the same company.

EL-TECH TEAM ApS' complaint also concerned the issue of the rejection of the tender as abnormally low. The Complaints Board noted that according to Section 8(3) of the Act on Invitations to Tender, the contracting authority carries the burden of proving that a tender can be rejected as being abnormally low. Whether a tender is abnormally low depends on the contracting authority's discretion establishing whether there is every probability that the contracting authority is incapable of performing the work of a satisfactory quality, in an appropriate and responsible way and in due time. According to the explanatory notes, Section 8(3) has the same function as Article 55 of the previous Public Procurement Direction on abnormally low tenders. Furthermore, the Complaints Board stated that on the one hand, the contracting authorities are free to fix prices for each service in a way that - in the contracting authority's opinion - maximises the changes of being awarded the contract (strategic pricing). On the other hand, AAB Vejle, being the contracting authority, was responsible for establishing an evaluation model that was suitable and thus legal, and the housing organisation was thus able to take into account any strategic pricing from the contracting authorities. An evaluation model that was not suitable, e.g. because it entailed a risk of distorting the evaluation for tenders with strategic pricing, may not form basis for a legal award decision in the given circumstances.

The Complaints Board considered that AAB Vejle initially had not rejected the tender as abnormally low but had let it form part of the evaluation without declaring that it seemed abnormally low. The difference between the total price in the tender from EL-TECH TEAM ApS, which submitted the lowest tender, and the total price in the second lowest tender, submitted by the successful tenderer, merely constituted DKK 74,741, equivalent to 4%, as the five submitted tenders had no significant spread from the lowest total price of DKK 1,897,911 to the highest total price of DKK 2,961,775. Following a specific assessment, including of a number of the submitted price specifications and the housing organisation's reasons for rejecting the tender as abnormally low - and in the light of the circumstance that according to the explanatory notes, Section 9(3) of the Act on Invitations to tender is to be interpreted as restrictive - the Complaints Board found that the burden of proving that the tender was abnormally low had not been lifted. It had, *i.a.*, not been rendered likely that EL-TECH TEAM ApS would disregard its obligations under the collective agreement when employing trainees merely because the company had tendered an hourly rate that might have been lower than the cost price.

### 2.2.5 Evaluation, including choice of evaluation model

*Interim decision of 3 January 2020, A-Sport A/S v the City of Copenhagen*

*In the assortment tender, it had not been unambiguously and clearly described which procedure would be used to select products for an evaluation technical shopping basket and how the requirement for a representative evaluation would be fulfilled. For some products that were requested purchased, trademarks - regardless of the prohibition in Section 42 of the Public Procurement Act (Article 42(4) of Directive 2014/24/EU) - were stated.*

The question above all was whether the evaluation method used had, as stated by the complainant, been nontransparent, not representative and thus unfit to identify the most economically advantageous tender. The Complaints Board stated that Section 45(2) of the Public Procurement Act on the evaluation in assortment tenders must be interpreted in the light of Section 160 of the Act. It is deemed to be the intention of the amendment of Section 160(1) as amended by Act No. 204 of 5 March 2019 that it is described unambiguously and clearly which procedure would be used to select products for a shopping basket so that the final combination of the shopping basket will be a direct consequence of the description. According to the Complaints Board's case law, it is - also the case for an assortment tender considering the subcriterion "Price" - contrary to the principles of equal treatment and transparency, see Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU), to not perform an evaluation that is representative of the anticipated purchase. The requirement can be fulfilled by including an estimated purchase need or purchase volume or by weighing each product line, see, *i.a.*, the Complaints Board's decision of 15 February 2019, KONE A/S v Staten og Kommunernes Indkøbsservice A/S, the decision of 9 February 2018, Dansk Cater A/S v Staten og Kommunernes Indkøbsservice A/S and the decision of 15 June 2018, AGA A/S v Aalborg University and others.

The assortment tender was designed with 110 product categories, e.g. "Soccer goals", "Shuttlecocks" and "Basket balls" distributed on approx. one forth as many general product categories, e.g. "Soccer", "Badminton" and "Basketball". A certain clarification had occurred as a number of specific products from historic purchases was stated under each product category. For example, 17 different products were listed under "Soccer for asphalt" with brand/trademark, i.a. "Astro Street size 4.5", "Trial Ultima

soccer size 5, 3-layer plastic football" and "Midas Kids Street". In other cases, the description was without brand/trademark.

32 out of the 110 product categories (approx. 29%) were not included in the evaluation. The Complaints Board noted that it had not been established how many products and product categories would be included in the evaluation. It had merely been determined that at least 150 and no more than 200 "comparable" goods would be selected among the products for which all tenderers had submitted tenders. No minimum for the number of product categories to be included in the evaluation had been determined. It was not described in more detail how the Municipality would ensure that the "standard purchase", which would be approx. 200 products but which turned out to be reduced to no more than 151 products, per se would constitute a representative sample in relation to the anticipated purchase. Thus, it was not described in the procurement documents how the Municipality would ensure, if possible, that the selection of product categories and products to be used for the evaluation would take place in a fair way that considered the arbitrariness of not knowing in advance which goods the tenderers would each tender or refrain from tendering. A product or possibly an entire product category would be omitted from the evaluation if it had not been tendered by all tenderers or if the products tendered were not assessed as "comparable".

The Complaints Board considered that the product categories were essentially described by referring to the products with named brands/trademarks which were on the one hand allegedly not an expression of being "the relevant products and/or producers which the Contracting Authority would like to buy" but on the other hand allegedly were an expression of "the quality which the Contracting Authority would like to buy". Thus, the procurement requirements were unclear, contradictory and essentially unfit to make it clear to tenderers which quality was in request in connection with the price competition, thus what to submit tenders for. It was unclear and nontransparent what minimum quality the tenderers could tender while making sure that a tendered product would also be assessed "comparable" and thus be included in the competition.

The award criterion was "Price". An actual qualitative evaluation should therefore in principle take place, see Section 162(1) item 1 of the Public Procurement Act (Article 67(2) of Directive 2014/24/EU). In spite of this, a condition for the award design was that a qualitative assessment of the tendered products was made for the purpose of establishing which ones were "comparable" and subsequently could be included in the evaluation based on the "Price" criterion. The quality of the tendered products was assessed by a working group with professional experts who determined an evaluation technical shopping basket with "comparable" products on that background. If a tenderer had tendered several comparable product, the cheapest one was selected. Thus, it was a condition for the award design that a qualitative assessment was made, but the parameters for that assessment were nontransparent to the tenderers.

In summary, it had therefore not been unambiguously and clearly described which procedure would be used to select the products in the shopping basket. It had not been described how it would be ensured that the evaluation based on the shopping basket whose final content depended on the specific tendered products would fulfil the requirement of being representative of the anticipated purchase, e.g. by including an estimated purchase need or purchase volume or by weighing each product

line. Because of the reference to trademarks, it was also likely that Section 42 of the Public Procurement Act (Article 42(4) of Directive 2014/24/EU) had been violated. The Complaints Board thus found that it was likely that the complaint would be upheld. However, the other conditions for suspensive effect were not fulfilled, and the complaint was therefore not granted suspensive effect.

The procurement was subsequently cancelled, and the interim decision was thus the final decision in the case.

*Decision of 31 January 2020, LeBock Fodtøj ApS v the Danish Ministry of Defence's Acquisition and Logistics Organisation*

*Complaint stating that the chosen tender was non-compliant not upheld. Based on the contracting authority's admission, established that the contracting authority had violated the procurement rules by giving too high a score to one of the selected tenderers' products. A decision not made concerning a complaint of qualitative misevaluation of the complainant's tender as the complainant's tender was non-compliant. Of that same reason, no cancellation of the award decision. Rejected a complaint about the contracting authority's evaluation of a tender which the contracting authority had rejected as non-compliant but still had evaluated as a service to the tenderer.*

In that case, the Danish Ministry of Defence's Acquisition and Logistics Organisation ("FMI") organises a procurement under Title II of the Public Procurement Act for a framework agreement on the supply of footwear to the Defence. Several tenders were submitted, but only the tender from LeBock Fodtøj ApS and the tender from the company that was successful were considered compliant. LeBock Fodtøj ApS complained to the Complaints Board about FMI's decision to award the contract to the other tenderer.

One of the claims concerned the qualitative assessment of a third tenderer's tender which was one of the tenders that had been rejected as non-compliant, but FMI had still assessed the tender in its evaluation report.

The Complaints Board rejected the claim regarding the assessment of the rejected tender as LeBock Fodtøj ApS had no legal interest in determining whether there was a mistake in the evaluation of the tender as it had been rejected. Thus, an assessment of the accuracy of the qualitative assessment would not affect the outcome of the procurement.

LeBock Fodtøj ApS' claims that the successful tenderer's tender was non-compliant due to non-observance of some minimum requirements were also unsuccessful. However, LeBock Fodtøj ApS' claim that - something which FMI had acknowledged - the successful tenderer had been given one score too many at the assessment of one of the competition requirements was successful. However, during the complaints procedure, FMI had claimed that LeBock Fodtøj ApS' tender rightfully should have been rejected as non-compliant as it did not fulfil the minimum requirement that running shoes and winter boots were to be offered in several widths, and the Complaints Board agreed. As LeBock Fodtøj ApS' tender therefore should have been rejected as non-compliant, the mistake found in the scores could not lead to the cancellation of the award decision.

*Decision of 27 May 2020, DXC Technology Scandihealth A/S v the Municipality of Frederikshavn*

*The Municipality of Frederikshavn had violated the principles of equal treatment and transparency by using different procedures when awarding scores for some qualitative subcriteria. The award decision was cancelled.*

The case concerned procurement for a new, electronic care records system used within the care, health and social areas.

The award criterion was best price-quality ratio based on the subcriteria "Price" (25%), "Functionality and user friendliness" (25 %), "Use cases" (25 %), "Operation and maintenance" (15%) and "Test and implementation" (10%). Weighted subcriteria were linked to the qualitative subcriteria.

The complainant, who was an unsuccessful tenderer, claimed that the evaluations of the Municipality in relation to the qualitative criteria were not in accordance with the procurement conditions, including specifically as the Municipality of Frederikshavn had used various procedures to transfer scores at the qualitative evaluation.

The complainant had gained access to a spreadsheet of which scores appeared at the sub-subcriteria level for each tender and presented this as an appendix in the complaints procedure. When reviewing the spreadsheet and the evaluation, the Complaints Board found that the scores in the spreadsheet, rounded with two decimals to an integer in each case, were identical with the final scores for the subcriterion. Thus, the Board was satisfied that the spreadsheet had formed the basis for the evaluation and in terms of evidence disregarded the information from the Municipality of Frederikshavn during the complaints procedure stating that a (free) overall assessment had been made as had also been contemplated in the procurement conditions.

Subsequently established that different procedures had been used when evaluating the various tenders and various elements and that those differences in several cases seemed to have been to the complainant's disadvantage. Thus, there was basis for a cancellation of the award decision.

The complainant's claim for legalisation of the procurement was not successful as the procurement was completed.

