

Complaints Board for Public Procurement

2024 Annual Report

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INTRODUCTION

The Complaints Board for Public Procurement hereby publishes its 12th annual report.

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

Chapter 2 contains summaries of a number of the Board's decisions from 2024 that are considered leading cases or are of particular interest otherwise. The decisions of the Complaints Board are published on an ongoing basis on the Complaints Board's website at www.klfu.dk.

Chapter 3 contains summaries of selected decisions on access to documents which may be considered to be of general or wider interest. Selected decisions on access to documents are also published on the Board's website, but to a lesser extent.

Chapter 4 provides an account of Danish judgments in cases that were previously heard by the Complaints Board.

Chapter 5 contains the Complaints Board's statistics for 2024. In 2024, the Complaints Board received 67 complaints – a decrease of about 7% from 2023 – and closed 73 cases. The average time spent by the Complaints Board on all closed cases was 5.1 months. The way in which the Complaints Board compiles its statistics has changed in comparison with previous years, and for this reason, the calculation of the time to process cases cannot be compared with previous years, see chapter 5.

Chapter 6 describes the Board's other activities in the course of the year.

Jakob O. Ebbensgaard, President

Viborg, June 2025

1. COMPLAINTS BOARD FOR PUBLIC PROCUREMENT

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 92/13/EEC). The Board's activities are currently governed by the Danish Act on the Complaints Board for Public Procurement (the Complaints Board Act) (*lov om Klagenævnet for Udbud (klagenævnsloven)*), see Act no. 448 of 8 May 2025, which contains 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 Executive Order on the Complaints Board), most recently amended by Executive Order no. 178 of 11 February 2016. The Complaints Board Order regulates, inter alia, the submission of complaints and the Complaints Board's procedure.

1.2 The Complaints Board's composition

The Complaints Board's organisation is laid down in Section 9 of the Complaints Board Act and Section 1 of the Executive Order on the Complaints Board.

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. In 2024, the Complaints Board has been temporarily composed of five High Court judges and five 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 expand the number of participating members from the presidency and experts in the adjudication of a case. For information on this matter, please refer to Section 1.5 below.

The Complaints Board's expert members are appointed among people with knowledge within fields such as building and 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 Executive Order on the Complaints Board. The expert members are independent in their duties as experts of the Complaints Board and are thus not subject to powers of direction or supervision of the authority or organisation where they have their principal occupation or the authority or organisation that nominated them.

In 2024, the Complaints Board's presidency was composed of the following judges:

President of the Complaints Board for Public Procurement:

Jakob O. Ebbensgaard, High Court Judge

Other members of the Complaints Board's presidency:

- Erik P. Bentzen, High Court Judge
- Jesper Stage Thusholt, Judge
- Jesper Jarnit, High Court Judge
- Mette Langborg, Judge (until 18 December 2024)
- Morten Juul Nielsen, Judge
- Ane Røddik Christensen, High Court Judge
- William Lindsay-Poulsen, Judge
- Johann Herzog, High Court Judge
- Mads Stockholm, Judge (from 26 January 2024)
- Lise Troelsen, Judge (from 19 December 2024)

On 15 April 2024, a new appointment period came into effect for the expert members of the Complaints Board. The names of the expert members of the Complaints Board for the period prior to that date are stated in the 2023 Annual Report.

As of 15 April 2024, the following expert members have been appointed/reappointed:

- Pernille Hollerup, Senior Director
- Preben Dahl, General Counsel
- Claus Pedersen, General Counsel, LLM
- Birgitte Nellemann, Office Head
- Kurt Helles Bardeleben, Lawyer
- Maria Haugaard, Office Head
- Mikael Kenno Fogde, Lawyer
- Rikke Fog Bach, Sales Manager
- Christian Lund Hansen, Chief Advisor
- Anette Gothard Mikkelsen, Office Head
- Mads Severin Holm, Lawyer
- Linda Norstrøm Nissen, Lawyer
- Julie Ramhøj Meisner, Legal Director
- Malene Dall Sørensen, Advisor (until 22 October 2024)
- Dorthe Kristensen Balshøj, Associate Professor
- Jesper Nørholt, Lawyer
- Dorte Bjerring Friis-Vigh, Centre Manager
- Randi Bach Wrengmose, Manager
- Cecilie Førby, Tender and Contracting Manager
- Morten Qvist Fog, Specialist (from 22 October 2024)
- Carina Risvig Hamer, Professor (from 19 December 2024)

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 Complaints Board's President is the head of the secretariat, which had four lawyers and two secretaries for the major part of 2024.

The lawyers of the Complaints Board prepare the cases and assist to the greatest extent possible in preparing draft decisions. In addition, the lawyers assist the Complaints Board's president with various management tasks. The secretaries of the Complaints Board participate in the case preparation, answer questions about whether a complaint has been lodged during the standstill period, carry out a number of administrative tasks and provide telephone guidance on complaints. In addition, there are a number of joint tasks for the Danish Appeals Boards Authority, where, inter alia, the legal officers also assist with servicing other boards.

In 2024, the secretariat consisted of:

- Maiken Nielsen, Legal Head Advisor, MSc in Business Administration and Commercial Law
- Tanja Bøtker Lindgren, Legal Special Advisor, LL.M
- Louise Dissing Jensen, Legal Administrative Officer, MSc in Business Administration and Commercial Law
- Stine Loftager Rasmussen, Legal Administrative Officer, MSc in Business Administration and Commercial Law (until 1 March 2024)
- Ingo Zubcevic Eriksen, Legal Administrative Officer, LL.M
- Mia Cecilie Jørgensen, Legal Administrative Officer, MSc in Business Administration and Commercial Law
- Heidi Thorsen, Administrative Officer
- Katrine Kirkegaard Gade, Administrative Officer (until 1 September 2024)
- Anja Vibe Visby Bunch, Junior Clerk (Administrative Officer from 1 September 2024)
- Camilla Rytter, Junior Clerk (from 1 May 2024)

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

In accordance with the first sentence of Section 10(1)(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 Section 1 and Section 193 of the Public Procurement Act
- EU law on the conclusion of public contracts and supply contracts (the EU public procurement rules)
- Financial sanctions imposed by the EU against third countries pursuant to the Treaty on the Functioning of the European Union concerning the award of public contracts
- Law on collecting tenders in the construction sector (Act on Invitations to Tender – *tilbudsloven*)

Pursuant to Section 37 of the Danish Access to Public Administration Files Act (*offentlighedsloven*), the Complaints Board is the appeals body for the consideration of complaints of other authorities' decisions on access to documents in public procurement cases. The Complaints Board is the final appeals body for local and regional governments' violations of the Danish Executive Order on Reference Bids (Executive Order no. 607 of 24 June 2008) (*kontrolbudsbekendtgørelsen*) as well as in particular areas where the Complaints Board has status as an appeals body by law or in accordance with law.

The majority of cases dealt with by the Complaints Board concern the Public Procurement Act, which mainly transposes the Public Procurement Directive (Directive 2014/24/EU) and other EU public procurement rules, including the Utilities Directive (Directive 2014/25/EU), the Concession Directive (Directive 2014/23/EU) and the Defense and Security Directive (Directive 2009/81/EC), while only a very limited 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. Reference is made to the article in the Danish weekly case law reports 2013 B, pages 241 et seq. (Michael Ellehaug: *Erfaringer med håndhævelsen af EU's udbudsregler* (Experience with the application of the EU public procurement rules)).

As a source of law, the Complaints Board's decisions are subordinate to judgments from Danish courts of law and the Court of Justice of the European Union. However, only a small share of the Board's decisions is brought before the courts of law; in 2024, it only happened once that a decision of the Complaints Board was brought before the courts. The practice of the Complaints Board is therefore considered an important source of law in the application of the public procurement rules in Denmark. Furthermore, the Complaints Board has the advantage of being able to act faster than the courts. In 2024, the average length of proceedings for public procurement cases was 5.1 months, and to this should be added that a very large portion – approx. 56% – 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). See Chapter 5 below.

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 (Section 12(1) of the Complaints Board Act), the Complaints Board may, on request, 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 the opposite.

Reference is made to Mette Frimodt Hansen and Kirsten Thorup: Standstill and suspensive effect in public procurement law, in the Danish weekly case law reports 2010 B, page 303 et seq., and Katja Høegh and Kirsten Thorup: Standstill and suspensive effect in public procurement law – again, in the Danish weekly case law reports 2016 B, page 403 et seq., and the same in the chapter Standstill and suspensive effect in public procurement law in Steen Treumer (ed.) Public 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 is made on the current preliminary basis and 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 existing 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 violations have been committed which, in the circumstances, should cause the respondent to consider annulling 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 deciding in its favour in the subsequent substantive decision in the case.

Sometimes, suspensive effect is requested 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, the Complaints Board may instead decide to settle the case so that the Complaints Board will not decide on whether to grant suspensive effect, but will instead issue a final decision (immediate decision). The parties will then be allowed to submit supplemental pleadings. Three immediate decisions were issued in 2024.

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 annul the contracting authority's unlawful decisions or cancel a procurement procedure;
- to declare a contract ineffective and/or;
- to impose an alternative sanction on the contracting authority;
- to file a police report for the purpose of a fine;
- to order the contracting authority to pay compensation.

"Ineffective contract" in combination with the rules on alternative sanctions / filing of a police report 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.

Section 185(2) of the Public Procurement Act dictates that if an award decision is annulled 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 apply where the "ineffective contract" sanction applies, see the first and second sentences of Section 185(2), points 1 and 2 of the Public Procurement Act. A 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 believes in "good faith" 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. See the above-mentioned article by Katja Høegh and Kirsten Thorup in the Danish weekly case law reports 2016 B, page 403 et seq., with reference to, among other things, the Complaints Board's decision of 7 May 2015, *Rengoering.com A/S v Ringsted Kommune*. 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. Wherever possible, the Complaints Board's secretariat will reply to 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 therefore is not covered by Section 19(1) of the Complaints Board 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 decision of the Complaints Board of 16 September 2022, *Electrolux Professional A/S v Alabu Bolig* (referred to in the Board's Annual Report 2022, chapter 2), in which the Complaints Board filed a police report. The Complaints Board has not filed any police reports in 2024.

The case law overview shown at the Complaints Board's website in relation with the Annual Report contains a number of 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, the Complaints Board 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. The power may be exercised in cases of principle, of particular importance or of complexity, such that the panel is extended to two members of the presidency and two expert members. In 2024, this happened in six cases.

Decisions by the president

The president of the case may decide to adjudicate cases without the involvement of an expert member 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. An expert member always assists in those decisions where a contract is considered ineffective or where alternative sanctions are applied.

The president of the case may also decide to settle procedural issues without the involvement of an expert member. These include, inter alia, decisions on suspensive effect and access to documents, as well as rejection of ineligible complaints, or if the complaint is not suitable to form the basis for the case.

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 Executive Order on the Complaints Board.

In each case, the Complaints Board ensures that 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 procedure for the filing of complaints.

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 must, in the complainant's view, be excluded from access.

Complaints of violations of Titles I-III of the Public Procurement Act, the Utilities Directive, the Concession Directive or 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 still cannot be used as basis for consideration of the case, the Complaints Board will reject – on the basis of Section 6(2) of the Complaints Board Act – the claims or the entire complaint, see the decision of 21 March 2018, *Scientia Ltd. v Aarhus University* and the decision of 22 June 2021, *Pro Medical Covid-19 Test ApS v the Central Denmark Region, the North Denmark Region, the Region of Southern Denmark, Region Zealand and the Capital Region of Denmark*. In 2024, the Complaints Board rejected three complaints on the grounds that the complaint did not adequately form the basis for the case.

