The Complaints Board for Public Procurement

2023 Annual Report

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INTRODUCTION

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

Chapter 1 provides an account of the Complaints Board's legal basis, establishment and composition, including the presidency, the Board's experts and secretariat. Furthermore, the chapter provides a brief review of selected decisions on access to documents which the Complaints Board made in 2023.

Chapter 2 contains summaries of a number of the Board's decisions from 2023 that are considered leading cases or are of particular interest otherwise. The Complaints Board's decisions are also published on an ongoing basis on the Complaints Board's website at www.klfu.naevneneshus.dk. This applies to decisions concerning violation of the public procurement rules, decisions awarding compensation and a selection of the Complaint's Boards final decisions regarding suspensive effect and access to documents.

Chapter 3 gives an account of Danish judgments in cases that were previously heard by the Complaints Board.

Chapter 4 contains statistics on the Complaints Board's activities with comments. In 2023, the Complaints Board received 72 complaints, which is significantly fewer than the number of complaints received in 2022. In 2023, the Complaints Board found fully or partly in favour of the complainant in approx. 35% of the complaints which is on the same level as 2022. Moreover, in approx. 15% of the Complaints Board's decisions regarding suspensive effect where the Board applied the prima facie case test (examined whether the complaint seemed to be well-founded on a preliminary assessment), it found that a prima facie case was made out. This typically led the parties to find a solution, and the complaint was withdrawn.

Chapter 5 describes the Complaints Board's other activities in the course of the year.

The Complaints Board's average length of processing in 2023 was seven months, thus on the same level as 2022.

Jakob O. Ebbensgaard, President

Viborg, July 2024

1. THE 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*) (*klagenævnsloven*), see Consolidated Act no. 593 of 2 June 2016, 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 Executive Order on the Complaints Board regulates, *i.a.*, 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. As of October 2023, the Complaints Board temporarily consisted 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 participate in the adjudication of a case. See 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 of the Complaints Board are independent in their duties as experts 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 2023, the Complaints Board's presidency was composed of the following judges:

6 THE COMPLAINTS BOARD FOR PUBLIC PROCUREMENT

President of the Complaints Board for Public Procurement:

Jakob O. Ebbensgaard, High Court Judge

Other members of the Complaints Board's presidency:

- Kirsten Thorup, Former High Court Judge
- Michael Ellehauge High Court Judge, PhD (until 23 October 2023)
- Niels Feilberg Jørgensen, Former Judge
- Erik P. Bentzen, High Court Judge
- Jesper Stage Thusholt, Judge
- Jesper Jarnit, High Court Judge
- Mette Langborg, Judge
- Morten Juul Nielsen, Judge
- Ane Røddik Christensen, High Court Judge (from 10 March 2023)
- William Lindsay-Poulsen, Judge (from 23 October 2023)

The Complaints Board's expert members in 2023 were:

- Pernille Hollerup, Senior Director
- Jan Eske Schmidt, Knowledge Partner (until 25 August 2023)
- Lene Ravnholt, Legal Advisor
- Preben Dahl, General Counsel
- Stephan Falsner, Attorney-at-Law
- Jeanet Vandling, CPO
- Ole Helby Petersen, Professor with Special Responsibilities, PhD
- Christina Kønig Mejl, Chief Advisor
- Claus Pedersen, General Counsel, LL.M.
- Birgitte Nellemann, Office Head
- Kurt Helles Bardeleben, Attorney-at-Law
- Maria Haugaard, Office Head
- Carina Risvig Hamer, Professor
- Trine Kronbøl, Head of Service
- Mikael Kenno Fogde, Attorney-at-Law
- Rikke Fog Bach, Sales Manager
- Louise Kirkegaard Folling, Chief Advisor (until 10 March 2023)
- Torkil Schrøder-Hansen, Attorney-at-Law, Chief Advisor (until 16 May 2023)
- Michael Steinicke, Professor
- Christian Lund Hansen, Chief Advisor
- Anette Gothard Mikkelsen, Office Head (from 10 March 2023)
- Mads Severin Holm, Attorney-at-Law (from 16 May 2023)
- Linda Norstrøm Nissen, Attorney-at-Law (from 25 August 2023)

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 2023.

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

In 2023, the secretariat consisted of:

- Maiken Nielsen, Legal Consultant, MSc in Business Administration and Commercial Law
- Tanja Bøtker Lindgren, Legal Consultant, LLM (leave from 24 November 2023)
- 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
- Heidi Thorsen, Administrative Officer
- Katrine Kirkegaard Gade, Senior Clerk
- Nadia Reichenbach Bodentien, Junior Clerk (until 31 August 2023)
- Anja Vibe Visby Bunch, Junior Clerk (from 1 May 2023)

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

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

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

- The Public Procurement Act and rules adopted under the Act, 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)
- The EU's financial sanctions against third countries which have been issued under the Treaty on the Functioning of the European Union and which concern the conclusion of public contracts
- The Danish Act on Invitations to Tender in the Construction Sector (the Act on Invitations to Tender) (*Lov om indhentning af tilbud i bygge- og anlægssektoren* (*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 procurement cases. The Complaints Board is the final appeals body for municipalities' and regions' violations of the rules in Danish Executive Order no. 607 of 24 June 2008 on municipalities' and regions' calculation and submission of reference bids (the Executive Order on reference bids (*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 the cases heard by the Complaints Board concern the Public Procurement Act, which mainly implements the Public Procurement Directive (Directive 2014/24/EU) and the other EU public procurement rules, including the Utilities Directive (Directive 2014/25/EU), the Concessions Directive (Directive 2014/23/EU) and the Defence 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 when not warranted by the relevant decision. Reference is made to Michael Ellehauge: Erfaringer med håndhævelsen af EU's udbudsregler (*Experience with the application of the EU public procurement rules*), Danish weekly law reports 2013 B, pages 241 et seq.