*Decision of 18 December 2020, Kube Data Aps v the Ministry of Foreign Affairs of Denmark, the Danish National Police and the Danish Ministry of Immigration and Integration.*

*A minimum requirement must be understood to mean that the tenderer must state in its tender information about the producer and model/type for specified components. As the successful tender only had information about the name of the producer of the combined solution, the tender did not fulfil the minimum requirement. The award decision was therefore cancelled. Furthermore, the contracting authority was ordered to pay an alternative sanction of DKK 25,000 for having taken delivery of services comprised by the tendered contract in the standstill period.*

The case concerned procurement under Title II of the Public Procurement Act for a contract on the upgrade and maintenance of equipment for biometrics uptake and the purchase of new biometrics stations and mobile biometrics stations.

Following evaluation of the tenders received, the Ministry of Foreign Affairs of Denmark and others decided to contract with the previous supplier.

Kube Data ApS then complained to the Complaints Board and claimed that a mistake had been made in the evaluation and that the successful tender was non-compliant. The Complaints Board only made a decision regarding the last claim. Kube Data stated, *i.a.*, that the successful tender was non-compliant as it did not fulfil several of the minimum requirements, including a minimum requirement for the tenderer to state information in the tender about the producer and type/model for specified components. Furthermore, Kube Data claimed that supply of services comprised by the tender had started de facto in the standstill period.

The Complaints Board stated that the minimum requirement must be understood to mean that the tender must contain information about the producer and model/type for the components described and that the minimum requirement had not been fulfilled by the successful tenderer having stated the name of the producer and the combined, mobile biometrics solution. The successful tender therefore was non-compliant, and the Complaints Board therefore allowed a claim for the cancellation of the award decision.

Furthermore, the Complaints Board found that the Ministry of Foreign Affairs of Denmark and others had acted contrary to Section 3(1) of the Complaints Board for Public Procurement Act, see Section 12(2), in that it had concluded an agreement with the previous supplier on the relocation and setting up of biometrics stations in the standstill period. The work had substantially been carried out in the standstill period. The Complaints Board stated that as the tendered contract covered existing as well as new biometrics stations and as it was generally assumed that relocation of biometrics stations could be done by suppliers with expertise within biometrics stations, thus by the same potential suppliers of the tendered service, the contract must be understood to mean that it also covered relocation of biometrics stations already delivered. Considering that and the general connection between the tendered contract, including the connection in terms of time, the Complaints Board found that the relocation and the subsequent installation and testing of biometrics stations carried out by the successful tenderer were comprised by the tendered service. The Complaints Board then imposed an alternative economic sanction of DKK 25,000.

### 2.2.6 Obtaining further information

*Decision of 29 April 2020, Eksponent ApS v the Municipality of Gentofte*

*The successful tenderer's submission of references which did not fulfil the established minimum requirements meant that the tender was non-compliant. The contracting authority had not been entitled to arrange for the successful tenderer to submit new references pursuant to Section 159(5) of the Public Procurement Act (Article 56(1) and (3) of Directive 2014/24/EU).*

The case concerned public procurement for the design and implementation of a new website for the Municipality. As a minimum requirement, the Municipality established that the tenderers were to submit at least three references from similar tasks. It was stated that “similar” meant delivery in the form of design, development and implementation of a new corporate website supplied to a public customer.

Corporate website was understood to mean the customer's main website which was the site accessed via the URL www.insertcustomername.dk.

Eksponent ApS, an unsuccessful tenderer, specifically claimed that the successful tender's (Kruso A/S) tender did not fulfil the established minimum requirement for technical and professional capacity regarding three references as two of the three references submitted did not fulfil the minimum requirement on "similar". After having received Eksponent's objections, the Municipality had acknowledged that at least one of the references could not be used, but instead of disqualifying Kruso, the Municipality allowed Kruso the possibility of submitting new references, thus fulfilling the minimum requirement. Kruso then submitted references that fulfilled the minimum requirement. The Complaints Board explained that the references submitted later on were also available before Kruso submitted its tender.

The Municipality claimed that pursuant to Section 159(5) of the Public Procurement Act (Article 56(1) and (3) of Directive 2014/24/EU), it had been entitled to request the successful tenderer to submit suitable references.

The Complaints Board upheld Eksponent's claim that the tender from Kruso had been non-compliant and that Section 159(5) of the Public Procurement Act, read with subsection (6) of the provision (Article 56(1) and (3) of Directive 2014/24/EU), did not allow the Municipality to obtain new references from Kruso. In those regards, the Complaints Board referred to the European Court of Justice's judgment in the Manova case, Section 159(5) and (6) of the Public Procurement Act (Article 56(1) and (3) of Directive 2014/24/EU) and its explanatory notes. Section 159(6) of the Public Procurement Act (Article 56(1) and (3) of Directive 2014/24/EU) is a codification of the Manova judgment, and a tenderer cannot rectify the lack of a document which should have been submitted together with the tender by requesting a tenderer to clarify its tender.

The decision has been referred to the courts.

### 2.2.7 Framework agreements

*Decision of 16 January 2020, Simonsen & Weel A/S v the North Denmark Region and Region of Southern Denmark on referring questions for a preliminary ruling to the EU Court of Justice.*

According to Title II of the Public Procurement Act, the North Denmark Region launched a public procurement procedure for a framework agreement for four years with one supplier for the purchase of tubes for patients at home and institutions. The Region of Southern Denmark was listed as a participant "on option".

The boxes in the contract notice on the estimated value had not been completed. Nor did the contract notice contain information about the maximum value of the framework agreement or the maximum number of products intended purchased under the framework agreements.

The procurement documents, written in Danish, contained a detailed description of the tendered products and a list of tenders of which the anticipated consumer amounts were listed with a notice stating that the statements concerning the anticipated consumption were merely recommended.

The award criterion was best price-quality ratio, and once tenders had been received, the regions decided to contract with a tenderer. Another tenderer then complained to the Complaints Board. After having received the complaint, the Complaints Board decided to not grant the complaint suspensive effect, and the North Denmark Region subsequently contracted with the chosen tenderer.

The complainant claimed, *i.a.*, that each of the two regions 1) had acted contrary to Section 56 of the Public Procurement Act (Article 49 of Directive 2014/24/EU) and Section 128(2) (Article 51(2) of Directive 2014/24/EU) as well as the principle of equal treatment and transparency in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) by not having stated the estimated amount or estimated value of the products that were to be supplied according to the tendered framework agreement in the contract notice and 2) had acted contrary to the principle of equal treatment and transparency in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) by not having stated a maximum amount or a maximum value of the products that were to be supplied according to the tendered framework agreement in the contract notice or in the other procurement documents.

Furthermore, the complainant claimed cancellation of the award decision of the regions and that the Complaints Board should declare the contracts concluded ineffective.

The complaint is clearly inspired by the judgment of the EU Court of Justice of 19 December 2018 in C-216/17, Autorità.

As the outcome, *i.a.*, depends on an interpretation of the Public Procurement Directive and the Control Directive, the Complaints Board decided to refer the following matter to the EU Court of Justice:

1) Is the principle of equal treatment and transparency in Article 18(1) of the Public Procurement Directive and the provision in Article 49 of the Public Procurement Directive, read with Annex V, part C 7 and 10 a to be interpreted to mean that the contract notice in a case such as this must contain information about the estimated amount and/or the estimated value of the products to be delivered according to the tendered framework agreement?

If the answer to the question is in the affirmative, the Court is asked to state whether the provisions mentioned should then be interpreted to mean that the information must be stated for the framework agreement a) combined and/or b) for the original contracting authority that has declared that it would like to conclude a contract based on the tender (here: the North Denmark Region) and/or for the contracting authority which merely declared that it participates on an option (here: the Region of Southern Denmark).

2) Is the principle of equal treatment and transparency in Article 18(1) of the Public Procurement Directive and the provisions in Articles 33 and 49 of the Public Procurement Directive, read with Annex V, part C 7 and 10 a to be interpreted to mean that either a maximum amount and/or a maximum value of the products to be delivered according to the tendered framework agreement must be stated either in the contract notice or in the procurement conditions so that the relevant framework agreement would have depleted its effect once that limit has been reached?

If the answer to the question is in the affirmative, the Court is asked to state whether the provisions mentioned should be interpreted to mean that the maximum limit mentioned must then be stated for the framework agreement a) combined and/or b) for the original contracting authority that has declared that it would like to conclude a contract based on the tender (here: the North Denmark Region) and/or for the contracting authority which merely declared that it participates on an option (here: the Region of Southern Denmark).

If the answer to question 1 and/or question 2 is in the affirmative, the Court is also asked - to the extent that it is relevant according to the content of the answers mentioned - to answer the following questions:

3) Is Article 2 d(1)(a) of the Control Directive, read in conjunction with Articles 33 and 49 of the Public Procurement Directive, read with Annex V, part C 7 and 10 a to the Directive, to be interpreted to mean that the condition that the "contracting authority has awarded a contract with no prior publication of a notice in the Official Journal of the European Union" involves a case such as this where the contracting authority has published a contract notice in the Official Journal of the European Union about the intended framework agreement but
   a. where the contract notice does not live up to the requirement of stating the estimated amount and/or the estimated value of the products to be delivered according to the tendered framework agreement as an estimate is stated in the procurement conditions and
   b. where the contracting authority has disregarded the obligation to establish a maximum amount and/or a maximum value of the products to be delivered according to the tendered framework agreement in the contract notice or in the procurement conditions?

The case is pending before the EU Court of Justice under case number C-23/30. In addition to the Commission and the Danish Government, five member states have submitted written pleadings.

*Decision of 7 October 2020, Remondis A/S v the Municipality of Hedensted*

*Complaint stating that the Municipality of Hedensted had put out to tender a contract for six years with an option on an extension for two years on the collection of sorted refuse as a public contract (an agreement) and not as a framework agreement.*

Claim 1 of the complaint concerned the question of whether the agreement rightfully should have been put out to tender as a framework agreement. To support this, Remondis principally claimed that the successful tenderer was not ensured a specific minimum turnover and that according to the procurement conditions in the term of the contract, a number of changes could occur, including, *i.a.*, in the number of associated households and in the nature of the rubbish bins which could be changed in connection with the citizens' registrations and deregistrations and ordering of extra collection due to the changes in the legislative framework. According to Remondis A/S, the right to make changes meant that it was a matter of a framework agreement. In those regards, Remondis also stated that the limit for permissible clauses for changes in Section 179 of the Public Procurement Act (first paragraph of

Article 72(1)(a) of Directive 2014/24/EU) (stating that changes must have been envisaged in the procurement documents in clear, precise and unambiguous clauses) had been overstepped. However, Remondis did not make a separate claim against a violation of Section 179 (first paragraph of Article 72(1)(a) of Directive 2014/24/EU).

The Complaints Board dismissed claim 1. The Complaints Board stated as its reasons that the chosen supplier, the way the procurement documents were designed, was guaranteed having to collect refuse during the contract period to the extent stated at the unit prices stated by the supplier in its tender. Accordingly, the tendered agreement was a bilateral contract, see Section 24 item 24 of the Public Procurement Act (Article 2 of Directive 2014/24/EU) and Article 2(1) item 5 of the Public Procurement Directive. The circumstance that according to the tender documents, the scope and content of the supplier's service and the remuneration would depend on and vary according to the choices made by citizens regarding the number of collections, bins etc. and that the supplier, without changing the unit prices, had to accept such changes and the changes which any new national regulation within the refuse area could mean did not mean that (new) contracts would be awarded in case of such changes as stated in Section 24 item 30 of the Public Procurement Act (Article 2 of Directive 2014/24/EU) and the second sentence of Article 33(1) of the Public Procurement Directive. Thus, there was no basis to disregard classification of the tendered agreement as a public contract.