It is also a condition that the complainant have a legal interest. Companies that had an interest in winning a certain contract are eligible to file a complaint. Typically, complainants will be companies that have applied for preselection or submitted a tender, but companies that could have applied for preselection or submitted a tender (potential candidates/tenderers) may also have a legal interest. In very special circumstances, the winner of a tender may also be a complainant, cf. Decision of 24 April 2023, *Meldgaard Miljø A/S v Afatek A/S*. If the complainant is unlikely to have a legal interest in the case, the complaint is rejected. To mention an example, this was the case in the Complaints Board's decision of 24 October 2022, *KN Rengøring v/Henrik Krogstrup Nielsen v Herlev Municipality* where a potential tenderer was not found to have a legal interest as the company was subject to the ground for exclusion in Section 137(1), paragraph (5) (now paragraph 4)) of the Public Procurement Act. The decision is described in more detail in Chapter 2 of the 2022 Annual Report. The Complaints Board has made a number of decisions that illustrate the legal interest requirement. Some of these decisions are shown in the case law overview at the Complaints Board's website in relation to annual reports.

The Danish Competition and Consumer Authority and certain organisations and public authorities mentioned in the annex to the Executive Order on the Complaints Board have been granted access to complaints. No complaint has been lodged by the Competition and Consumer Authority or other public authorities mentioned in the annex to the Executive Order on the Complaints Board in 2024.

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 procurement 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 (Regulation no. 1182/71 of the Council of 3 June 1971 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 Executive Order on the Complaints Board.

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 (replication 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. Such decisions are made in accordance with the relevant rules in the Danish Public Administration Act (*forvaltningsloven*). The parties 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, and 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 annulment of the award decision has been made and where annulment 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 concerning the “ineffective contract” sanction, 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 present its own arguments and can therefore not be ordered to pay costs.

The Complaints Board is responsible for ensuring that there is sufficient evidence in the case. 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 Executive Order on the Complaints Board). By contrast, the Complaints Board is not entitled to raise any issues of errors for consideration in the case as the parties’ claims and arguments 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 31 May 2021, *Familieplejen Bornholm v the Regional Municipality of Bornholm* (discussed in chapter 2 of the 2021 Annual Report).

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 very few cases.

Whether a case requires oral proceedings is assessed on a specific case-by-case basis. The assessment involves a consideration of, i.a., whether the case relates to a complex or principled question, whether explanations are necessary or desirable, whether a demonstration is necessary and whether the parties agree that the case should be considered in oral proceedings.

Oral proceedings 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. Oral proceedings will normally take 4-5 hours, but in major cases, they may take up to 1-2 days. Oral proceedings were held in 2024 in the case *Cubic Transportation Systems Limited v Rejsekort & Rejseplan A/S*, where a decision was issued on 12 April 2024, and in the case *Babcock Vehicle Engineering Limited v Department of Defence’s Acquisition and Logistics Organisation*, where the Complaints Board issued a decision on 4 October 2024.

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 member 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 damages, the Complaints Board will consider the issue of costs. So does the Complaints Board in cases where the complaint is withdrawn and one of the parties so requests. 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, but the Complaints Board may order the respondent to pay a higher amount if justified by the amount of the contract or special circumstances. 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 (discussed in the 2018 Annual Report) and in the decision of 12 April 2024, *Cubic Transportation Systems Limited v Rejsekort & Rejseplan A/S*, the costs were set at DKK 106,082.75 for the successful party (the decision is discussed in Chapter 2).

The award of damages in a complaint case requires that a claim has been made, see Section 14 of the Complaints Board Act. Once a complaint has been withdrawn, the case has been closed and cannot be reopened by claiming damages during the exchange of pleadings in connection with a decision on costs, see for example the decision on costs of 22 November 2021, *Rally Point Tactical Scandinavia ApS v the Danish Ministry of Defence's Acquisition and Logistics Organisation* (discussed in chapter 2 of the 2021 Annual Report).

The Complaints Board's decisions may be brought before the courts within eight weeks of notification of the decision to the parties. This also applies to interim decisions on suspensive effect. In cases with questions of damages, the Complaints Board generally divides the case into two parts: the substantive assessment and the award on damages. The time limit for bringing the substantive decision before the courts starts from the date on which the decision on the question of damages has been notified to the parties. The Complaints Board's decision is binding for the parties if not brought before the courts within the statutory time limit. When the case is brought in its entirety before the courts, the Complaints Board concludes the case. If the case as a whole does not reach its final decision by the courts, the Complaints Board may resume the proceedings. See, for example, the Complaints Board's decision of 13 December 2022, *Øens Taxa in Paul Erik Düring Pedersen v FynBus, Sydtrafik and Midttrafik*, in which the court had not taken a position on the question of damages in the court proceedings between the parties, and in which the Complaints Board resumed the damages proceedings. However, resumption in such a situation requires that the claim is not outdated, as set out in the Complaints Board's decision of 14 February 2025, *Alsvognen I/S v FynBus, Sydtrafik and Midttrafik*.

2. DECISIONS IN SELECTED AREAS

2.1 Introduction

All substantive decisions and decisions on damages are published on the Complaints Board's website, www.klfu.dk. Furthermore, in the event of withdrawal of the complaint, interim decisions concerning suspensive effect are published and the interim decision becomes the final decision of the Complaints Board in the case. In addition, decisions on access to documents are published if they are of general interest. Below follows a description of a number of decisions from 2023 that have all been published at the Complaints Board's website. Some of the decisions were leading decisions. 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
- Negotiated procedure
- Prequalification
- Requirements for specifications, including minimum requirements, and organisation of procurement procedures
- Evaluation, including choice of evaluation model
- Framework agreements
- Collection of additional information
- The Complaints Board Act, including suspensive effect and the Complaints Board's sanctions
- Termination of contract, pursuant to Section 185(2) of the Public Procurement Act
- Rejection

The decisions are categorised according to which issues the decision specifically addresses, as several aspects can be raised in each case.

2.2 Selected interim decisions and decisions

2.2.1 Competitive tendering obligation, direct award and modification of contracts

Decision of 10 April 2024, Dialab, Danish Diagnostics and Laboratory Association v the Central Denmark Region

The case concerned the Central Denmark Regions direct award of contracts for the supply of quick tests for self-testing in the period from 15 February to 22 December 2021, following the provision of a negotiated procedure without prior publication in Section 80(5) of the Public Procurement Act (Article 32(2) of Directive 2014/24/EU) as part of the health authorities' preventive measures under the COVID-19 pandemic in Denmark.

As a result of the special situation with COVID-19, starting in autumn 2020 the Central Denmark Region assisted the Ministry of Justice, the Ministry of Health and Senior Citizens, the Ministry of Finance and the Danish Critical Supply Agency with the procurement of protective equipment and critical equipment as well as testing capacity.

The Central Denmark Region purchased approximately 84 million quick self-testing kits for COVID-19 in connection with the reopening of educational institutions in early 2021 and in connection with a revised test strategy as a result of the advent of the COVID-19 Omikron variant at the end of 2021 without a procurement procedure. This was done pursuant to Section 80(5) of the Public Procurement Act (Article 32(2) of Directive 2014/24/EU), under which procurement may take place without procurement procedure to the extent strictly necessary if compelling reasons – which the contracting authority could not have foreseen – make it impossible to comply with the deadlines for public procedures, limited procedures or negotiated procedures.

On 4 July 2022, DiaLab, the Danish trade association for diagnostics and laboratories (hereinafter “DiaLab”) filed a complaint to the Complaints Board for the purchase of quick tests for self-testing in the Central Denmark Region without a procurement procedure. The complaint involved a series of direct awards in the period from 15 February 2021 to 22 December 2021. DiaLab based its complaint on the fact that the conditions laid down in the Public Procurement Act for direct award of contracts for the provision of quick self-testing kits for COVID-19 were not met.

The Complaints Board reached the decision that on an exceptional basis, the Central Denmark Region was justified in not conducting a procurement procedure, opting instead to directly award contracts for the supply of quick tests for self-testing under the provision on a negotiated procedure without prior publication in Section 80(5) of the Public Procurement Act (Article 32(2) of Directive 2014/24/EU) as part of the health authorities’ preventive measures during the COVID-19 pandemic in Denmark. The Board noted, among other things, that the region had no way of predicting the need for and the scope of quick self-testing tests, as the need depended on the development of the infection as a result of new variants and mutations as well as the government’s testing strategy. The Complaints Board also assessed that due to the evolution of COVID-19 there were exceptional events that gave rise to urgent needs and that therefore it was not possible to meet the need through procurement procedure, including urgent procedure. Furthermore, it assessed that the Central Denmark Region had only made purchases to the extent strictly necessary, in particular since the region had to take into account the lives and health of people as well as the international market, where there was pressure on the delivery of high-quality quick tests.

The complaint was therefore not taken into account.

Decision of 14 May 2024, SundVikar A/S v Fællesindkøb Fyn v/Faaborg-Midtfyn Municipality

The case concerned a direct award after the termination of a SKI framework agreement.

SundVikar complained about a direct award following the termination of a SKI framework agreement, which had exhausted its legal effect and was therefore terminated in the light of the Simonsen & Weel decision of 9 November 2021. SundVikar had been a supplier under Lot 3, which included Fyn (including the South Fyn Islands).

The Complaints Board found that the conditions in Section 80(5) of the Public Procurement Act (Article 32(2) of Directive 2014/24/EU) were not met. In this connection, the Complaints Board stated that the contracting authority is responsible for checking that the maximum value purchased under a framework agreement is not exceeded. The cancellation of a framework agreement as a result of reaching the maximum value in the framework agreement cannot generally be regarded as an unpredictable event, even if the cancellation takes place before the framework agreement is terminated. This was also true in this case where the framework agreement was concluded by a central purchasing body, while the purchases were carried out by contracting parties to the framework agreement.

The provisional framework agreement had expired, and there was therefore no basis for declaring it ineffective.

In the light of a number of mitigating circumstances, the Complaints Board set the financial sanction at DKK 400,000 on an estimated basis.

Decision of 15 May 2024, Acapulka AS v Defence Ministry's Acquisition and Logistics Organisation (FMI)

The case concerned the direct award by FMI of a contract for the supply of pulks.

Acapulka argued in particular that the conditions laid down in Section 80(5) of the Public Procurement Act (Article 32(2) of Directive 2014/24/EU) were not met and that the contract was covered by Section IV of the Public Procurement Act. Acapulka also argued that FMI violated Article 346 of the Treaty on the Functioning of the European Union (TFEU). Furthermore, it was alleged that FMI had acted contrary to Section 191(1) of the Public Procurement Act by awarding a contract for the supply of pulks directly without prior notice, despite the fact that the conditions in Section 80(5) of the Public Procurement Act (Article 32(2) of Directive 2014/24/EU) were not fulfilled and in violation of Section 129(1) of the Public Procurement Act (Article 50(1) of Directive 2014/24/EU) by not publishing an announcement of contract to the EU Publications Office within 30 days of the conclusion of the contract. Finally, Acapulka claimed that FMI had acted contrary to Section 192, paragraphs 1 and 2 of the Public Procurement Act by failing to organise an award procedure in accordance with Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) and by failing to inform potential tenderers about the award process.

After an overall assessment, the Complaints Board found that the purchase was not covered by the Defence and Security Directive and that the conditions in Section 80(5) of the Public Procurement Act (Article 32(2) of Directive 2014/24/EU) were not met. There was no basis to consider the purchase of pulks to be covered by Annex III to the Public Procurement Directive. The purchase therefore falls under Section 6(2)(2) of the Public Procurement Act (Article 4 of Directive 2014/24/EU) and did not exceed the threshold value in this provision. The contract was thus covered by Title IV of the Public Procurement Act on Public procurement below the thresholds for clear cross-border interest. FMI had not followed the publication obligation in Section 191(1) of the Public Procurement Act and FMI had acted in violation of Section 192, paragraphs 1 and 2 of the Public Procurement Act. The award decision should therefore be annulled. There was no basis for claiming a financial sanction as the contract was not covered by Section III of the Public Procurement Act.