The Complaints Board also noted that the changes which the tendered contract allowed the Municipality to make did not appear to be beyond the limits implied in Section 179 of the Public Procurement Act and the first paragraph of Article 72(1)(a) of the Public Procurement Directive.

Following the outcome of claim 1, claim 2 stating that Section 95(2) of the Public Procurement Act (Article 33(1) of Directive 2014/24/EU) according to which a framework agreement, except for extraordinary cases, may have a term of no more than four years was not upheld.

Remondis A/S had referred to the Complaints Board's decision of 8 May 2014, Abena AS v the Municipality of Slagelse, where the Complaints Board had found that a tendered, public contract rightfully should have been put out to tender as a framework agreement. However, the procurement in the case from 2014 differed significantly from the procurement of the Municipality of Hedensted.

The case is an example of the Complaints Board sometimes making decisions on the facts in very little time. Thus, as requested by both parties, the Complaints Board made a decision on the facts in the case within the deadline by which the Complaints Board has to make a decision on the suspensive effect rather than considering the suspensive effect issue.

### 2.2.8 The Complaints Board Act, including suspensive effect and the Complaints Board's sanctions

*Interim decision of 18 March 2020, Alcyon ApS v the Capital Region of Denmark, the Central Denmark Region, the North Denmark Region and Region Zealand*

*The complaint not granted suspensive effect according to Section 12(1) of the Complaints Board for Public Procurement Act as a balancing of interests favoured the regions.*

The case concerned public procurement on delivery of hospital beds divided into four lots at a total value estimated by the complainant of approx. DKK 72 million. The complainant asked questions during the tender but chose to not submit a tender and instead file a complaint at the expiry of the deadline for the submission of tenders claiming, *i.a.*, that a number of minimum requirements in the technical specifications were designed to favour the existing suppliers and also that they were not objective or proportionate.

The regions acknowledged a violation (claim 3) that only concerned lot 4 and cancelled that lot. The regions protested against the complaint being granted suspensive effect and claimed that the prima facie and urgency conditions were not fulfilled and that a balancing of interests favoured the regions.

The Complaints Board noted that Alcyon had not provided information that could lead to the company's interest in the complaint being awarded suspensive effect exceeding the obvious interest of the regions in concluding the contracts on hospital beds as quickly as possible for the purpose of ensuring the necessary capacity at the hospitals.

The Complaints Board further noted that on the preliminary basis, it was not likely that the claims regarding the technical requirements for the beds would be upheld. A possible violation (claim 5) by neither having stated an estimated amount, estimated scope or estimated value in total or separately for each of the lots had not specifically kept Alcyon from participating in the tender. The other claims as related to the information on the number of tenderers were not of such a nature that Alcyon's interest in a clarification in the specific situation outweighed the possibility of the regions to conclude a contract on the purchase of beds.

Accordingly, the complaint was not granted suspensive effect.

Alcyon then withdrew the complaint. The interim decision was thus the Complaints Board's final decision in the case.

*Decision of 30 March 2020, the Danish Construction Association v the Municipality of Tårnby*

*Complaint about the violation of the Public Procurement Act rejected as the deadline of 45 days for submitting a complaint in Section 7(4) of the Complaints Board for Public Procurement Act had not been met.*

The Danish Construction Association, one of the organisations who have been granted a right of complaint according to Section 6(1) item 3 of the Complaints Board for Public Procurement Act, filed a complaint about a restricted procedure according to the Public Procurement Act for the establishment of a skater park which the Municipality of Tårnby had initiated. Only one tender was submitted, and the contract was then concluded on 5 September 2019. The Danish Construction Association filed a complaint on 21 January 2020, and according to the Municipality, the complaint should be dismissed referring to the deadline of 45 days not having been met.

The Danish Construction Association claimed that the deadline for an organisation eligible to complain was as from the time when the organisation had sufficient information to assess whether there were grounds for the complaint.

The Complaints Board upheld the claim for rejection referring to the circumstances that the explanatory notes to Section 7 of the Act do not support an interpretation against the wording, neither in a case such as this where only one tender has been received which is accepted and complaints are therefore not expected from companies, nor through trade organisations. All the more, the Complaints Board noted that the 2-year deadline for complaints for the Danish Competition and Consumer Authority in Section 7(7) of the Act would then be unnecessary.

*Decision on compensation of 2 April 2020, MBG Entreprise A/S v the City of Copenhagen*

*The tenderer who had in fact submitted the tender with the lowest price but who had not been awarded the contract awarded compensation for expectation damages. Not proven that the Municipality had been obliged to cancel the procedure due to ambiguities in the procurement documents or would have chosen to cancel it due to the ambiguity.*

In a decision of 26 September 2019 between the same parties, the Complaints Board found that the Municipality in a procurement procedure had acted contrary to the principles of equal treatment and transparency. The procurement documents were unclear, and in those regards, the Municipality had compared MBG Entreprise A/S' tender inclusive of a price for zinc coating with a tender that did not contain a price for that service. Thus, the Municipality had compared tenders and prices which were not directly comparable.

The decision of 2 April 2020 concerned MBG Entreprise A/S' claim for compensation. The Complaints Board found that when disregarding the price specification for zinc flashing - a service which the Municipality had not requested - it was in fact MBG Entreprise A/S and not the selected tenderer that had submitted the tender with the lowest price. The Complaints Board also found that the Municipality had not been obliged to cancel the procurement (such an obligation would have precluded a claim for compensation in the form of expectation damages) and that the Municipality could have removed the ambiguity by merely publishing a corrigendum. In the given circumstances and in the light of the considerations for transparency and equal treatment, the Municipality could have clarified the procurement documents to avoid discrimination of the tenderers, see Section 2(3) of the Act on Invitations to tender. This should also be seen against the background that during the procurement, the Municipality had received questions from MBG Entreprise A/S about the understanding of the procurement material showing that clarification was necessary. The Municipality had not rendered it likely that it would have cancelled the procedure for the purpose of initiating a new procedure although such practice could have removed the ambiguity. It was found important that the cancellation of the procedure would have been a further step causing increased transaction costs and increased time consumption. Against that background, it was proven that the Municipality's actions gave rise to liability in damages and that the conditions for a causal link and for a claim for compensation in the form of expectation damages were fulfilled.

The calculation of the claim for compensation in terms of money contained uncertain factors, including in relation to the size of the contribution ratio and the risks of the contract. The size of the compensation was therefore estimated at DKK 650,000 based on the contract sum tendered and the available agreements from the completed contract.

*Decision of rejection of 16 April 2020, Tunstall A/S and Tunstall Health A/S v Fælles Udbud og Udvikling af Telemedicin v/Region Midtjylland ("FUT"), TeleCare Nord and TeleKOL Landsdel Sjælland*

*The case concerned whether use of a framework agreement should occur, i.a., based on the prices which the suppliers had stated in their tenders for the framework agreement. It was the complainants' opinion that the contracting authorities had not been entitled to deny the complainants the possibility of reducing their prices according to a price regulation clause in the framework agreement.*

In 2017, FUT, TeleCare Nord (TeleCare) and TeleKOL Landsdel Sjælland (TeleKOL) launched a framework agreement consisting of two lots: "Lot 1 – Employee solution" and "Lot 2 – Citizen solution" regarding a roll-out of telemedicine for citizens with COPD. FUT, TeleCare and TeleKOL decided to contract with, *i.a.*, Tunstall Health A/S (Tunstall Health) and CGI Danmark A/S (CGI) regarding "Lot 1 – Employee solution" and with, *i.a.*, Tunstall A/S (Tunstall), Tunstall Health and CGI regarding "Lot 2 – Citizen solution". The contracts were concluded on 8 January 2019.

The framework agreement contained a procedure for the award of a supply agreement/choice of supplier, and it appeared, *i.a.*, that tasks were awarded according to the rules on direct award, see Section 99 of the Public Procurement Act (Article 33(4)(a) of Directive 2014/24/EU). The award of a supply agreement would be to the supplier who had submitted the tender with the best price-quality ratio in relation to the specific delivery. Paragraph 10 of the Framework Agreement contained price regulation provisions. It stated, *i.a.*, about the decline in the supplier's list prices that if the price development in the supplier's general list prices was favourable to the customers, the unit prices were to be adjusted in terms of percentages in relation to the price development in the supplier's list prices. The adjustment of the supplier's unit prices was to be calculated by reducing the supplier's tendered list prices with the percentage with which the supplier had reduced its list prices.

Tunstalls and Tunstall Health's tendered prices on the two lots were several times higher than the tendered prices from the tenderer with the lowest prices. Tunstall and Tunstall Health requested permission to regulate the company's prices according to the provisions on price regulation in the framework agreement. Prices would be reduced significantly in relation to the prices initially tendered, and Tunstall and Tunstall Health gave reasons for the change. FUT, TeleCare and TeleKOL assessed that the price reduction was so significant that it was critical to Tunstall and Tunstall Health's chance of being chosen as suppliers.

FUT, TeleCare and TeleKOL which received objections from CGI during the process did not allow Tunstall and Tunstall Health to regulate prices. The supply agreements were therefore concluded without considering Tunstall and Tunstall Health's reduced prices.

During the complaints procedure, Tunstall and Tunstall Health claimed that FUT, TeleCare and TeleKOL had acted contrary to Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) and Section 99 (Article 33(4)(a) of Directive 2014/24/EU) by not approving Tunstall and Tunstall Health's price regulations and by awarding and concluding contracts without considering Tunstall and Tunstall Health's reduced prices.

FUT, TeleCare and TeleKOL claimed that the complaint should be dismissed, and the Complaints Board allowed the claim. The Complaints Board stated that the Complaints Board is not competent to hear

complaints that concern matters regarding performance of contracts concluded between an authority and a company. Tunstall and Tunstall Health requested the Complaint Board's position on a dispute between the parties regarding the understanding of a price regulation provision in the framework agreement. According to their wording, the claims made did not involve the general principles of equal treatment and transparency in community law.

*Decision on compensation of 14 July 2020, Kære Pleje Fredericia ApS v the Municipality of Fredericia*

*In its decision, the Complaints Board considered whether the violations of the Municipality of Fredericia as established in the decision of 3 April 2020 meant that the Municipality was to pay compensation to the complainant, Kære Pleje Fredericia A/S.*

Kære Pleje Fredericia ApS had submitted a tender for, but had not been awarded, a tendered agreement under Title III of the Public Procurement Act (light procurement) concerning various home care services.

In its decision of 3 April 2020, the Complaints Board upheld Kære Pleje Fredericia ApS' claims that the Municipality had violated the Public Procurement Act as follows:

> "Re claim 1
>
> The Municipality of Fredericia had acted contrary to Section 187(2) of the Public Procurement Act (Article 75(1) of Directive 2014/24/EU), see Annex V, part H of the Public Procurement Directive by not having described the key elements in the award procedure, including the award criterion for the procurement.
>
> Re claim 2
>
> The Municipality of Fredericia acted contrary to Section 188(2) of the Public Procurement Act (Article 76 of Directive 2014/24/EU), see Section 171 (Article 55(1) and (2) of Directive 2014/24/EU) by not having stated in its notification to Kære Pleje Fredericia ApS which tenderer had submitted the tender with the lowest price.
>
> Re claim 4
>
> The Municipality had acted contrary to the principle of equal treatment and transparency in Section 2(1) of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) by having set an ambiguous minimum requirement regarding references as it did not appear from the procurement conditions what services were to be included under "personal care tasks round-the-clock" and "practical assistance", respectively.

Furthermore, the Complaints Board cancelled the award decision of the Municipality of Fredericia.

In the compensation part of the case, Kære Pleje Fredericia ApS claimed damages in the form of reliance damages.

The Complaints Board found for the Municipality. Although the nature of the violations of the procurement rules in terms of claims 1 and 4 means that the Municipality of Fredericia - if the other conditions

for liability to pay damages had been met - was liable in damages for Kære Pleje Fredericia ApS' loss by submitting tenders, the violations had been or should have been obvious to Kære Pleje Fredericia ApS that nevertheless submitted a tender. Consequently, it could not be assumed that there was any causal connection between the violations found and the claimed loss just as liability to pay damages was precluded due to contributory negligence.

The decisions reflect the Complaints Board's established practice that violations which the complainant could or should have found before the tender was submitted cannot be grounds for a claim for damages. The Complaints Board typically only states that there is no causal connection, but the relevant practice can also be seen as an expression of a contributory negligence consideration. Thus, it is also clearly stated in the decision that the reasons for dismissal were the lack of a causal connection as well as contributory negligence.

*Decision on compensation of 17 December 2020, De Forenede Dampvaskerier A/S v the Municipality of Ringkøbing-Skjern*

*The complaint was filed by the tenderer with the lowest tendered price. The complainant's tender had been rejected as non-compliant, but in its decision of 15 May 2020, the Complaints Board found that the rejection had been unfounded. In its decision of 17 December 2020, the Complaints Board ordered the contracting authority to pay an estimated compensation of DKK 2.5 million to cover the complainant's loss from not having been awarded the contract (expectation damages).*

The complainant, De Forenede Dampvaskerier A/S ("DFD"), submitted a tender for a framework agreement on the supply of laundrywork and renting of clothes for healthcare workers in the Municipality of Ringkøbing-Skjern. The award criterion was "Price".

The Municipality of Ringkøbing-Skjern defined a number of minimum requirements for clothes to be delivered, for example that T-shirts may not be see-through.

DFD submitted the tender with the lowest price, but the Municipality rejected the tender as non-compliant, *i.a.*, because a white T-shirt tendered was see-through in the opinion of the Municipality. There were further minimum requirements which the Municipality assessed were not fulfilled. The Municipality then awarded the contract to another tenderer, Berendsen Textil Service A/S.

DFD complained about the Municipality's rejection of the tender and requested that the complaint be granted suspensive effect. In an interim decision, the Complaints Board stated that it was not likely that DFD's complaint would be upheld as the Municipality had found that the T-shirt was see-through and that the tender therefore did not meet the minimum requirements established in that area.

During the subsequent consideration of the case, DFD obtained a statement from the Danish Technological Institute comparing DFD's tendered T-shirt and the T-shirt which Berendsen had tendered. The Complaints Board then considered that the T-shirt which DFD and Berendsen had tendered was from the same producer and had the same defined characteristics. The Municipality stated that Berendsen's T-shirt had received a special final treatment that made it not be see-through, but the case had no statement from Berendsen about such treatment or any indication of what such treatment consisted.

The Complaints Board therefore could not consider that Berendsen's T-shirt had received a final treatment that had an impact on whether or not it was see-through. DFD's claim that the Municipality had acted contrary to the procurement rules by rejecting DFD's tender as non-compliant and by not awarding the framework agreement to DFD was then successful. The award decision was therefore cancelled.

DFD then made a claim for compensation in the form of expectation damages of approx. DKK 4.1 million. During that part of the complaints procedure, the Municipality presented a statement from Berendsen concerning the final treatment of the company's T-shirts which have an impact on whether or not the T-shirt is see-through.

Although the Municipality had presented a statement from Berendsen, it did not change the Complaints Board's decision. In the compensation decision, the Complaints Board therefore considered that neither the T-shirt from Berendsen nor the one from DFD was see-through. In its decision, the Complaints Board did not find it likely that the Municipality would have cancelled the procurement or that the Municipality would have terminated the framework agreement in its term of six years. As DFD had submitted the tender with the lowest price, DFD was entitled to compensation in the form of expectation damages. The compensation was estimated at DKK 2.5 million.

The Municipality of Ringkøbing-Skjern has brought the Complaints Board's decision before the courts.

# 3. SELECTED DECISIONS ON ACCESS TO DOCUMENTS

## 3.1 Introduction

In chapter 3 of the 2016 Annual Report, the Complaints Board examined the rules governing the Board's consideration of applications for access to documents according to the Access to Public Administration Files Act and the Public Administration Act. These rules have not been amended since then, and reference is made to the 2016 Annual Report for further information. Also, the Complaints Board's practice was described in chapter 3 of the 2017-2019 Annual Reports. In 2020, the Complaints Board also decided to publish the Board's decision on access to documents to a greater extent so that also such decisions from 15 June 2020 would generally now become publicly available at the Board's website.

For that reason, the following will only be a supplementary account of the Complaints Board's case law on access in selected areas.

The Complaints Board sometimes make decisions on access to documents according to the special rules on access to environmental information. Such cases that are partially heard according to the rules in the previous Access to Public Administration Files Act (Consolidated Act No. 988 of 9 October 2012) are not normally considered separately in the Complaints Board's annual reports.

Whether a request for access to documents should be heard according to the Danish Environmental Information Act (*miljøoplysningsloven*) depends, *i.a.*, on whether the information to which access is requested is covered by the concept of "environmental information" as defined in Section 3 of the Environmental Information Act. The concept is very broad, and it is implied in, *i.a.*, the case law of the European Court of Justice that the concept must be construed likely. According to Section 3(1) item 3, the concept includes "*measures, including administrative measures such as policies, legislation, plans, programmes, environmental agreements and activities that affect or may affect each environmental element... and factors and measures and activities intended to protect these environmental elements*". It stands to reason that procurement procedures for contracts that may affect the environment in the given circumstances may be considered such "measures" and therefore can be comprised by the definition of environmental information in the Act.

In a decision from 2020 of a more general nature, however, the Complaints Board heard the issue of whether access to documents in a cancelled procedure is to be heard according to the act on access to environmental information or according to the general rules on access to documents in the Access to Public Administration Files Act and the Public Administration Act.

> **The Complaints Board's decision of 18 June 2020 (file no. 20/03844)**. The case concerned an issue regarding access to documents according to the Environmental Information Act in tenders submitted in a negotiated procedure concerning a contract on a permanent extension of existing sewage installations. According to the rules of the Utilities Directive, the tender was initiated

with preselection through a qualification procedure. The complainant had also complained to the Complaints Board for Public Procurement about the actual procurement.

However, the procedure which the information concerned was cancelled due to errors in the procurement documents, and the contracting authority was faced with a repeat procedure. As the procedure was cancelled, the Board established that it was not possible to conclude an agreement based on the procurement and tender documents to which the complainant requested access. Thus, it was not a measure which could affect the environment directly or indirectly. It was therefore not environmental information, and the complaint was therefore not subject to the Environmental Information Act.

## 3.2 The Complaints Board's competence in right of appeal cases pursuant to the Access to Public Administration Files Act

According to Section 37(1) of the Access to Public Administration Files Act, complaints against decisions on access may be brought separately and directly before the authority acting as the final appeals body in respect of the decision or the proceedings in the case where a request for access has been made. In the special notes to Section 37(1) of the Access to Public Administration Files Act, see Bill no. L 144 of 7 February 2013, it is provided that: "*In cases where the right of appeal against the substantive decision is subject to specific regulation, e.g. in the form of a dedicated appeals body, it follows from Subsection (1) that complaints against decisions on access to documents must also be brought before the special appeals body*". As mentioned in the 2017-2019 Annual Reports, it follows from Section 37 of the Access to Public Administration Files Act that the Complaints Board's competence in right of appeal cases follows the Board's subject-matter jurisdiction which is set out in the Complaints Board Act. According to this Act, the Board is competent to hear complaints against public contracting authorities' infringements of the public procurement rules.

Thus, the Complaint Board's competence is limited to specific procurement cases. If the contracting authorities have more general cases about procurement law issues which per se are not in the nature of procurement cases, decisions on access to documents can therefore not be referred to the Complaints Board for Public Procurement:

**The Complaints Board's decision of 30 June 2020 (file no. 20/04953).** The case concerned a complaint about the Department of the Danish Prison and Probation Service's rejection to grant access to material that was part of a case concerning an audit of the Department's observance of the procurement and purchase rules. The complaint was dismissed as the Complaints Board was not competent according to Section 37 of the Access to Public Administration Files Act. It was found important that the case about an audit which the request for access concerned not per se was in the nature of a procurement case which could be referred to the Complaints Board for Public Procurement and that the Board therefore was not competent to hear complaints about decisions on access in that case. In those regards, it was noted that if the relevant documents were also part of (procurement) cases that could be referred to the Complaints Board for Public Procurement, any decisions on access to documents in those cases could be referred to the Board.

**The Complaints Board's decision of 30 June 2020 (file no. 20/05221).** The case concerned the Danish Prison and Probation Service's rejection of access to the final audit report. This case was also dismissed with the same reason as in the previous case.

According to Section 39(1) of the Access to Public Administration Files Act, a complaint about the processing time regarding a request for access - just like a complaint about access according to Section 37 of the Act - can be referred separately and directly to the authority that is the final appeals body in respect of the decision or the proceedings in the relevant case. However, especially in relation to such cases, there is the issue of whether the Board is competent if the request for access about which the complainant is complaining about the processing time is not limited to one (or more) actual procurement cases.

**The Complaints Board's decision of 17 December 2020 (file no. 20/10449).** The case concerned a complaint about the processing time at the Danish Coastal Authority. The original request for access comprised all correspondence between the department and a (later) successful tenderer that was also the supplier according to a contract already concluded. The Board established that only a small number of mails concerned a specific procedure for which the Complaints Board for Public Procurement was the appeals body. The Complaints Board found that according to the principle in Section 39(1) of the Access to Public Administration Files Act, the complaint about the Danish Coastal Authority's processing time had to be with the authority to which the case concerning the most essential part of the request could be referred. However, as the mails mentioned only formed a limited part of the combined correspondence covered by the request, the Complaints Board found that according to an overall assessment, the request for access could not be considered a case about a procurement process which could be referred to the Complaints Board for Public Procurement. The Complaints Board then rejected hearing the case.

## 3.3 Internal information

As mentioned in the Complaints Board's 2017 and 2019 Annual Reports, according to Section 23(1) item 1 of the Access to Public Administration Files Act, the right of access does not apply to internal documents that have not been disclosed to outsiders. Section 23(2) dictates that documents are no longer considered internal when they are disclosed to outsiders, unless this is prescribed by law, for research purposes or other similar purposes.