Interim decision of 21 June 2024, Mediq Denmark A/S v Roskilde Municipality

The case concerned the Roskilde Municipality's award of a framework agreement for the procurement of clinical nutrition and medicines for enteral nutrition.

The Roskilde Municipality had carried out an invitation to tender under Title V of the Public Procurement Act without prior publication of a contract notice on the grounds that the value of the framework agreement was below the threshold value. The Roskilde Municipality had not taken into account a price regulation clause in the framework agreement when calculating the value of the framework agreement.

However, the Complaints Board found that the municipality was obliged to include the price regulation mechanism in the framework agreement on an equal footing with other possible obligations listed in Section 30 of the Public Procurement Act (Article 5(1) and (2) of Directive 2014/24/EU) in its assessment of the contract value. The value of the framework agreement therefore exceeded the threshold for the municipality to publish a contract notice. The fact that the tenderers received were found to be below the threshold value could not lead to a different result, since the decisive time under Section 30 of the Public Procurement Act (Article 5(1) and (2) of Directive 2014/24/EU) is the time of collection of tenders.

The Board found that this satisfied the *prima facie* case test.

As it was an unlawful direct award, the condition of urgency was in principle fulfilled.

Furthermore, after a balance of interests, the Complaints Board found that the complainant's interest in attributing the appeal to suspensive effect to be more significant than the municipality's opposing interest.

The complaint was therefore granted suspensive effect.

The interim decision is the final decision of the Complaints Board in the case.

2.2.2 Negotiated procedure

Decision of 16 May 2024, Nuuday A/S v Staten og Kommunernes Indkøbsservice (SKI)

The case concerned a restricted procurement procedure under the Public Procurement Act of Framework Agreement 50.07 on the supply of communications products, in which SKI subsequently switched to a negotiated procedure without a prior contract notice on the grounds that none of the tenders under SKI were compliant.

Nuuday and a number of other tenderers had submitted tenders on, inter alia, lot 1 relating to "Unified Communications and Telephone Products" and lot 2 relating to "Network Products".

The assortment of the two lots was divided into a mandatory and a (less) voluntary assortment. The optional product range was voluntary both for the tenderer to offer and for the customers under the agreement to purchase during the contract period.

SKI had indicated in the specifications that the evaluation of the voluntary assortment, which was assessed according to a criterion of assortment width, would evaluate and award points to each offer based on the number of products offered by the tenderer in each product group.

Tenderers who offered the maximum number of products allowed in a product group would receive 10 points. Tenderers who offered 0 products in the voluntary range of a product group would receive 1 point, and tenderers who offered between 0 and the maximum number of products in a product group of the voluntary range would be awarded points based on a linear interpolation between 0 and the maximum offered for the relevant product group.

The tenderers were required to offer products or services on all product lines in the mandatory range, but SKI could accept that each tenderer had an error of up to two percent in the total number of product lines.

After the deadline for submitting a tender expired, SKI announced that it would proceed to a negotiated procedure without the publication of a contract notice.

Nuuday, which was an unsuccessful tenderer, argued in particular that SKI was not entitled to continue the negotiations after receiving a compliant tender from Nuuday, that SKI's evaluation methodology resulted in the procurement obligation not being relieved as regards the purchase of products in the voluntary range, and that the framework agreement did not contain sufficiently clear provisions and objective criteria for when the respective buyers should use mini-tender or direct award, and that it therefore became arbitrary and possible to speculate as to whether the intention was to proceed with a direct award.

The Complaints Board found that it had not been demonstrated that Nuuday's initial tender was non-compliant. The Board noted that the errors identified by SKI were not fundamental elements and that the description of the evaluation model had to be understood as meaning that errors of the type that Nuuday's tender had on both lots had to be considered to be covered by the quantitative error margin of up to two per cent. SKI did not assume its burden of proof that the conditions for switching to a negotiated procedure under Section 61(1)(2) of the Public Procurement Act (Article 26 (4)(b) of Directive 2014/24/EU) were met. It was taken into account that SKI had applied the evaluation model according to which errors were accepted in up to two percent of product lines, in violation of the principles of transparency and equal treatment in the assessment of the tenders from Nuuday, and that the same had to be presumed to apply in the assessment of the other tenders received prior to the transition to negotiated procedure. The Complaints Board annulled the award decision.

There were no grounds to uphold a claim for ineffectiveness. After reviewing the legal basis, the Complaints Board concluded that an interpretation according to which the award of a contract following a negotiated procedure pursuant to the procedure laid down in Article 26(4)(b) of the Public Procurement Directive and Article 61(1)(2) of the Public Procurement Act (Article 26 (4)(b) of Directive 2014/24/EU), as referred to in paragraph 4, should not be regarded as a direct award within the meaning of the Control Directive was in accordance with the principles of equal treatment and transparency. Given the above, and in the light of the principle of proportionality as set out in recital 13 of Directive 2007/66/EC, the Complaints Board found that Article 2d(1)(a) of Directive 2007/66/EC and Article 17(1)(1)(1) of the Danish Act on the Complaints Board for Public Procurement were not applicable in the present case. This was a change in the Complaints Board's practice, as reflected in its decision of 11 March 2014, *HS Hansen A/S v Danish Building and Property Agency*. It was also a change in the Complaints Board's practice, as reflected in its decision of 2 October 2019, *E-box A/S v Danish Agency for Digital Government*, although this is not expressly stated in the decision.

Interim Decision of 7 November 2024, Northrop Grumman International Trading, Inc. v Department of Defense's Acquisition and Logistics Organisation (FMI)

The case concerned a negotiated procedure under the Defence and Security Directive of a contract and related framework agreement for the procurement of "Fixed Air Defence Radar systems (FADR), including support for sustainment and training". The tender had an estimated value of up to EUR 320 million.

Northrop Grumman had not been prequalified since the application, according to FMI, did not meet the requirements of technical and professional competence.

In the procurement documents, the applicants were asked to submit a list of at least three references made in the last five years. Northrop Grumman submitted a list of the number of systems delivered, but it was not possible to determine the number of deliveries.

The Complaints Board stated that Northrop Grumman as the applicant was responsible for the ambiguities in the application and that FMI could not have identified – with the necessary certainty and in accordance with the principles of equal treatment and transparency based on the description of the reference – three specific references and, on the basis thereof, made a concrete assessment of Northrop Grumman's application.

The Board also found that FMI did not have any obligation to give Northrop Grumman the opportunity to correct their references, even though FMI had given other applicants the opportunity to make corrections to their tenders. In this connection, the Complaints Board stated that the facts in the other applications requested by FMI were of a substantially different nature than those which led to Northrop Grumman's application not being prequalified.

The prima facie case test was therefore not fulfilled and the complaint was not granted suspensive effect.

The interim decision is the final decision of the Complaints Board in the case.

2.2.3 Prequalification

Interim decision of 10 April 2024, Anchersen A/S v transport company Movia

The case concerned a negotiated procedure on bus routing pursuant to the Utilities Directive.

In the case, Anchersen had submitted a prequalification application via the Ethics tender portal, but had not completed all fields, which resulted in the prequalification application not being forwarded from the system to Movia.

On these grounds, Movia had excluded Anchersen from the prequalification phase.

The Board noted that the conditions of the procurement indicated, inter alia, that the application must contain a completed ESPD, that the ESPD must be completed through the integrated ESPD function in Ethics, and that it was the sole responsibility of the applicant to complete the ESPD correctly.

Subsequently, the Complaints Board stated that the specifications had to be understood as meaning that all fields in the ESPD had to be completed and that the form had to be "completed" in Ethics in order for an

application to comply with the specifications, including to be considered “uploaded” within the meaning of the specifications.

Since Anchersen did not meet these conditions for submitting a prequalification application, tMovia was unable to take into account Anchersen’s application.

Since the prima facie case test was not fulfilled, the complaint was not granted suspensive effect.

The complaint was subsequently withdrawn, thus making the interim decision the final decision of the Complaints Board.

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

Decision of 4 October 2024, Babcock Vehicle Engineering Limited v Defense Ministry’s Acquisition and Logistics Organisation (FMI)

The case concerned an ongoing tender for the acquisition and maintenance of “off-road utility vehicles (OV)” for an estimated total value of DKK 900 million and with a maximum value of DKK 2 billion.

After being prequalified, the consortium, to which Babcock Vehicle Engineering belonged, asked a number of questions about the procurement documents. FMI did not answer these questions, and on this behalf Babcock Vehicle Engineering didn’t submit an initial tender.

In particular, the case raised the question of whether FMI was obliged to answer the questions, including whether the questions had been presented correctly. The case was handled in oral proceedings.

The Complaints Board stated that according to the specifications, the questions should be formulated in English in Ethics via the “Communication” subpage and that questions received by 1 May 2024 at 3 p.m. would be answered no later than six days before the deadline for submission of initial tender 1. Questions received after 1 May 2024 at 3 p.m. would also be answered according to the specifications unless the nature of the question would render it disproportionately onerous for FMI to answer. The established method for uploading questions into Ethics was to ensure that all tenderers received the answers from FMI in an anonymous form and that FMI could comply with the principle of equal treatment. The specifications provided a description of how questions should be asked, meaning that was more than just a procedural rule. The Board also stated that it was the sole responsibility of the tenderer to use the tendering portal correctly and that, therefore, an improper use of the tendering portal could not lead to an act by the contracting authority that violated the principle of equal treatment, the principle of transparency or the principle of proportionality.

The Board found that Babcock Vehicle Engineering Limited had not demonstrated that it was due to errors in the Ethics system that the questions were not properly uploaded to the portal and thus not received by FMI in accordance with the specifications. Since the questions were not asked in accordance with the requirements outlined in the specifications, it would have been contrary to the principle of equal treatment and transparency if FMI had answered the questions that FMI subsequently received by e-mail.

The complaint was therefore not taken into account.

2.2.5 Evaluation, including choice of evaluation model

Decision of 31 January 2024, Jensen Denmark A/S v Region Zealand

The case concerned a negotiated procedure under the Public Procurement Act of a total contractual agreement for the execution of the machinery undertaking in connection with Region Zealand's upcoming construction of a new hospital laundry facility as a replacement for a laundry facility in Holbæk, which burned in 2018.

At the end of the deadline for application for prequalification, Region Zealand prequalified the two companies Jensen Denmark and Girbau. After a joint questionnaire and negotiating meetings, both Girbau and Jensen Denmark submitted final tenders, after which the Region Zealand awarded the contract to Girbau.

Jensen Denmark filed a complaint with the Complaints Board, claiming in particular that the secondary point model which the contracting authority used gave them de facto freedom of choice, making the outcome of the assessment arbitrary.

The Region Zealand had acknowledged the infringement in claim 1, paragraph 1, according to which the Region had violated Section 160 of the Public Procurement Act by failing to provide sufficiently clear guidelines in advance for the region's use of the secondary point model in the assessment of the economic sub-criterion.

The Complaints Board noted that the Region Zealand had not specified in the specifications or in the procurement documents what was "inappropriate" in relation to the distribution of the tenders, or what the Region would, if applicable, consider when determining the slope factor in order to obtain a "more reasonable assessment". Despite the fact that the chosen slope factor could not be considered unfair or unusual, the Complaints Board found that the evaluation method was not described in a sufficiently clear and transparent manner such that it was unambiguously defined how the final slope factor would depend on the tenders received. This meant that Region Zealand had full or partial freedom of choice in the evaluation of the tenders in relation to the economic subcriterion "price", as the outcome depended on how the Region chose to determine the slope. This was further supported by the calculations made by Jensen Denmark. The fact that the winning tenderer ended up being the same – but with a different tender – could not lead to a different result, since the specifications for the use of the secondary point model could not have been the basis for a legal award.

The complaint was then taken into account to the extent recognised and established, and the claim for annulment was also taken into account, with reference to the infringements, under claims 1 and 2. The Complaints Board didn't handle claims 3, 4 and 6 pursuant to Section 10(2) of the Complaints Board Act.