**The Complaints Board's decision of 16 April 2020 (file no. 20/02582).** The case concerned, *i.a.*, the rejection of access to the respondent's internal correspondence. The complainant claimed that the correspondence could not be considered internal as the respondent had forwarded the correspondence to its lawyer. The Complaints Board upheld the rejection and noted that the respondent had only given the internal correspondence to its lawyer to use at an access case in relation to a complaints case at the Complaints Board for Public Procurement and that the handing over of the correspondence in those circumstances did not entail that the correspondence was then no longer internal, see Section 27 item 4 and Section 23(1) item 1 of the Access to Public Administration Files Act.

## 3.4 Exclusion of confidential business secrets from public access

As mentioned in the 2016-19 Annual Reports, the successful tenderer's tender often contains information relating to technical devices or processes or operating or business conditions that are covered by the exemptions in Section 30 item 2 of the Access to Public Administration Files Act and/or Section 15b item 5 of the Public Administration Act. However, the Complaints Board's case history often shows that a significant part of the successful tender's descriptions of the solution is often not the type of information that may be exempted from access pursuant to Section 30 item 2 of the Access to Public Administration Files Act or Section 15b of the Public Administration Act.

> **The Complaints Board's decision of 20 January 2020 (file no. 19/09001).** The case concerned a partial rejection of access to the contract that had been concluded with the successful tenderer in a procedure against which a complaint was made. Information in the agreement about "The content and length of the agreement", "Location", "The parties' acceptance", information about the date of the conclusion of contract and information about "Requirements for work wear and protective equipment etc.", "Collection tasks", "Pick-up equipment", "Penalty system" and "Breach" was not considered to be in the nature of trade secrets, and access was not granted.

According to the Complaints Board's practice, the derogation mentioned cannot lead to information about trade secrets which may normally be exempted from access not being handed over to the respondent public authorities as the granting of such access does not per se involve any noticeable imminent risk to the company affected.

> **The Complaints Board's decision of 02 March 2020 (file no. 20/00992).** In the Complaints Board's decision of 18 December 2019, the complainant was successful in a claim for cancellation of the award criterion in a procedure for bus services. In the subsequent compensation case, the claimant claimed expectation damages. In those regards, the complainant claimed that the respondent transport authority was not allowed access to the material which the company had sent for the purpose of proving the size of the loss (expectation damages). Thus, the complainant claimed that it was a matter of trade secrets, see Section 15 b of the Public Administration Act. The Complaints Board made a decision according to that provision. The Complaints Board initially established that the respondent transport authority had a real and significant interest in access and that the information was to be considered critical to the transport authority being able to manage its interests in the compensation case. The Board then established that no such fundamental considerations to the complainant existed, see Section 15 b item 5 of the Public Administration Act, and the document was to be exempted from the transport authority's access. The Board found it important that the transport authority had been founded pursuant to the Transport Authorities Act (*lov om trafikselskaber*) as part of the public administration and that it is subject to the rules of the Public Administration Act, including Section 27 of the Act concerning confidentiality. Thus, the decision in the compensation case about the transport authority's access did not involve a right to publication of the document in general, and in connection with the hearing of any requests for access according to the Access to Public Administration Files Act, the transport authority would therefore consider whether the information contained trade secrets according to Section 30 item 2 of the Access to Public Administration Files Act.

## 3.5 Exclusion of other documents

According to Section 27 item 4 of the Access to Public Administration Files Act, access does not include correspondence with experts to be used in court cases or when considering whether a case is to be conducted. Due to the quasi-judicial nature of the Complaints Board and as cases before the Board to a great extent - as is the case with arbitration cases that are expressly mentioned in the explanatory notes to the provision - replace legal proceedings in the ordinary courts , a case before the Complaints Board for Public Procurement is considered a "court case" pursuant to Section 27 item 4 of the Access to Public Administration Files Act, see the Complaints Board's decision of 11 September 2015, Wind People v the Danish Energy Authority, specifically pages 40 et seq.

See also the above case in which, however, there was also an obvious possibility of legal proceedings in the courts:

> **The Complaints Board's decision of 20 January 2020 (file no. 19/09001).** The Complaints Board established that correspondence between the respondent utility company and the company's legal advisor could be exempted according to the provision in Section 27 item 4 of the Access to Public Administration Files Act. It was found important that a current complaints case was pending before the Complaints Board for Public Procurement, that the Board in its interim decision in the procurement law complaints case had found that the *prima facie* condition (that the complaint must be well-founded) was met and that legal proceedings therefore was to be considered an obvious possibility. Some of the correspondence with the company's legal advisor which, *i.a.*, concerned the planning of meetings was not specifically considered covered by the provision.

# 4. DANISH JUDGMENTS ON THE COMPLAINTS BOARD'S CASES

This chapter gives an account of final judgments handed down in 2020 in cases which have been heard by the Complaints Board. When making its decisions, the Complaints Board asks the parties to notify the Board if the case is referred to the courts and to be informed of the outcome of the case. However, it is not certain that the Board is informed of all such cases. Judgments which did not become final in 2020, because they were appealed to a higher court, have not been included here.

*The Western High Court's judgment of 21 August 2020, Staten og Kommunernes Indkøbsservice A/S v Dansk Cater A/S, see the Complaints Board's decision of 9 February 2018 (2018 Annual Report, p. 33)*

The case concerned a procurement procedure under Title II of the Public Procurement Act for the supply of food at an estimated value of DKK 1.6 billion distributed on approx. 4,500 product lines. The award criterion was best price-quality ratio. In its decision of 9 February 2018, the Complaints Board decided that the contracting authority's evaluation for the subcriterion Price was unfit to identify the most economically advantageous tender and that the qualitative evaluation had not been made based on a representative sample and therefore had also not been fit to help identify the most economically advantageous tender.

SKI appealed to the District Court, however, only with respect to the evaluation model for the subcriterion Price. The district court referred the case to the high court, and the judgment was therefore made by the high court as the court of first instance.

According to the Complaints Board's decision, it may be required from an evaluation model for an assortment tender which it concerned that the evaluation is representative in relation to the anticipated purchase, see the principles on equal treatment and transparency. This was not the case. Thus, no estimate had been made of the purchase need/volume, and no weighing had been made of each product line.

The High Court upheld the Complaints Board's decision and also referred to Section 1 of the Public Procurement Act (about the purpose of the Act) and Section 161 (according to which a contracting authority shall award the contract to the tenderer which has submitted the most economically advantageous tender).

*Judgment of the City Court of Copenhagen of 21 October 2020, the Prosecution Service v Staten og Kommunernes Indkøbsservice A/S, see the Complaints Board's decision of 15 February 2019, KONE A/S v Staten og Kommunernes Indkøbsservice A/S (2020 Annual Report, page 38)*

In its decision of 15 February 2019, the Complaints Board upheld a claim for "ineffective contract" as of 1 April 2019 as part of a framework agreement that had had effect as of 1 March 2018. As SKI is not covered by Section 19(1) of the Complaints Board Act, the Complaints Board filed a police report according to Section 18(3) instead of imposing an alternative penalty.

The Judgment of the City Court of Copenhagen concerns the size of the penalty which SKI must pay.

On 15 October 2019, SØIK issued a fixed-penalty notice to SKI in the amount of DKK 440,000 after first having obtained an advisory opinion from the Danish Competition and Consumer Authority about the assessment of the penalty according to the Public Procurement Act. According to the judgment, the prosecution believed that calculation of the penalty should be based on the contract value of the spare parts at issue estimated by the Complaints Board, minimum DKK 22 million.

SKI believed that the calculation of the penalty should be made considering the specific circumstances of the case and the special agreement structure, for example that it was a matter of 63 framework agreements with successive commencement and that the value of the contracts which were allowed upheld could be calculated objectively based on the procurement documents. SKI estimated the value at the time of the procurement of the upheld framework agreements at DKK 4,262.941,06 and claimed that the penalty should be calculated with 5% of that amount.

Referring to, *i.a.*, the explanatory notes to the Act, the Court stated that the intention was for the economic sanction to be calculated based on the estimated value of the part of the contract which is allowed upheld in spite of the infringement of the rules. Thus, the penalty should be determined based on the part of the contract that was already fulfilled as at 1 April 2019, and the options not exercised should not be part of the basis for the calculation of the penalty.

The court also found that the special agreement structure with 63 individual framework agreements with different commencement dates should be considered and also that some framework agreements had not become effective and thus not enforced in whole or in part as at 1 April 2019, and they therefore were not to form part of the basis for the calculation of the penalty.

There was agreement that for the categorisation of the offence, a percentage of 5% should be used. The Court then set the penalty at DKK 220,000, see Section 20 of the Complaints Board Act, see Section 22, see Section 19(2) item 3, see Section 18(2) item 3, see Section 17(1) item 1.

*The District Court of Odense's judgment of 6 November 2020, TCA Anlæg A/S v Assens Spildevand A/S, see the Complaints Board's decision of 21 February 2019*

The case concerned a negotiated procedure according to Title II of the Public Procurement Act for the construction of a construction project as a turnkey contract with the award criterion best price-quality ration at an estimated value of DKK 100 million. The complaint was filed by an unsuccessful tenderer and to the Complaints Board included a number of claims about the contracting authority's evaluation of the tenders etc. The Complaints Board did not uphold any of the claims.

The complainant then appealed to the court and now also claimed, *i.a.*, that the successful tenderer, Per Aarsleff A/S, should have been excluded due to a conflict of interests as a project manager with the contracting authority's consulting engineering firm, who had had a key role, *i.a.*, in connection with the negotiations with the tenderers and with the evaluation of the tenders, was married to a financial manager in the Per Aarsleff group.

The court found that the contracting authority had been obliged to exclude the successful tenderer pursuant to Section 136 item 1 and referred to the circumstance that it fell on the contracting authority to prove that no partiality existed specifically with the engineering firm's employee. This burden of

proof was not lifted, see also the judgment of the EU Court of justice of 12 March 2015 in C-538/13, eVigolo, paragraph 43.

The court then had no reason to consider whether there were other conditions in the successful tender that made the award of the contract be contrary to the principles of equal treatment and transparency.

There was no basis to establish that the tender from TC Anlæg that had been found compliant in connection with the submission of the tender was non-compliant.

It was the responsibility of Assens Spildevand, which had violated the procurement rules by not rejecting the tender from Aarsleff, to render it probable that it would not have accepted the tender from TC Anlæg but that it would rather have cancelled the procurement, see U.2012.2952H. During the assessment, it was found important, *i.a.*, that the difference in the scores between the tenders from Per Aarsleff and TC Anlæg was very modest, and the burden of proof was not considered lifted.

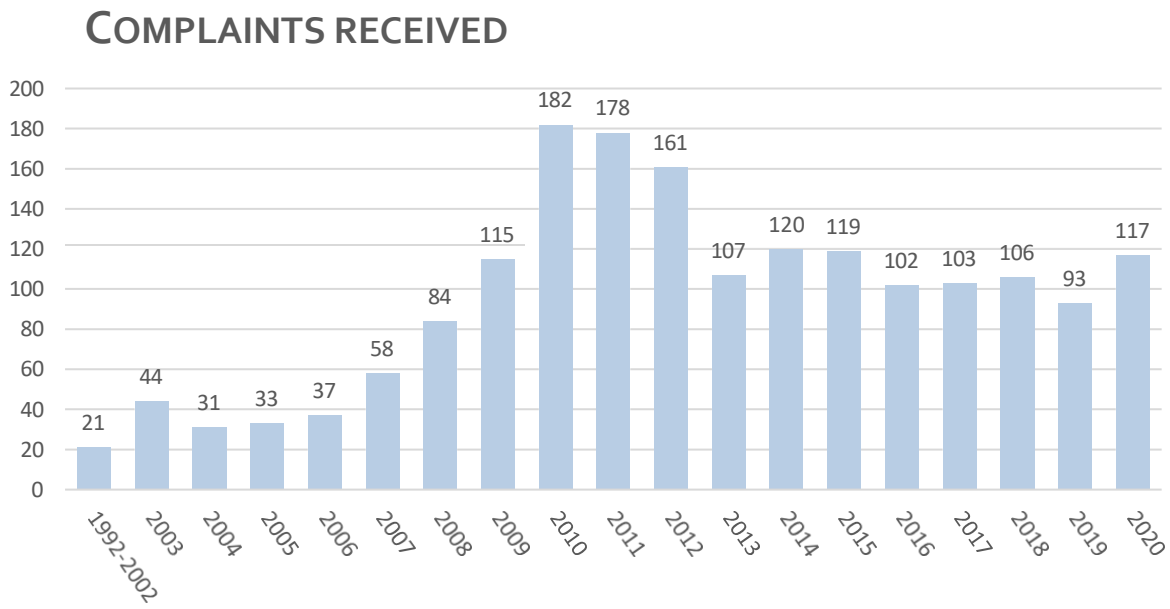
The Complaints Board ordered Assens Spildevand to pay an estimated compensation of DKK 5 million to cover TC Anlæg's loss from not having been awarded the contract.

# 5. THE COMPLAINTS BOARD FOR PUBLIC PROCUREMENT'S ACTIVITIES IN 2020

The statistical information below is based on a manual count and on the annual statistics prepared each year by the Complaints Board.

## 5.1 Complaints received

The Complaints Board received 117 complaints in 2020. The below overview illustrates the development in the number of complaints received in 1999-2020.



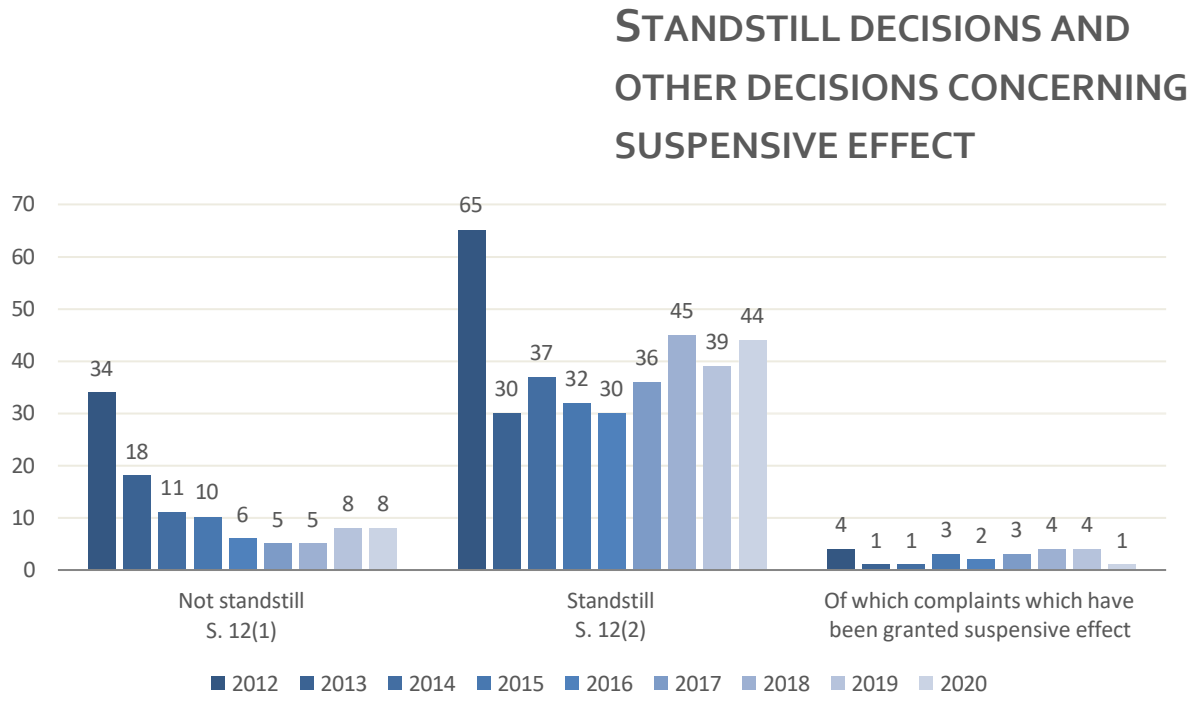

The number of complaints received in 2020 is above the level in 2019 but still significantly lower than in 2010-2012.

As stated in section 4.1 of the 2013 Annual Report, the sharp decline in the caseload was due to the amendment of the Enforcement Act (now the Complaints Board Act) and the Complaints Board Order in 2013, the purpose of which was to bring down the increasing number of complaints. The increase of the complaint fee to DKK 20,000 in cases on infringement of the Public Procurement Directive (the majority of cases) as well as the fact that the complainant risks being ordered to pay the respondent contracting authority's costs must be assumed to be decisive factors. The slight decline in the number of cases in 2016-2019 may be explained by the fact that, because of the implementation of the major amendments to the substantive procurement rules, potential complainants have been more cautious, and by the fact that the Complaints Board is no longer competent to adjudicate cases on purchases below the thresholds without a clear cross-border interest, see Title V of the Public Procurement Act.

## 5.2 Standstill cases and other decisions regarding suspensive effect

As shown below, in 2020, the Complaints Board made interim decisions in eight cases where a request for suspensive effect had been made under Section 12(1) of the Complaints Board Act, and interim decisions in 44 cases received in the standstill period pursuant to Section 12(2) of the Act, where the Complaints Board has a statutory deadline of 30 days to make its decision on whether to grant suspensive effect. The Board decided to grant suspensive effect to a complaint in one case in 2020, see section 1.4 above and the description of the decision in chapter 2. In some cases, the Complaints Board's decisions on suspensive effect are made in writing and not as an actual order. These decisions are also included in the figures.

The number of standstill decisions and other decisions etc. regarding suspensive effect made in 2012-2020 is shown below.

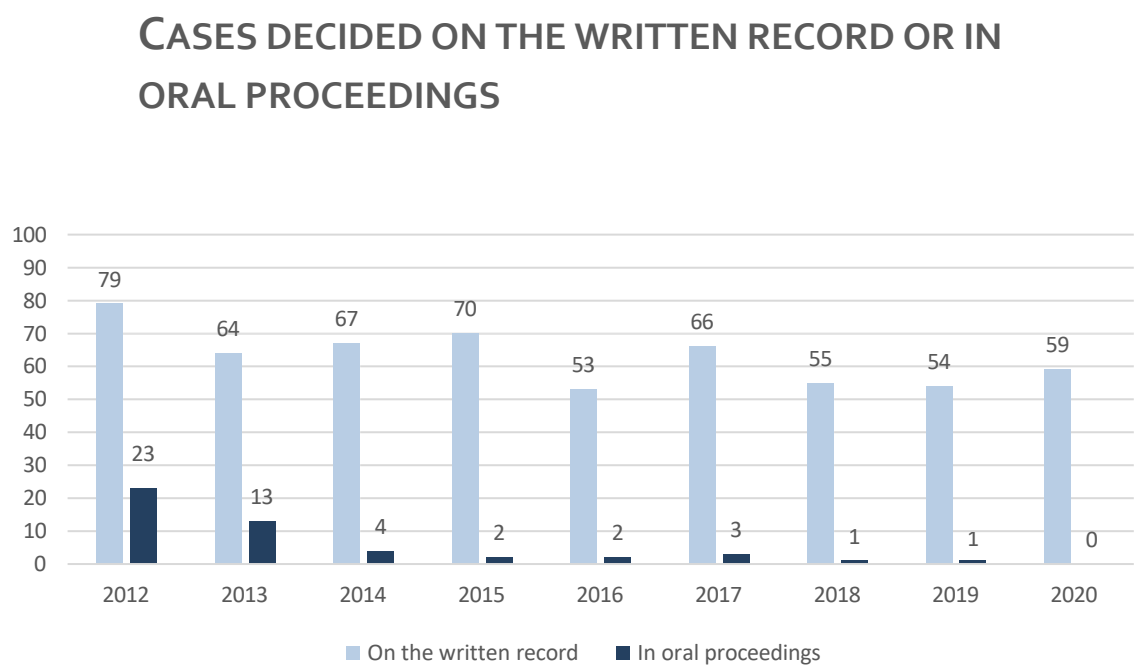



In a number of cases, the Complaints Board's decisions etc. regarding suspensive effect will lead to withdrawal of the complaint due to the Complaints Board's prima facie orders where the Complaints Board based on a preliminary assessment delivers an opinion on whether the public procurement rules are likely to have been violated. Such decisions are very resource-intensive for the Complaints Board, as the decision in most cases must be prepared and handed down within 30 days under considerable time constraints, and as the decisions, although they are preliminary in nature, often comprise a comprehensive statement of claim and detailed grounds. Generally, the standstill rules and the rules on suspensive effect imply that the Complaints Board in a significant proportion of all cases is required to make two decisions, namely a decision on suspensive effect and a substantive decision on the alleged infringements. In addition to this are possible decisions on compensation and perhaps also one or more decisions on access during the case.

## 5.3 Cases decided on the written record or in oral proceedings

The 44 cases in which the Complaints Board adjudicated on their merits in 2020 (see paragraph 5.4) all were decided on the written record.

Below is an overview of cases considered on the written record and in oral proceedings, respectively, in the years 2012-2020.