Interim decision of 1 February 2024, A v Danish Road Directorate

The case concerned the Road Directorate's procurement of winter service on railways. In the course of the evaluation of the tenders, the Road Directorate had assessed that A had committed serious negligence in the exercise of his profession, which raised doubts about the integrity of the company, and that the company was therefore covered by the mandatory exclusion grounds set out in Section 136(1)(4) of the Public Procurement Act (Article 57(4)(c) of Directive 2014/24/EU).

The Road Directorate had subsequently asked the Competition and Consumer Authority for an indicative opinion on reliability, pursuant to Section 138 of the current Procurement Act. The Competition and Consumer Authority concluded in its opinion that A had not provided sufficient evidence for its reliability, for which reason the Road Directorate excluded the company.

The questions were whether the conditions for exclusion under Section 136(1)(4) of the Public Procurement Act (Article 57(4)(c) of Directive 2014/24/EU) were met and whether A had demonstrated its reliability, including by replacing the director.

In the interim decision, the Complaints Board concluded that, on the basis of a preliminary assessment, the Road Directorate had demonstrated that A had committed serious negligence in the exercise of his profession which questioned A's integrity, see Section 136(1)(4) of the Public Procurement Act (Article 57(4)(c) of Directive 2014/24/EU). The Complaints Board placed importance on the available information regarding the matters that the Road Directorate reported to the police on 13 November 2023 and the nature of the underlying documentations. For the same reasons, after a preliminary assessment, there was no basis to conclude that the Road Directorate, by excluding A from the procurement procedure, had acted contrary to the principles of equal treatment, transparency and proportionality contained in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU). There was no basis for disregarding the Road Directorate's assessment that A had not provided sufficient evidence for its reliability, pursuant to Section 138(1) of the Public Procurement Act (Article 57(6) of Directive 2014/24/EU). The fact that A had resigned from management could, based on the preliminary information available, not be considered sufficient to prevent further negligence.

Since the *prima facie* case test was not fulfilled, the complaint was not granted suspensive effect.

The complaint was subsequently withdrawn, and the interim decision is therefore the final decision of the Complaints Board.

Interim decision of 12 April 2024, Plandent A/S v Indkøbscirkel Øst in Gentofte Municipality

The case concerned a public procurement under the Public Procurement Act for a framework agreement on the purchase and supply of dental consumer goods to five Zealand municipalities (assortment tender).

In order to submit tenders, tenderers were required to complete a tender list, divided into product categories. Plandent had mistakenly failed to fill out the product lines for an entire product category. In this connection, the Complaints Board stated that since it was a whole product category with a number of product lines, it was not possible for Indkøbscirkel Øst in the Gentofte Municipality to make a sufficiently secure and objective pricing of the missing product group. Indkøbscirkel Øst in the Gentofte Municipality was thereafter not obliged to price the missing product group and had therefore been entitled to reject the tender as non-compliant.

Furthermore, the Complaints Board found that it was sufficiently clear from the procurement documents that there were five unanimous framework contracts concluded between the winning tenderer and the five contracting entities. The fact that the object of the tender in the specifications was referred to both as "one

framework agreement” and “five framework agreements”, and that one estimated value was provided collectively for all five framework agreements, did not mean that the procurement documents should be considered opaque or unsuitable as a basis for an award.

In addition, the Complaints Board found, in particular after a specific assessment, that it was sufficient, in the case of the five identical framework agreements, to provide a single estimated total value for the five framework agreements in the contract notice. In that connection, the Complaints Board stated that, “in these circumstances, the contract notice contains the information necessary for the initial screening of potential tenderers whether they wish to make a detailed assessment of whether or not they should submit tenders and that, in the light of the principle of transparency, the contract notice meets the requirement of Annex V, regardless of the fact that the contract notice does not specify an estimated value for each framework agreement separately.”

Since the *prima facie* case test was not fulfilled, the complaint was not granted suspensive effect.

The complaint was subsequently withdrawn, and the interim decision is therefore the final decision of the Complaints Board.

Decision of 12 April 2024, Cubic Transportation System Limited v Rejsekort & Rejseplan A/S

The case concerned a restricted procedure under the Utilities Directive for a framework agreement with five actors concerning the development, maintenance and administration of applications for a Rejsekort & Rejseplan A/S (“RKRP”) comprehensive digital mobility solution for public transport by bus, train, light rail, metro and other modes of transport in Denmark.

In the case, the Complaints Board decided whether RKRP’s assessment of the tender by the complainant, Cubic Transportation Systems Limited, was unfair, based on an objectively incorrect basis, or whether RKRP had exceeded the broad limit applicable to a contracting entities discretion.

In the evaluation, RKRP had attributed the negative importance to the fact that the subcontractors, as shown in Cubic’s tender, had not previously provided a “Pay as you go” (PAYG) function, despite the fact that Cubic’s tender showed that Cubic itself had substantial experience in providing “Pay as you go” solutions and would itself make any deliveries related to “Pay as you go” under the framework agreement. The Board found that RKRP’s assessment of Cubic’s tender regarding “Pay as you go” thus rested on an objectively incorrect basis.

RKRP also assessed in the evaluation of Cubic’s tender that Cubic’s fulfillment of the subcriterion “Sector-specific knowledge” was somewhat lacking. RKRP based the assessment on the fact that it saw Cubic’s experience in the field as largely related to map- and infrastructure-based solutions that were less relevant to RKRP. However, Cubic’s tender showed that Cubic offered solutions that were mobile-first, and it could therefore not be inferred from Cubic’s tender that Cubic’s described experience was based on map- and infrastructure-based solutions, as RKRP had assumed in the evaluation. The Complaints Board found that RKRP’s assessment of the subcriterion “Sector-specific knowledge” therefore rested on an objectively incorrect basis.

In addition, when evaluating a winning tender from HaCon, RKRP had attributed positive weight to the fact that the tender contained “Solutions for public transport operators”, including “Fleet management system”. However, the procurement documents did not indicate that this aspect would be given positive weight. The Complaints Board found that RKRP had taken into account unfair considerations by attributing in the evaluation of HaCon’s tender the positive importance that HaCon offered a “Fleet management system”.

In view of the nature of the infringements found, the Complaints Board the claim for the annulment of the award decisions into account.

Given the value of the case (DKK 500 million) and its very substantial size, there were grounds to derogate from the maximum amount in Section 9(5) of the Executive Order on the Complaints Board, for which reason the Complaints Board determined the costs of the case to be higher than DKK 75,000.

The case was handled in oral proceedings.

Decision of 7 May 2024, Hareskov Elektrik A/S v Municipality of Copenhagen

The case concerned a restricted procedure under the Public Procurement Act for a framework agreement to renovate lighting systems.

After the framework agreement was awarded, the Municipality of Copenhagen was informed that errors had been made in the evaluation of the “Price” criterion. The municipality therefore decided to annul the award decision and conduct a re-evaluation. In the new evaluation, changes were made both in the evaluation of “price” and in the qualitative evaluation. The framework agreement was again awarded to the same tenderer to whom it was initially awarded. In the new evaluation, the tender from Hareskov Elektrik was evaluated as having significantly lower quality than in the first evaluation.

In the case, the Complaints Board decided whether the new evaluation was carried out in accordance with Section 170(2) of the Public Procurement Act. In an interim decision on suspensive effect, the Complaints Board had found that prima facie case test was satisfied, and in this connection had, inter alia, referred to the fact that the municipality had not detailed why and how it had – on the same basis – reached two different qualitative assessments of Hareskov Elektrik’s.

In the final decision, the Complaints Board reached the opposite result, since the municipality had now detailed the qualitative evaluation. On this basis, the Complaints Board found, inter alia, that the municipality had made a mistake in the first evaluation by awarding points in between two different scores, although it was not described in the procurement documents that this would be possible. In addition, the Complaints Board found that errors had been made in the first evaluation, since the positive emphasis had been given to the fact that the electricians offered were “skilled”, although this was a minimum requirement. Thus, the qualitative evaluation could not give positive consideration to the fact that a service offered meets a minimum requirement.

Furthermore, the Complaints Board found no grounds to override the municipality’s qualitative evaluation.

In addition, the Complaints Board found, inter alia, that the specifications could not be interpreted as meaning that tenderers were required to submit only one resume for a “light designer” and that a tender would be considered non-compliant if several resumes for light designers were attached. Hareskov Elektrik therefore did not accept that the winning tender was non-compliant for that reason.

The Complaints Board also rejected several claims, including a claim that the Complaints Board should require the municipality to provide evidence that Hareskov Elektrik should not have been awarded the contract.

The complaint was therefore not taken into account for a number of claims and rejected for the other claims.

Decision of 24 May 2024, KPMG P/S v Ministry of Finance

The case concerned a public procurement for a framework agreement divided into three lots for the provision of “Financial advisory services”.

During the tender evaluation, the Ministry of Finance had rejected the offers from KPMG as non-compliant. The reason for this was that the Ministry of Finance in the procurement documents had requested the tenderers to state a price for the advisors offered to be available 24 hours a day. KPMG had stated in its tender that the prices given for being available were based on a working day of 7.5 hours.

The Complaints Board found that the tenders of KPMG contained a price reservation. Furthermore, KPMG’s reference to the rules on maximum working hours under the ILO conventions and the rules on safety and safety at work could not lead to a different understanding of the contents of the tenders.

The Complaints Board also found that the Ministry of Finance had neither been entitled nor required to ask KPMG to confirm that the price offered included 24-hour availability.

The complaint was therefore not taken into account.

Interim decision of 11 September 2024, Jacobs Douwe Egberts DK ApS v Ringkøbing-Skjern Municipality

The case concerned a public procurement under the Public Procurement Act for a contract for the purchase of coffee, tea, machinery and services.

During the procurement process, a taste test was conducted. During the tasting trial, three of the four tenderers made the mistake of using the wrong machine to prepare some of the tasting test. The municipality awarded the contract to one of the three tenderers, but chose – after a complaint was filed to the Complaints Board – to annul the award decision. The municipality then carried out a partial tasting trial, which only covered the taste samples where there were errors in the first instance. The municipality then again awarded the contract to one of the tenderers who had initially made a mistake.

The Complaints Board noted that the tenderers who had made a mistake in the first taste test should have been awarded 0 points, and the condition of prima facie case test was therefore met.

However, the complaint was not granted suspensive effect as the condition of urgency was not met.

The tender was subsequently cancelled and the complaint withdrawn, so the interim decision is the final decision of the Complaints Board.

Decision of 2 October 2024, DriveClever A/S v Municipality of Copenhagen

The case concerned a public (re-)procurement of a framework agreement for maintenance and repairs, including insurance repairs, supply of spare parts and consumables, periodic inspection and tire service to the total fleet of vehicles up to 3,500 kg.

The procurement was an assortment procurement pursuant to Section II of the Public Procurement Act and included maintenance and repairs of the municipality's 750 vehicles, including petrol, diesel and electric vehicles and about 20 different factories.

The list of tenders included nine different brands and one model within each brand. In the "Hourly rate" tab, the tenderers were required to specify the price of the workshop hourly prices, periodic visits, tire service, pick-up and delivery service and hired cars. In addition, tenderers were required to specify price and discount rates for spare parts and consumables in tab 3, "Reserve parts and consumables". Under each of the nine models, the Municipality of Copenhagen had set nine procurement categories. According to the list of tenders, the Municipality of Copenhagen evaluated the net price of the individual car models per line, and the discount rate was not included as an independent element in the evaluation.

DriveClever, an unsuccessful tenderer, primarily argued that the Municipality of Copenhagen had used an unlawful evaluation method that was not suitable for identifying the most economically advantageous tender, as (i) the evaluation method was not representative, and (ii) the actual purchase price was not included in the evaluation method, since suppliers were free to set the prices during the term of the framework agreement; that the procurement process was structured in such a way that only a subset of the spare parts and consumables that could be acquired under the agreement was subject to competition; and that the procurement documents contained a diverging/unclear specification of requirements for the spare parts that formed the basis for the evaluation.

The Complaints Board found that the Municipality of Copenhagen had not demonstrated that the list of prices offered for the individual car models were representative of the other models of the same brand, and therefore the evaluation was not carried out on the basis of a representative selection of comparable products in the tenderers' tender. The award decision was therefore annulled.

There was not sufficient basis for an opinion under Section 14a of the Danish Act on the Complaints Board for Public Procurement. The Complaints Board did not take a position on the other claims, pursuant to Section 10(2) of the Complaints Board Act.

2.2.6 Framework agreements

Interim decision of 12 April 2024, Plandent A/S v Indkøbscirkel Øst in Gentofte Municipality

The decision is discussed in detail under paragraph 2.2.5 Evaluation, including choice of evaluation model.

Decision of 12 December 2024, Biogen (Denmark) A/S v Amgros I/S

The case concerned a public procurement for a framework agreement for the purchase of a medicinal product. The contract had an estimated value of DKK 382 million.

Amgros re-tendered a framework agreement for the procurement of a number of medicines, including the drug dimethyl fumarate, ATC code L04AX07, in strengths of 120 mg and 240 mg and unit value of 0.48 g. The framework agreement ran from 1 January 2024 to 31 December 2024 with the possibility of renewal up to three times for up to four months. The award criterion was the lowest price.

On 16 October 2023, Amgros awarded the contract to Sandoz A/S as first priority, as it had submitted the tender with the lowest price for dimethyl fumarate. Biogen (Denmark) A/S received the contract as second priority as it had submitted the second lowest tender.

Biogen (Denmark) filed a complaint to the Complaints Board, claiming in particular that the medicinal product offered by the winning tenderer violated the patent of Biogen (Denmark) and the exclusive right to market the product in Denmark until 2 February 2025. The questions in the proceedings were, therefore, whether the winning tender violated the patent of Biogen (Denmark) and the exclusive right to market the product and whether Amgros had acted contrary to Section 159(3) of the Public Procurement Act (Article 5(1) of Directive 2014/24/EU) by failing to carry out an effective check of the information and documentation contained in the tender. Biogen (Denmark) further argued that Amgros had failed to enforce the framework agreement with the winning tenderer, by which Amgros had changed essential elements of the framework agreement without conducting a new procurement procedure.

The Complaints Board found that the contents of the tenderer's tender satisfied the requirements of the procurement documents. Before the conclusion of the contract, there was no such certainty or high probability that the winning tenderer would not be able to deliver the offered medicinal product during the contract period that Amgros was obliged to reject the tender as non-compliant. Furthermore, there was no basis to assume that Amgros had not enforced the rights set out in the framework agreement during the duration of the contract.

The complaint was therefore not taken in to account.

2.2.7 Collection of additional information

Decision of 5 November 2024, Bruker Nordic AB v University of Southern Denmark

The case concerned a public procurement on equipment of scanning under the Public Procurement Act.

By the deadline of the tender on 4 December 2023, tenders had been received from MR Solutions Group and Bruker Nordic. The tender from MR Solutions Group indicated a company number belonging to another company, but from the same group as MR Solutions Group. In the tender, MR Solutions Group stated that the company did not rely on the ability of other companies and submitted two annual accounts to demonstrate its compliance with the requirements of equity of the procurement documents.

The University of Southern Denmark found that both tenders contained reservations that rendered the tenders non-compliant and therefore passed to a negotiated procedure without a contract notice pursuant to Section 61(1)(2) of the Public Procurement Act (Article 26(4)(b) of Directive 2014/24/EU). The University of Southern Denmark hereby indicated to the two tenderers that they were not required to submit new

tenders under the negotiated procedure and that they could simply waive the aforementioned reservations. Both tenderers waived the reservations.

On 12 December 2023, the University of Southern Denmark awarded the contract to MR Solutions Group on the basis of the negotiated procedure. Following a request from Bruker Nordic, the University of Southern Denmark reviewed one of the annual accounts submitted by MR Solutions Group and was hereby aware that the annual accounts relate to a company with a different company number than the company number provided by MR Solutions Group.

Bruker Nordic subsequently filed a complaint to the Complaints Board, claiming in particular that the University of Southern Denmark had violated Section 61(4) of the Public Procurement Act (Article 26(4)(b) of Directive 2014/24/EU) and the principles of equal treatment and transparency in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) by using a negotiated procedure without publishing a contract notice because the procedure involved MR Solutions Group, which did not meet the University of Southern Denmark's minimum requirements for the economic and financial capacity during the prior tender.

In the decision, the Complaints Board stated that it was contrary to the principles of equal treatment and transparency in Section 2 (Article 18(1) of Directive 2014/24/EU) and Section 159(5) of the Public Procurement Act (Article 56(3) of Directive 2014/24/EU) to allow MR Solutions Group to rely on the financial capacity of another undertaking after the tender deadline and submit a declaration of support and an ESPD for that undertaking. MR Solutions Group had submitted a new tender for that purpose.

Furthermore, the Complaints Board found that the sanction was not applicable without effect, despite the fact that University of Southern Denmark had not been entitled to allow the tenderer in question to participate in the negotiation.

On this basis, the Complaints Board annulled the award decision.

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

Interim decision of 21 June 2024, Mediq Denmark A/S v Roskilde Municipality

The decision is discussed in detail under paragraph 2.2.1 Competitive tendering obligation, direct award and modification of contracts

2.2.9 Termination of contract, pursuant to Section 185(2) of the Public Procurement Act

Decision on damages of 14 February 2024, Scania Denmark A/S v I/S REFA

The case concerned a claim for damages from an unsuccessful tenderer. The claim was supported by the fact that REFA had acted responsibly by awarding a contract for the procurement of renovation vehicles to a tenderer, despite the fact that its offer did not meet a minimum requirement for LED lights on all renovation vehicles.

The Complaints Board granted Scania Denmark damages for the positive fulfilment interest. In this regard, the Complaints Board found, inter alia, that REFA had not proved that the tender by the unsuccessful tenderer was non-compliant, nor had REFA discharged the burden of proof that the tender would have been cancelled. The Complaints Board also stated that the advance rate was not documented and estimated the compensation to DKK 1 million.

Furthermore, in the course of the proceedings, a claim was made that the Complaints Board should find that REFA had violated Section 185(2) of the Public Procurement Act by not terminating the contract with the winning tenderer, despite the fact that the award decision had been annulled by a substantive decision previously issued by the Complaints Board.

However, the Complaints Board rejected the claim on the ground that REFA is obliged – under Section 185(2) of the Public Procurement Act – to terminate the contract only after the award decision has been annulled by a final decision or judgment. As the question of damages remained pending before the Complaints Board, there was no final decision in the case and REFA was therefore not obliged to terminate the contract.

2.2.10 Rejection

Decision of 15 April 2024, Assemble A/S v Aarhus Municipality

The case concerned a procurement procedure for a day institution sign-up services system in accordance with the negotiated procedure rules. The contract was awarded to KMD.

Assemble, who was an unsuccessful tenderer, argued in the filing of the complaint on 7 May 2023 that KMD's tender was not compliant, as it did not comply with the GDPR rules, and that Aarhus Municipality had acted in violation of Article 28(3) of the GDPR Regulation and Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) by awarding the contract to KMD.

In its reply of 10 November 2023, Assemble withdrew its original claim and instead submitted a claim that Aarhus Municipality had made a manifestly incorrect assessment of Assemble's final tender in relation to the sub-criterion "Quality" and the sub-criterion "Specification of requirements"; that Aarhus Municipality had made a negative assessment of Assemble's final tender in relation to the same criteria; that there was no basis for Aarhus Municipality, in its evaluation of Assemble's tender under the "Quality" sub-criterion, to rely on aspects not set out in the procurement documents; and that the description of requirements for the contract in the procurement documents was not clear, precise or unambiguous.

Aarhus Municipality filed principal claim for rejection.

The Complaints Board decided to reject the complaint, pursuant to Section 10(2) of the Complaints Board Act. It was taken into account that the new claims were inconsistent with the original claims and that the claims were not supported by new factual information that had emerged, including the decision of the Complaints Board of 23 October 2023 on access to documents. On this basis, the claims in the reply were to be considered as a new complaint filed after the expiry of the time limit for complaint.

The complaint case was dealt with without an expert member, pursuant to Section 10(6) of the Complaints Board Act.

Decision of 18 October 2024, C Rail Safety ApS v Banedanmark

The case concerned a public procurement for a framework agreement for the supply of traction with and without ERTMS onboard equipment for the period 01 January 2023 to 01 July 2030.

On 8 April 2022, Banedanmark published a tender of a framework agreement for the provision of traction power with and without ERTMS onboard equipment (European Rail Traffic Management System) pursuant to the Utilities Directive. At the end of the deadline for submission of tenders, C Rail and Contec Rail ApS had submitted tenders.

On 30 August 2022, Banedanmark announced that C Rail did not meet the minimum requirements for tenderer eligibility and that Banedanmark awarded the contract to Contec Rail.

Only on 16 August 2024, i.e. almost two years after the notification, did C Rail file a complaint with the Complaints Board for Public Procurement against Banedanmark.

C Rail claimed that the winning tenderer was not in possession of a valid business insurance and did not comply with the statutory RID regulations (Regulation for International Rail Transport of Dangerous Goods).

Banedanmark claimed the complaint rejected.

The Complaints Board decided to limit the exchange of proceedings to the question of the rejection of the complaint.

As the complaint was not filed in due time, the complaint was rejected, pursuant to Section 7(2)(3) of the Complaints Board Act. The decision was issued without the assistance of an expert member, pursuant to Section 10(6) of the Complaints Board Act.

3. CASES ON ACCESS TO DOCUMENTS

3.1. Introduction

The Complaints Board's cases on access to documents pursuant to the Public Administration Act (*forvaltningsloven*) comprise:

- Decisions concerning the complainant's access to documents submitted by the respondent in account of the circumstances of the case and in the proceeding's documents, to the extent that they contain information on the other tenderers. These decisions can also concern the access of an intervener to the documents of the case.

The Complaints Board's final decision is an actual administrative decision, and the complainant as a party to the case has the right to access the documents in accordance with the rules of the Public Administration Act. On this basis, the Complaints Board already announces in its first letter to respondents that the Complaints Board – in accordance with the provision in Section 7(1) of the Executive Order on the Complaints Board – will make the complainant aware of the documents that the respondent forward to the Complaints Board. In this connection, the Complaints Board draws the respondent's attention to the fact that the complainant has a right to be acquainted with the respondent's documents, unless one of the exclusion provisions of the Public Administration Act applies. If there are documents or parts of documents (information) which, in the respondent's view, are excluded from the complainant's right to access pursuant to these provisions, the respondent must inform the Complaints Board of this and provide a justification with reference to the relevant exclusion provision in the Public Administration Act. The respondent submits the documents of the case to the Complaints Board and the complainant, but may refrain from sending such documents to the complainant (and any intervener) or – if only part of a document is to be withheld from party access – may submit such documents in redacted form only.

The Complaints Board's cases on access to documents pursuant to the Public Administration Files Act (*offentlighedsloven*) 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 complaints concerning the refusal to grant access to cases on the performance of agreements concluded as a result of a procurement procedure.

Public procurement by public authorities, including the choice of supplier for the execution of tenders, is not an administrative act, but an actual administrative activity. Cases regarding procurement procedures with public authorities are therefore not covered by the Public Administration Act, see Section 2 thereof. Questions concerning access to documents in such cases before a public authority must therefore be decided pursuant to the Public Administration Files Act. The authority's

decisions concerning access to documents may be appealed to the Complaints Board for Public Procurement pursuant to Section 37 of the Public Administration Files Act.