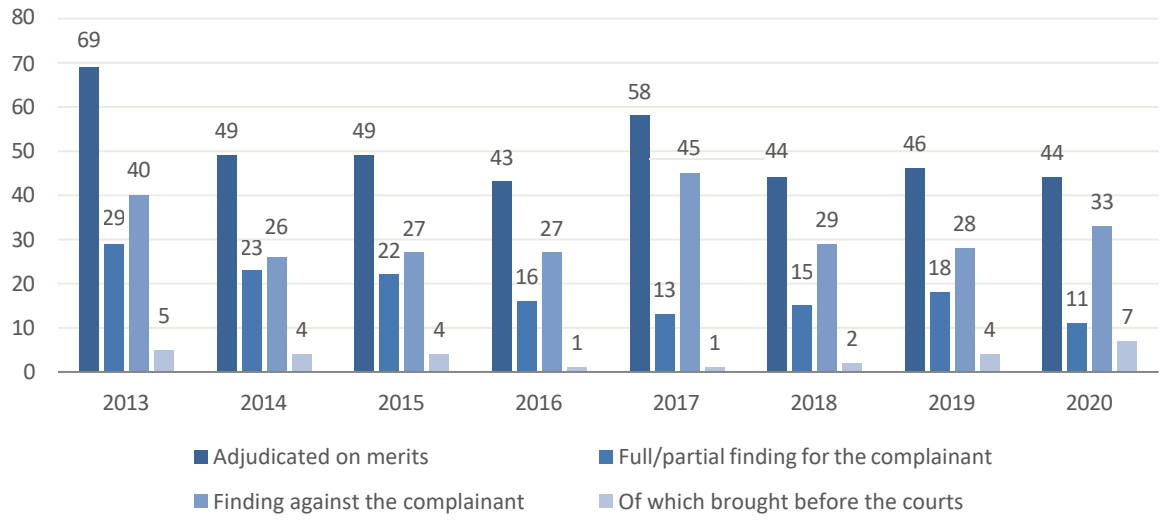

Note: These figures include rejected cases.

The distribution of cases decided on the written record/cases adjudicated in oral proceedings shows that only very few cases are reviewed in oral proceedings. As stated in section 4.3 of the 2013 Annual Report, this decline is in accordance with the legislator's intention. In 2010, Section 11(1) of the Enforcement Act (now the Complaints Board Act) provided that a case is prepared by the parties exchanging written pleadings and is adjudicated on this basis unless the president of the case decides that the case needs to be heard in oral proceedings. In 2009, which was the year before the coming into force of Section 11(1), there was an equal distribution of these two types of cases. During the case preparation, the parties may request that oral proceedings be held, but experience shows that this only happens in very few cases.

## 5.4 Resolved cases and their outcome

The Complaints Board adjudicated 44 cases on their merits in 2020. Of these cases, 11 complaints were fully or partly sustained, while 33 complaints were unsuccessful. In the majority of cases, the Complaints Board's decision is the final ruling in the case. Of these 44 decisions, only seven where thus referred to the courts of law. The number of decisions referred to the courts is slightly higher than previous years.

## RESOLVED CASES AND THEIR OUTCOME




Note: The number of cases brought before the courts is primarily based on the number of writs submitted to the Complaints Board for information. The Complaints Board cannot be certain that it receives all writs. The Complaints Board requests a copy for information of all writs submitted to the courts in relation to decisions made by the Board.

The below table shows that the percentage of cases upheld in 2020 was 25%, thus the lowest for 2011-2020.

The figures in the graph and in the table below do not include prima facie decisions where they are the final decision made in a complaints case. In 2020, the Complaints Board delivered 25 prima facie decisions. In 3 of these, the Board considered the cases to be prima facie cases (that the complaint seems to be well-founded). In 2 cases, this led the contracting authority to cancel the procurement procedure or withdraw its award decision after which the complaint was withdrawn. The interim decision was thus the Board's final decision in the case.

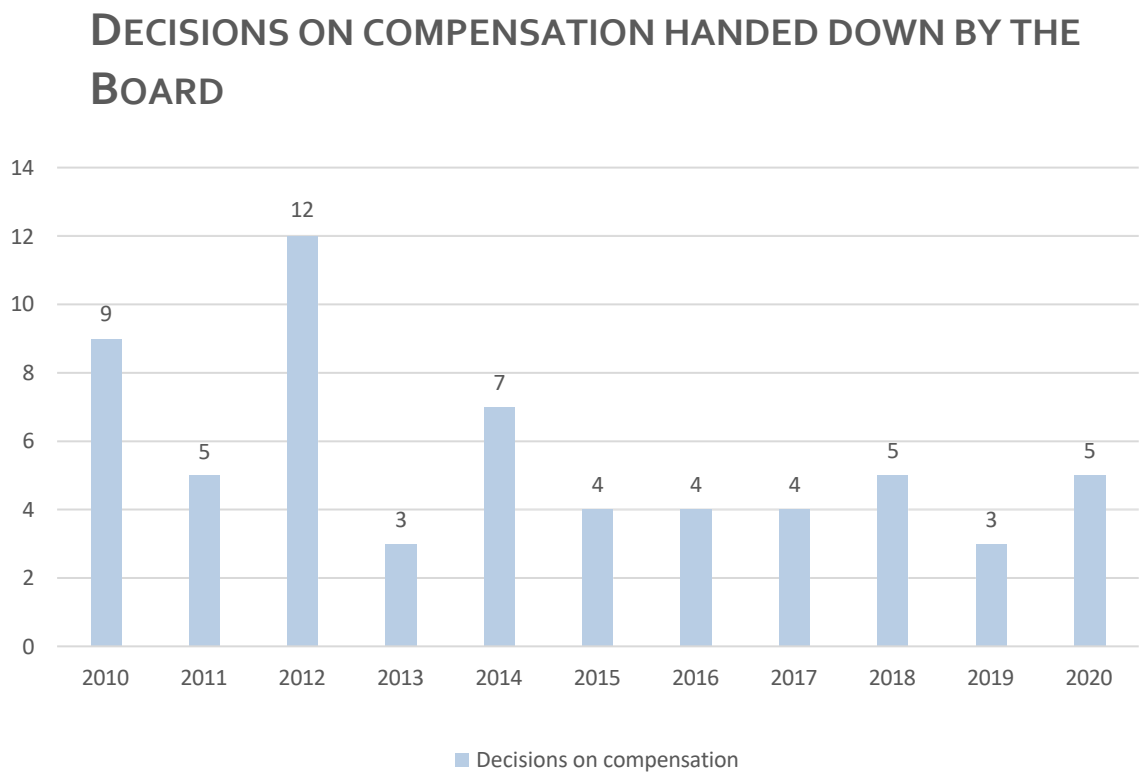
In the remaining 22 prima facie decisions, the Complaints Board assessed that the case was not a prima facie case. In 15 of these, the complaint was revoked, which made the interim decision the final decision in the case.

| Year | Full/partial finding for the complainant | Finding against the complainant |
|---|---|---|
| 2013 | 42 % | 58 % |
| 2014 | 47 % | 53 % |
| 2015 | 45 % | 55 % |
| 2016 | 37 % | 63 % |
| 2017 | 26 % | 74 % |
| 2018 | 34 % | 66 % |
| 2019 | 39 % | 61 % |
| 2020 | 25 % | 75 % |

## 5.5 Decisions on compensation

In 2020, the Complaints Board made five decisions on compensation.

The average length of proceedings for the issue of compensation was approx. six months.

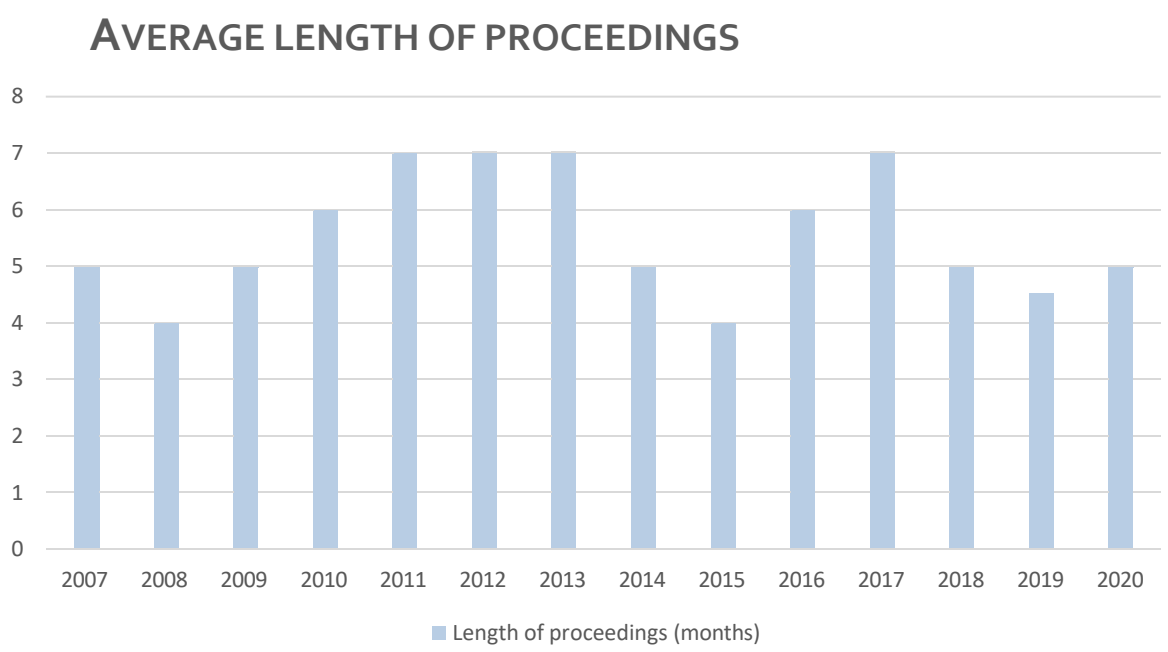



As described in section 4.5 of the 2013 Annual Report, experience shows that in many of the cases in which the Complaints Board has found fully or partly in favour of the complainant in its substantive decision, the issue of compensation is resolved without the Complaints Board, where the parties reach a settlement instead of letting it be up to the Complaints Board to decide the case in a decision on compensation. The number of decisions on compensation in 2012 should be compared with the large number of complaints received in 2010 and 2011 (182 and 178 complaints, respectively).

## 5.6 Average length of proceedings

The Complaints Board's average length of proceedings in 2020 was 5 months.

Below is an overview of the development in the average length of proceedings for rejected cases and substantive decisions in months in 2007-2020.




The average length of proceedings, which showed a decreasing trend in 2014 and 2015 from seven months in 2011-2013 to five months in 2014 and to four months in 2015, increased to six months in 2016 and to seven months in 2017, which is on a level with 2010-2013. In 2018, the length of proceedings decreased again to five months and to 4.5 months in 2019.

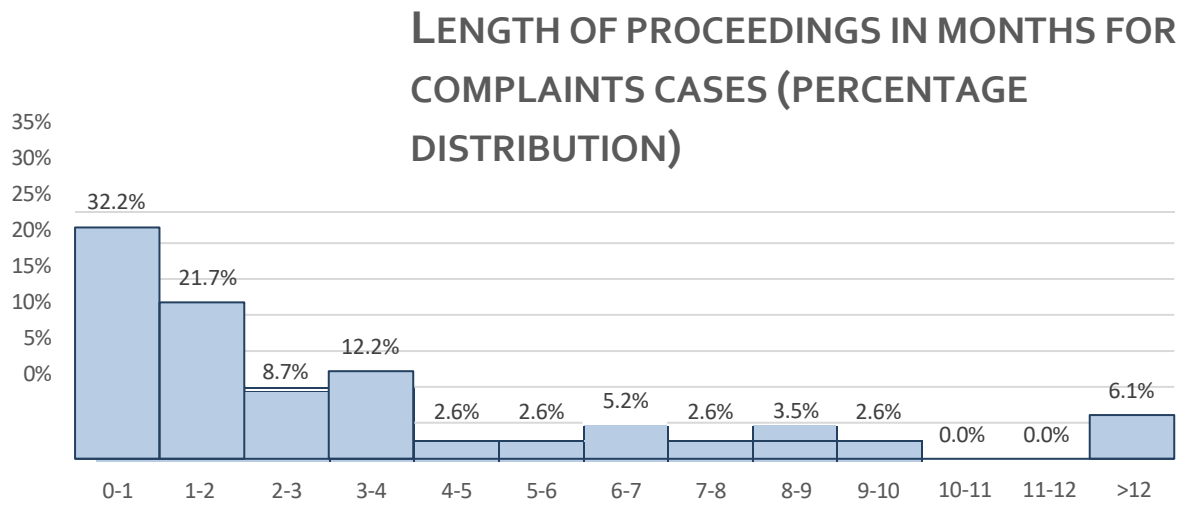
The average length of proceedings increased to five months in 2020, which is on a level with the length of proceedings in 2007, 2009, 2014 and 2018.