- 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 to documents will be made by the Complaints Board. 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.

3.2 Cases on access to documents

The cases concerning access to documents differ significantly from the cases concerning infringement of the procurement rules which, under the Complaints Board Act, must be decided by the Complaints Board. In March 2024, the Competition and Consumer Authority issued a guide on access to documents in public procurement cases.

In 2020, the Complaints Board decided to publish decisions on access to documents to a greater extent. The following is a brief review of selected decisions on access to documents from 2024, which are likely to be of interest to a wider audience and which have all been published at the Complaints Board's website.

Decision of 15 March 2024, Shield AI, Inc. v Ministry of Defense's Acquisition and Logistics Organisation (FMI).

Shield AI, Inc., which was an intervener in a case between the company Arcturus UAV, Inc., and FMI, requested access to documents from the Complaints Board regarding Arcturus' reply and FMI's rejoinder, including the attached annexes. The complaint concerned a tender for a framework agreement for the supply of unmanned aircraft.

In its reply Arcturus stated that much information should be excluded as both the reply and the rejoinder contained information relating to business matters which, for reasons of competition, should be kept confidential pursuant to Section 15b (5) of the Public Administration Act.

The Complaints Board found that the reply and the rejoinder contained information about Arcturus's solution, including information on the technical layout of the solution, spare parts, the selected maintenance concept, partial prices, and contained references from negotiations between FMI and Arcturus. The reply also contained information on re-acquisition prices and partial prices for spare parts stated in the tender from another tenderer. The Complaints Board found that the information relates to business matters, thus constituting legitimate interest in secrecy. The Complaints Board also noted that information on re-acquisition prices should often be excluded in accordance with the Board's practice. Furthermore, the Complaints Board noted that FMI had annulled the award decision after the interim decision had been issued. The possibility could thus not be ruled out that a new procurement procedure would be conducted for the same contract. It would therefore be likely that the previous tenders would be largely reused for the design of the new tenders. Based on the nature of the information and the details provided about the competitive situation in the relevant market, the Complaints Board found that the reply and rejoinder, including the attached annexes, contained information relating to confidential business matters covered by the exclusion

provision in Section 15b (5) of the Public Administration Act, and should therefore not be granted access to documents. Thus, Shield AI, Inc.'s concrete interest in obtaining insight into the information had to be considered as less significant.

Decision of 5 September 2024, Mediq Denmark A/S v Staten og Kommunernes Indkøbsservice A/S (SKI)

Mediq Denmark complained about SKI's decision not to grant access to documents in two other tenderers' offers; also, Mediq Denmark requested access to documents as a party in a case before the Complaints Board.

In the first decision of the Complaints Board, where a complaint was lodged against the decision of SKI on access to documents, the Board rejected the complaint on the grounds that SKI was excluded from the scope of the Public Information Act, in accordance with Decree No. 191 of 27 February 2014 on the exclusion of companies from the Public Administration Act.

In the second decision, in which Mediq Denmark, as a party to the case, requested access to the documents, the Complaints Board decided not uphold the request on the grounds, inter alia, that the tenders of the other tenderers and their evaluation were not included in the case.

Decision of 5 November 2024, Exodraft Energy HP A/S v Billund Varmeværk A.m.b.a.

The case concerned whether a number of detailed information in the tenders of the other tenderers, including information on partial prices, constituted business secrets and could therefore be excluded from access to documents pursuant to Section 30(2) of the Public Administration Files Act.

In accordance with the Complaints Board's practice, the Board found, among other things, that the conditions were met for excluding the partial and unit prices in the list of tenders from access to documents under Section 30(2) of the Public Administration Files Act.

The Complaints Board noted that these could not be considered partial prices, and the Board found that the sum prices themselves did not constitute information on the concrete pricing of the tenderers for the type of assignments in question, which could be excluded under Section 30 (2) of the Public Administration Files Act.

The particularity of the case was that one of the tenderers had indicated during the hearing that, in their opinion, there were no commercial secrets and that it had no objection to the publication of the information, provided that all the other tenderers' information was also made public.

The Complaints Board took a concrete position on whether there were commercial secrets. In addition, the Complaints Board stated that the applicant and the individual tenderer were free to exchange the confidential information if the companies wishes.

4. DANISH JUDGMENTS AND DECISIONS IN COMPLAINTS BOARD CASES

The Court in Svendborgs judgment of 31 May 2024, Fynbus, Sydtrafik and Midttrafik v Øens Handel & Service v/ Paul Erik Düring Pedersen (formerly Øens Taxa v/ Paul Erik Düring Pedersen), see the decision of the Complaints Board of 13 December 2022.

By decision of 13 December 2022, the Complaints Board ordered *Fynbys, Sydtrafik and Midttrafik* (the transport companies) to pay DKK 600,000 in damages to *Øens Handel & Service v/ Paul Erik Düring Pedersen*. In the decision, the Complaints Board established, with reference to the breach of the procurement rules found in the Complaints Board's decision of 27 October 2020, that the transport companies had acted negligently towards *Øens Taxa*. In the course of the proceedings, the transport companies had argued that the requirement of causality had not been met as the wagon offered by *Øens Taxa*, like the wagon of the winning tenderer, did not meet the minimum requirement for two large wheelchairs. However, the interpretation by the transport companies of the minimum requirement was not sufficiently accurate from the procurement documents, and the transport companies would therefore not have been able to reject the tender from *Øens Taxa* as non-compliant. The tender from *Øens Taxa* was ranked 4th, and it could not be denied that tender nos. 2 and 3 were compliant. However, the Complaints Board found it most appropriate to let the transport companies bear the burden of proof of the compliance of the other two respective tenders. Since this burden of proof was not raised, this meant that the requirement that there was a loss and that there was a causal connection was also met.

In the course of the case of damages, *Øens Taxa* also claimed damages for the violation by the transport companies of the procurement rules in connection with another procurement procedure of transportation. In connection with this operation, a parallel case was pending before the Complaints Board, in which the transport companies were also required to acknowledge that they had violated the procurement rules. *Øens Taxa*, however, was not a party in this case but only an intervening party. Since the intervention had to be equated with bi-intervention within the meaning of the Code of Judicial Procedure, there was no liability for this part of the claim.

The decision of the Complaints Board on the question of damages was brought before the Court of Svendborg on 3 February 2023. By judgment of 31 May 2024, the decision of the Complaints Board was confirmed (condemnation).

Judgment of the Eastern High Court of 12 June 2024, Man Truck & Bus Danmark A/S v Central Denmark Region, Capital Region of Denmark, Region Zealand and Region of North Jutland, see the decision of the Complaints Board of 1 June 2023.

The regions had launched a procurement for a framework agreement for the procurement of ambulance vehicles, special ambulance vehicles and vehicles for patient transportation. The procurement had an estimated value of DKK 145 million. On 29 September 2022, *Man Truck & Bus Denmark* filed a complaint with the Complaints Board alleging that the winning tenderer, *Ejner Hessel*, did not meet the requirements set

out in the procurement documents. The Complaints Board decided on 1 June 2023 not to take the complaint into account.

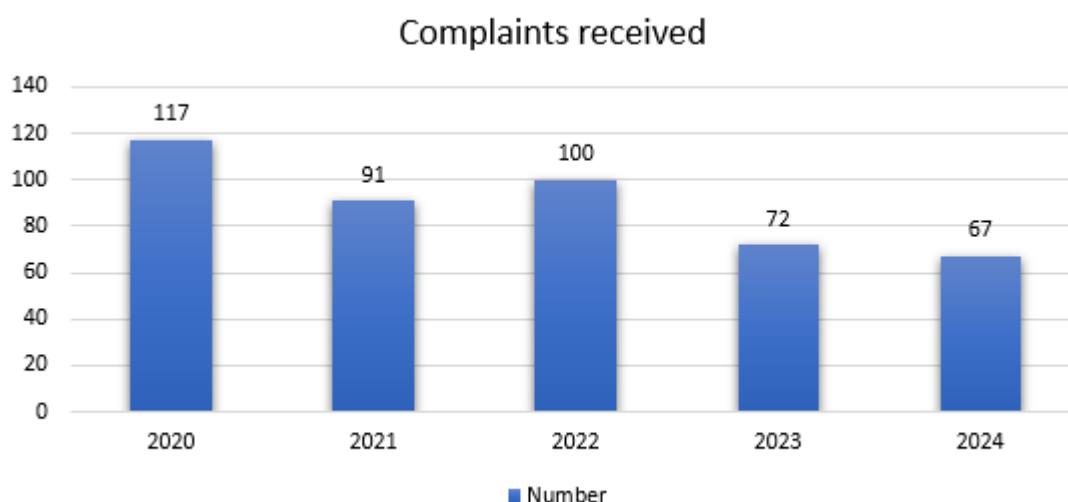
Man Truck & Bus Denmark brought the case before the Court in Roskilde on 26 July 2023 with the claim that the regions had to acknowledge that they had violated the procurement rules, as well as the claim for the annulment of the award decision. When the case was filed, Man Truck & Bus Danmark stated the value of the case as DKK 500. The Court in Roskilde found that the value of the case had to be assessed on the basis of the economic interest that Man Truck & Bus Denmark had in being awarded the contract which was allegedly cancelled. The value of the case was therefore to be determined to be no less than DKK 6,000,001, and the court fee had to be paid accordingly.

The Eastern High Court confirmed the decision of the city court.

5. COMPLAINTS BOARD'S FOR PUBLIC PROCUREMENT'S ACTIVITIES IN 2024

5.1 Complaints received

In 2024, the Complaints Board received 66 complaints, a decrease of approximately 8.3% compared to 2023.

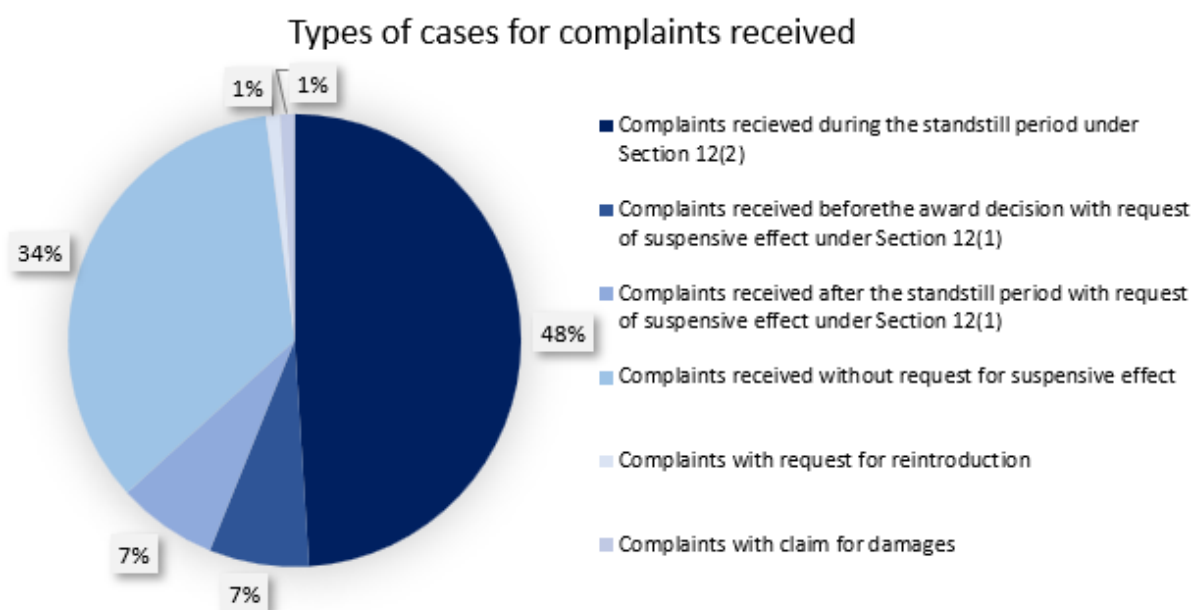


The figure above shows the number of complaints received since 2020. From 2020 to 2021, the number of complaints received decreased by 22%. From 2021 to 2022, the number increased by 10%, while from 2022 to 2023 it again decreased by 28%. Overall, the number of complaints received decreased by 43% from 2020 to 2024.

5.1.1 Case types for complaints received

Of the complaints received in 2024, 32 complaints were lodged with the Complaints Board during the standstill period under Section 12(2) of the Danish Act on the Complaints Board for Public Procurement. Ten complaints were lodged before the award decision (typically in connection with preselection) or after the expiration of an eventual standstill period with a request that the Complaints Board grant the complaint suspensive effect under Section 12(1) of the Danish Act on the Complaints Board for Public Procurement. In addition, 23 complaints were lodged without a request for suspensive effect. Finally, the Complaints Board received one claim for damages and one request for reintroduction.

The following figure shows the percentage distribution of complaints received:



5.2 Closed cases

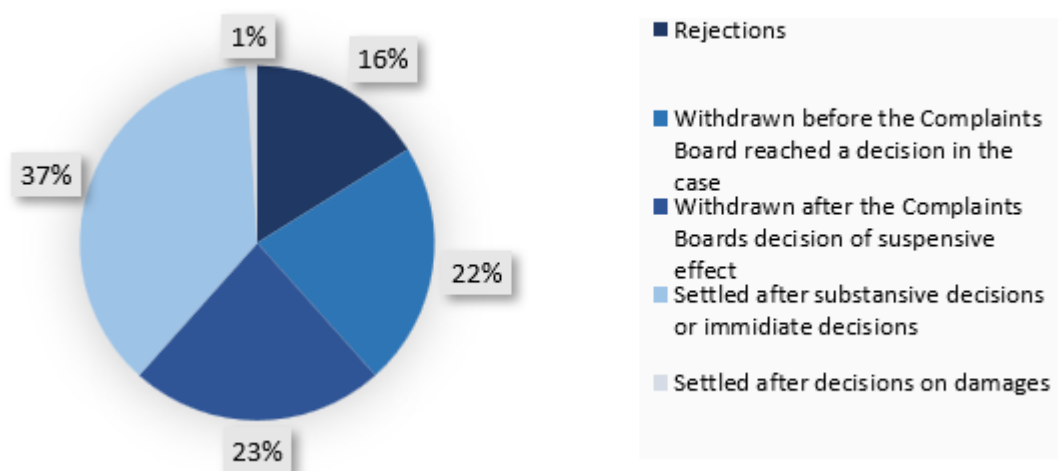
In 2024, the Complaints Board completed a total of 73 cases.

The cases were concluded as follows:

- 12 complaints were rejected
- 16 complaints were withdrawn before the Complaints Board reached a decision in the case
- 17 complaints were withdrawn following the decision of the Complaints Board on suspensive effect
- 27 complaints were settled by substantive decision, of which three complaints were settled by immediate decision
- 1 complaint was settled by a decision on damages

The figure below shows the percentage distribution of the final decisions in settled cases in 2024.

Final decisions in settled cases in 2024

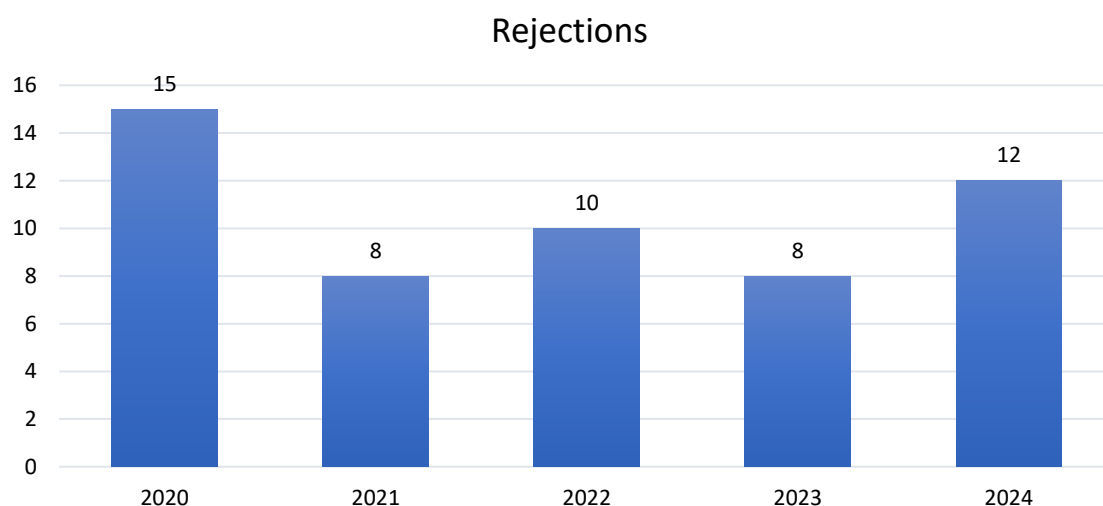


5.2.1 Outcome of closed cases

Rejections

In 2024, 12 complaints were rejected. Seven complaints were rejected due to the respective fee was not paid, while two complaints were rejected for having exceeded the deadline for filing a complaint. The remaining three complaints were rejected due to inappropriate claims.

The figure below shows the number of rejected complaints from 2020 to 2024.

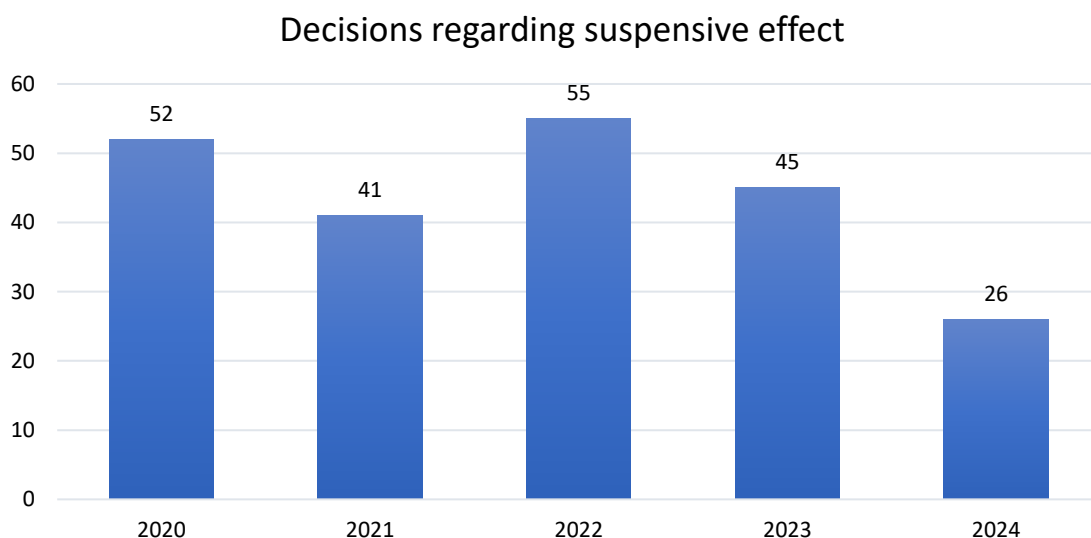


Withdrawn before the Complaints Board reached a decision in the case

In 2024, 16 cases were withdrawn before the Complaints Board reached a decision. Ten of the complaints were lodged with the Complaints Board during the standstill under Section 12(2) of the Danish Act on the Complaints Board for Public Procurement. Three of the complaints were lodged with a request for suspensive effect under Section 12(1) of the Danish Act on the Complaints Board for Public Procurement. The remaining complaints did not contain a request for suspensive effect.

Withdrawn after interim decision or partial ruling regarding suspensive effect

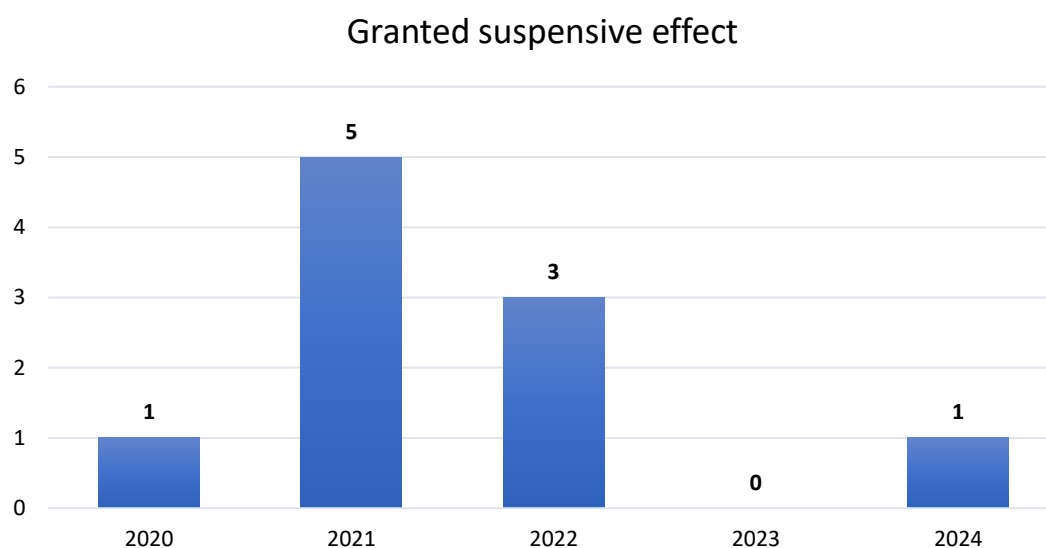
In 2024, the Complaints Board passed 26 decisions regarding suspensive effect. The figure below shows the number of rulings on suspensive effect from 2020 to 2024.



In the 26 cases in which the Complaints Board issued a decision on suspensive effect, the Complaints Board granted the complaint suspensive effect in one case.

17 of the complainants were withdrawn following the decision of the Complaints Board.

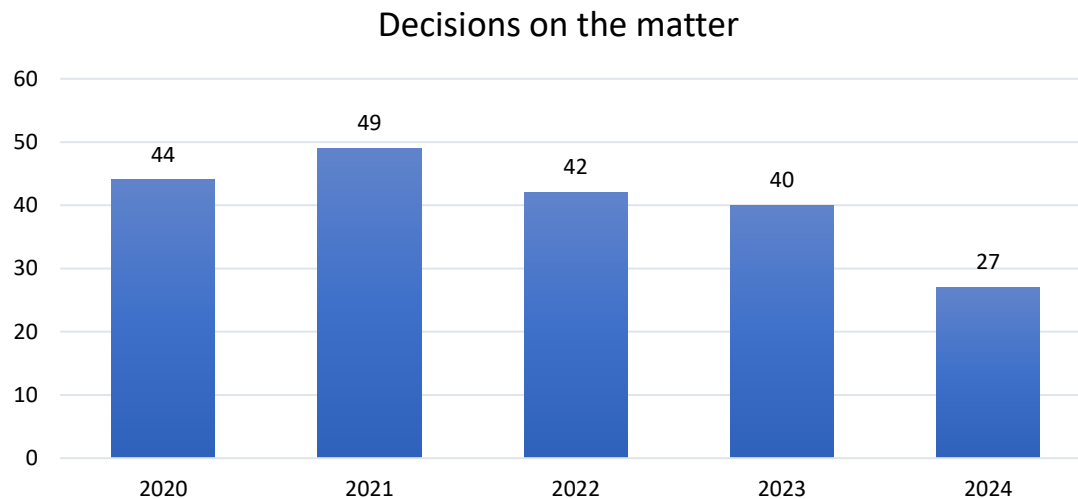
The figure below shows the number of sub-decisions in the period 2020 to 2024 where the Complaints Board granted a complaint suspensive effect.