At the end of 2019, there were 40 pending cases which is more or less equal to 2017-2019.

## 5.7 Length of proceedings in months for complaints cases (percentage distribution)

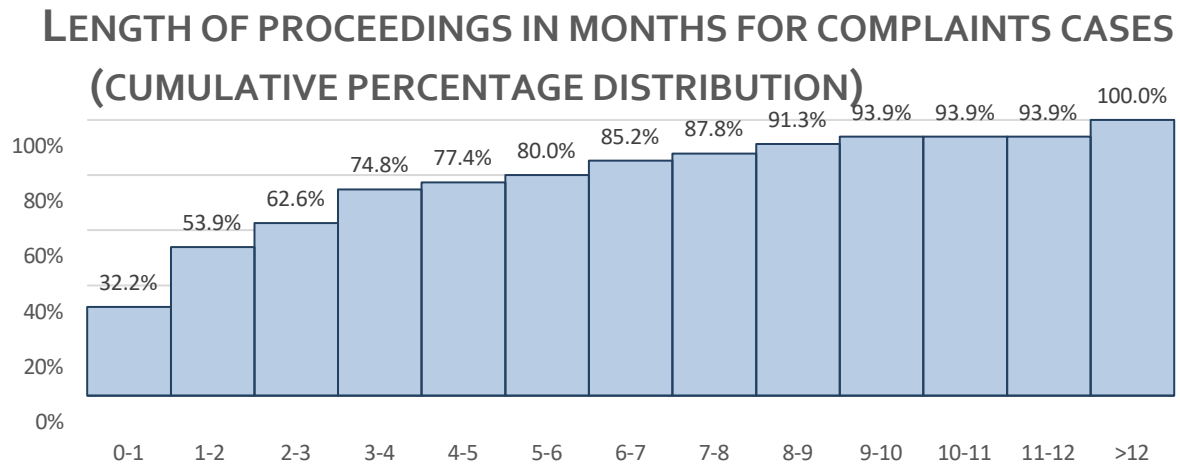
The figure below shows the percentage share of all cases that were closed within 0-1 month, 1-2 months etc. and more than 12 months in 2020. This includes all cases, i.e. also cases where the complaint was rejected and cases where the complaint was withdrawn, including after the Complaints Board's prima facie decision. Decisions on compensation, which are few and far between, are not included. Reference is made to section 5.8 for an overview of the cumulative percentage distribution of the length of proceedings in months for complaints cases.

Proceedings are regarded as completed when the Board makes a substantive decision in the case or rejects the complaint, or when the complaint is withdrawn. For more information about the length of proceedings in cases where a decision on compensation is also made, please see section 5.5.




## 5.8 Length of proceedings in months for complaints cases (cumulative percentage distribution)

The figure below shows the cumulative percentage distribution of the length of proceedings in 2020.



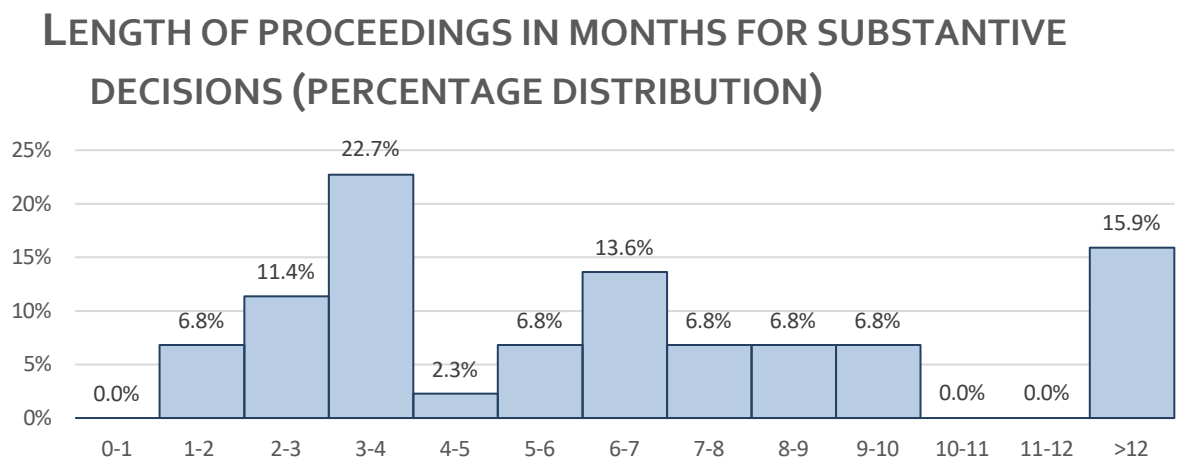

Approx. 32 % of the cases were closed within the first month of receipt of the complaint in 2020 against 29 % in 2013, 33 % in 2014, 47 % in 2015, approx. 39 % in 2016, approx. 27 % in 2017, 33 % in 2018 and approx. 27 % in 2019. Approx. 54 % of the cases were closed within the first two months of receipt of the complaint in 2020 against 42 % in 2013, 54 % in 2014, 62 % in 2015, 53 % in 2016, approx. 41 % in 2017, approx. 56 % in 2018 and approx. 48 % in 2019. It can also be seen that approx. 63 % of all cases received in 2020 were closed within three months against 49 % in 2013, 60 % in 2014, 69 % in 2015, 61 % in 2016, approx. 49 % in 2017, approx. 66 % in 2018 and approx. 56 % in 2019. The figures for 2020 include, *i.a.*, 56 cases where the complaint was withdrawn. In about one third of these cases, the complaint was withdrawn following the Complaints Board's prima facie decisions where the Complaints Board makes a preliminary decision on whether the public procurement rules have likely been violated. In addition, 80 % of the cases in 2020 were closed within five-six months of receipt of the complaint against 37 % in 2013, 62 % in 2014, 65 % in 2015, 74 % in 2016, approx. 77 % in 2017, approx. 81 % in 2018 and approx. 84 % in 2019 and approx. 94 % of the cases are brought to a conclusion within

nine-ten months against 86 % in 2013, approx. 87 % in 2014, 92 % in 2015, 87 % in 2016, 88 % in 2017 and 2018 and approx. 97 % in 2019.

As can be seen, the length of proceedings is generally short, and the Complaints Board closes a significant share of its cases within a short period of time considering their scope, factual and legal complexity and the often extremely large sums involved.

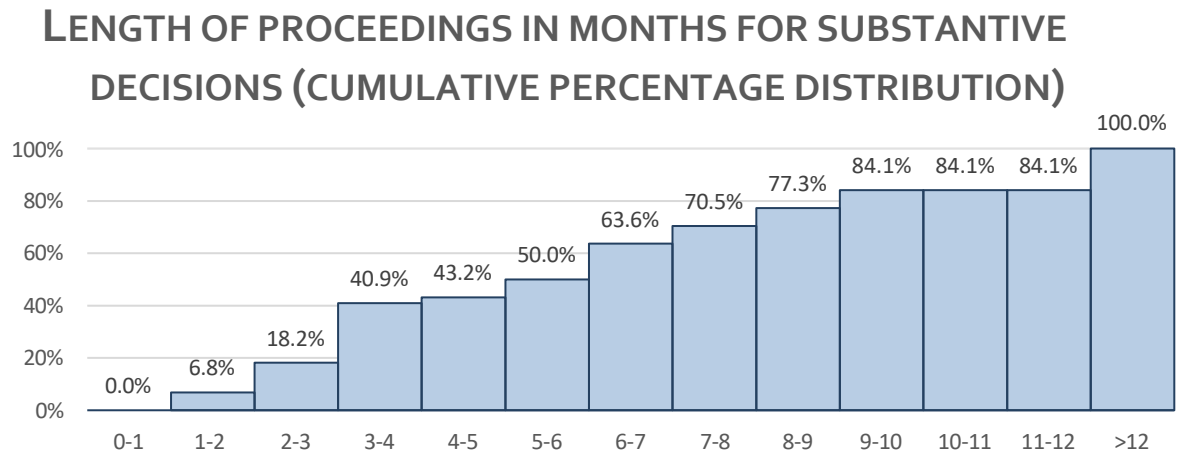
## 5.9 Length of proceedings in months for substantive decisions (percentage distribution)

The figure below shows the percentage share of all substantive decisions that were closed within 0-1 month, 1-2 months, 2-3 months etc. and more than 12 months in 2020.




## 5.10 Length of proceedings in months for substantive decisions (cumulative percentage distribution)

The figure below shows the cumulative percentage distribution of the length of proceedings for substantive decisions in 2020.




The table shows that substantive decisions were made in approx. 41 % of cases within three-four months in 2020 against 20 % in 2013, 30 % in 2014, 41 % in 2015, 44 % in 2016, 38 % in 2017, 34 % in 2018 and 37 % in 2019. Furthermore, in 2020, substantive decisions were made within five-six months

in 50 % of cases against 37 % in 2013, 62 % in 2014, 65 % in 2015, 54 % in 2016, 57 % in 2017, 59 % in 2018 and approx. 67 % in 2019. It can also be seen that a substantive decision was made within eight-nine months in approx. 77 % of cases against approx. 69 % in 2013, 87 % in 2014, 90 % in 2015, 71 % in 2016, 76 % in 2017, approx. 70 % in 2018 and 87 % in 2019. The remaining 23% (2013: 31 %, 2014: 13 %, 2015: 10 %, 2016: 29 %, 2017: 24 %, 2018: 30 % and 2019: 13%) of cases where the length of proceedings was longer belong in the category of particularly large and legally/technically complex cases which necessarily take longer to process. With regard to the Complaints Board's length of proceedings for substantive decisions, it is important to note that the work does not only involve making the substantive decision, but that in many cases considerable resources go into making one or more decisions on suspensive effect and access pursuant to the Public Administration Act, see section 5.2 above.

# 6. THE COMPLAINTS BOARD'S OTHER ACTIVITIES

Due to the COVID-19 pandemic, the Complaints Board's outreach activities in 2020 were limited compared to previous years.

On 15 June 2020, the Complaints Board and the Board's secretariat participated in a virtual meeting in Network of first instance procurement review bodies, arranged by the EU Commission.

The President of the Complaints Board, Nikolaj Aarø-Hansen made a presentation at a virtual procurement conference arranged by the Norwegian complaints board, Klagenemnda for offentlige anskaffelser (KOFA), on 19 November 2020.