Decisions on the matter

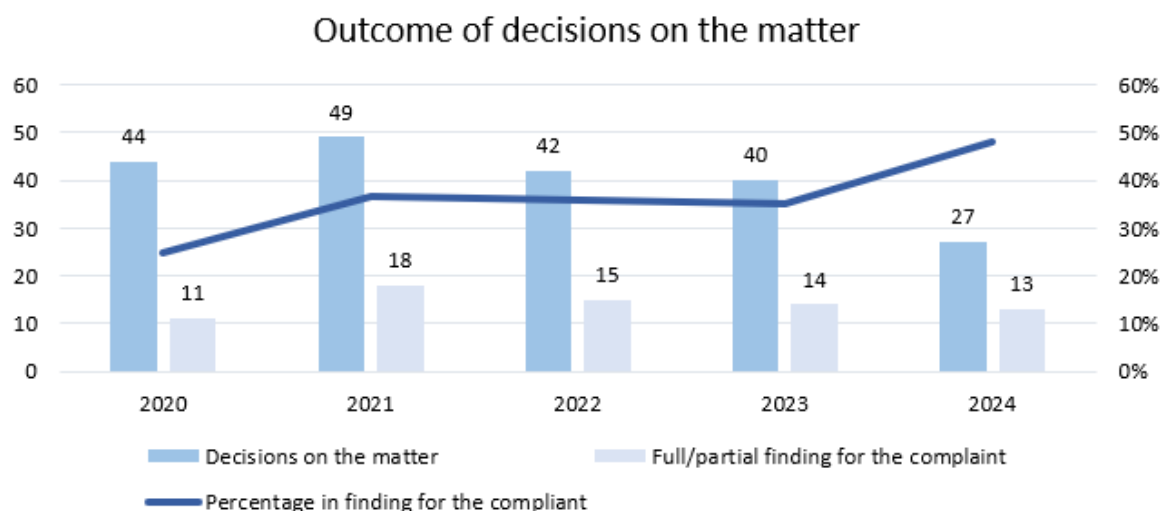
The Complaints Board's decisions on the matter concern both the substantive and immediate decisions.

The figure below shows the number of substantive decisions and immediate decisions from 2020 to 2024.



In 2024, 27 decisions on the matter were issued, of which three were immediate decisions. In 13 of the cases, complaints were either fully or partially finding for the complainant, while complaints in the remaining 14 cases were finding against the complainant.

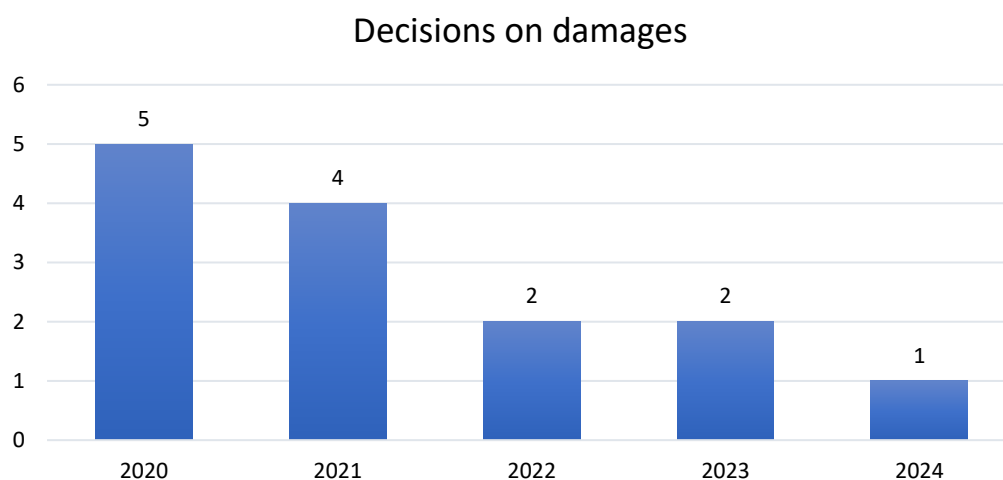
The figure below shows the percentage distribution of the outcome of decisions on the matter from 2020 to 2024.



Decision on damages

In 2024, one decision on damages was issued. The complainant was granted damages of DKK 1 million.

The figure below shows the number of decisions on damages from 2020 to 2024.

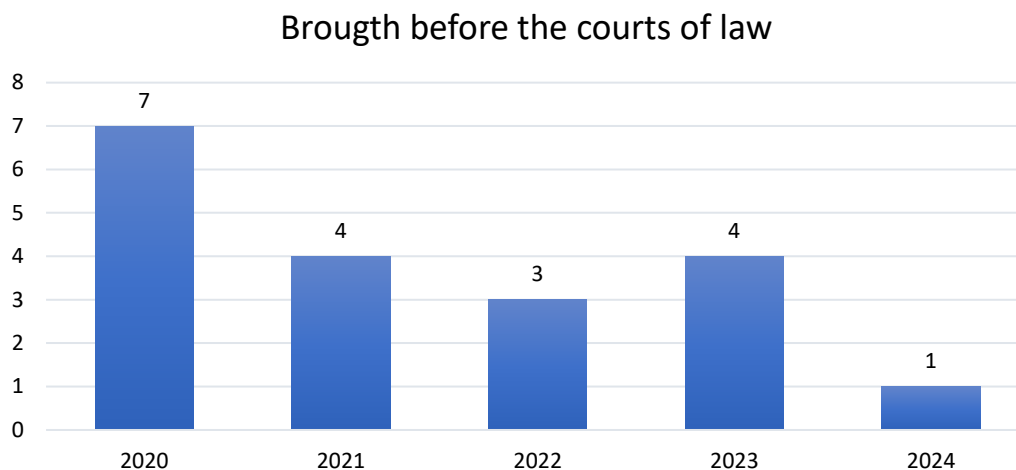


5.3 Appeal before the courts

The Complaints Board does not automatically receive notice from the courts when any of the Board's decisions are brought before the court. The Complaints Board receives information only if it is informed by the parties to the case. The Complaints Board therefore always asks the parties to the complaints to inform it of any appeals.

The Board has received information that one of its decisions was brought before the courts in 2024.

The figure below shows the number of the Complaints Board's decisions brought before the courts from 2020 to 2024.



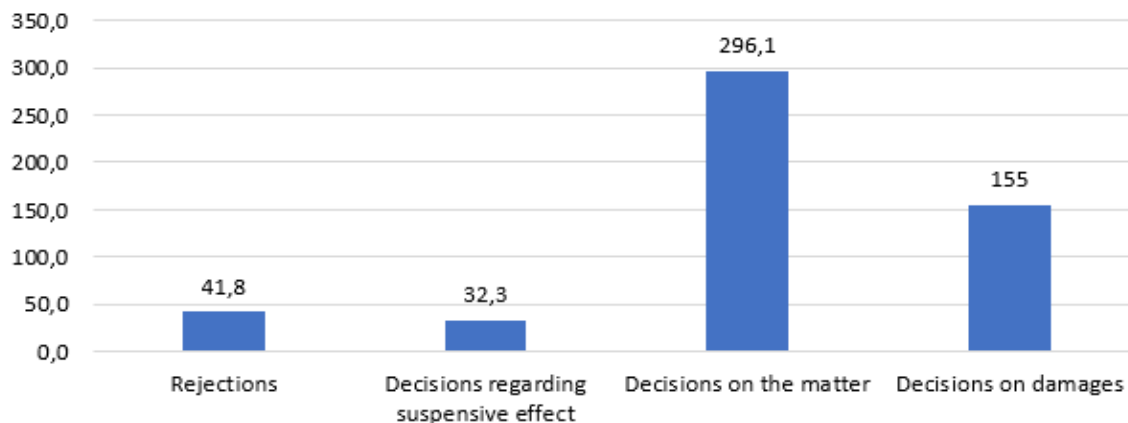
5.4 Length of proceedings

In 2024, the Complaints Board changed the principles for the calculation of the processing time to give a more fair picture. Therefore, the information on the length of proceedings in this annual report cannot be compared with previous annual reports.

In 2024, the average time spent by the Complaints Board on all closed cases was approximately 5.1 months from the time the complaint was received to the time the case was closed. (In the previous annual reports, the time spent by the Complaints Board has been calculated from substantive decisions combined with rejections. In 2023, the processing time for substantive decisions and rejections was approximately 7 months. If the same calculation is made for 2024, this results in a processing time of approximately 7.2 months).

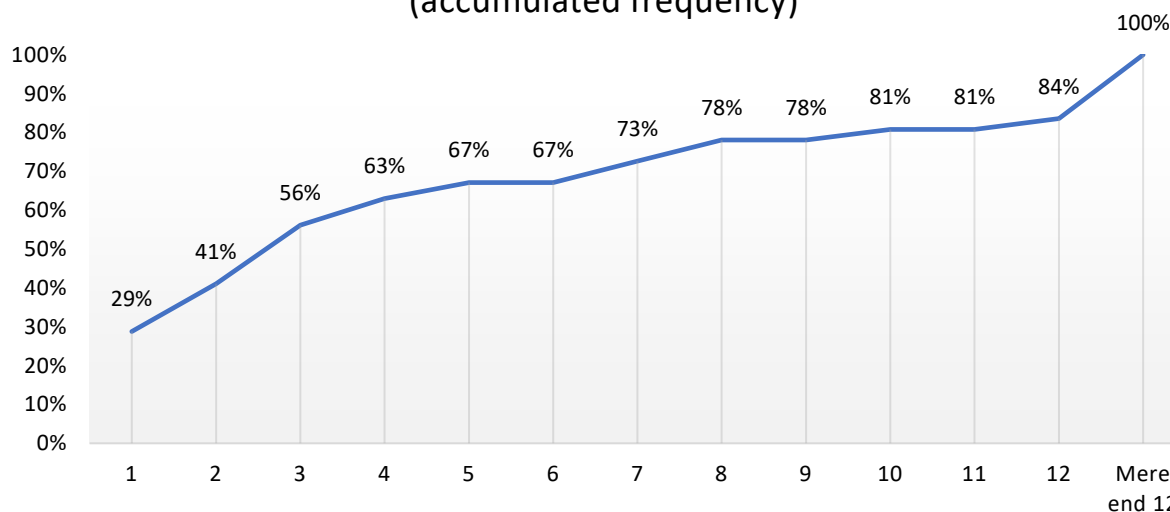
The figure below shows the average length of proceedings from receipt of the complaint until settlement of the case, broken down by type of decision.

Length of proceedings in days



The figure below shows the cumulative frequency of the length of proceedings for all decisions of the Complaints Board in 2024.

Length of proceedings in months for closed cases (accumulated frequency)



The figure shows an overview of the Complaints Board's time to process cases. For example, it can be inferred from the figure that approximately 56% of cases were concluded within the first three months after the Board received the complaint.

6. THE COMPLAINTS BOARD'S OTHER ACTIVITIES

The Board had a number of activities in 2024 in addition to hearing complaints.

Consultation responses

On 9 April 2024, the Complaints Board submitted a consultation response for the Danish Business Authority's evaluation of the Investment Screening Act.

On 2 October 2024, the Board of Appeals submitted a consultation response concerning a bill amending certain laws in the field of the Ministry of Industry (Amendment of certain laws and regulations in the field of the Ministry of Industry due to failure to perform tasks).

Participation in conferences etc.

Jakob O. Ebbensgaard, President of the Complaints Board, and Maiken Nielsen, Legal Head Advisor, made presentations at the State Procurement Conference on 28 May 2024.

On 29 May 2024, the President also made a presentation at Insight Legal Tender Conference in Copenhagen.

The President attended meetings of the Network of first instance procurement review bodies, organised by the European Commission, on 22 April 2024 in Zagreb and 12 November 2024 in Luxembourg, respectively.

The President made presentations at the JUC Procurement Conference on 31 October 2024. The Board's secretariat also attended the conference.