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 2023, only four out of 40 decisions. The Complaints Board's case law, and perhaps particularly decisions made within the past ten years, must be regarded as an important source of law in the application of the public procurement rules in Denmark. The Complaints Board also has the advantage of being able to act faster than the courts of law. In 2023, the average length of proceedings for public procurement cases was seven months, and to this should be added that a very large portion – approx. 53% – of the cases are brought to a conclusion within the first three months of receipt of the complaint (this figure includes rejected cases). See chapter 4 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, see Section 12(2) and (3) of the Complaints Board Act, and in other cases, see 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 og opsættende virkning i udbudsretten (*Standstill and suspensive effect in public procurement law*), Danish weekly law reports 2010 B, pages 303 et seq., and Katja Høegh and Kirsten Thorup: Standstill og opsættende virkning inden for udbudsretten – endnu engang (*Standstill and suspensive effect in public procurement law – revisited*)), Danish weekly law reports 2016 B, pages 403 et seq., and the same in the chapter Standstill og opsættende virkning i udbudsretten (*Standstill and suspensive effect in public procurement law*) in Treumer (ed.) Udbudsretten 2019 (*Procurement Law 2019*).

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

The Complaints Board's case law shows that it is common practice to provide a detailed explanation in relation to the first "prima facie case test". The objective is to explain to the complainant and the respondent that, on the 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 submitted, 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 the possibility of the Complaints Board finding 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 concluded 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 (immediate decision). The parties will then be allowed to submit supplemental pleadings. One such decision was made in 2023, the decision of 24 April 2023, Meldgaard Miljø A/S v Afatek A/S, which is discussed in chapter 2.

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, see 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 a 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) of the Public Procurement Act. According to the explanatory notes to the Act, final decision or judgment means a final decision from the Complaints Board or a judgment from the ordinary courts which may no longer be appealed.

The "ineffective contract" sanction may be used against the contracting authority even though it 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. Reference is made to the above-mentioned article by Katja Høegh and Kirsten Thorup in U.2016B.403, referring to the Complaint Board's decision of 7 May 2015, Rengoering.com A/S v the Municipality of Ringsted. However, the contracting authority may write to the Complaints Board's secretariat to ask whether a complaint has been filed against a procurement procedure, stating the contract notice number, before concluding a contract with the successful tenderer. Wherever possible, the Complaints Board's secretariat will reply to such written enquiries after 1 pm (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 Complaints Board's decision of 16 September 2022, Electrolux Professional A/S v Alabu Bolig (discussed in chapter 2 of the Complaints Board's 2022 Annual Report), where the Complaints Board filed a police report. The Complaints Board has filed no police reports in 2023.

The case law overview shown at the Complaints Board's website in relation to 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 expert members, participate in the adjudication of a case. These cases include leading cases, particularly large or complex cases, where two members of the presidency and two expert members will participate.

In 2023, this happened in four cases: the decision of 16 February 2023, Microsoft Danmark ApS v Ørsted Services A/S, the decision of 11 May 2023, Dustin A/S v Staten og Kommunernes Indkøbsservice A/S, the decision of 1 June 2023, MAN Truck Bus Danmark A/S v Region Zealand, the Central Denmark Region, the North Denmark Region and the Capital Region of Denmark, and the decision of 2 August 2023, S.A.S. SAF HELICOPTERES v the North Denmark Region, the Central Denmark Region, the Region of Southern Denmark, Region Zealand and the Capital Region of Denmark. The decisions are discussed in chapter 2.

Decisions by the president

The president of the case may decide to adjudicate cases without the involvement of an expert if they may be assessed based on the written record and are not leading cases. This option is hardly ever used as the expert members' assistance is essential. 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 such as decisions on suspensive effect and access to documents as well as rejection of ineligible complaints.

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.

The Complaints Board ensures in each case 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 an attorney-at-law or other professional advisor are available on the Complaints Board's website at www.klfu.naevneneshus.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 to that information.

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 contain claims describing in detail the 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, see 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 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.

It is also a condition that the complainant has a legal interest. Companies that have an interest in winning a certain contract are eligible to complain. Typically, complainants will be companies that have applied for prequalification or submitted a tender, but companies that would have had access to apply for prequalification or to submit a tender (potential candidates/tenderers) may also have a legal interest. In special circumstances, the successful tenderer may be eligible to complain, see the decision of 24 April 2023, Meldgaard Miljø A/S v Afatek A/S. If the complainant is not able to prove that it has a legal interest in the case, the complaint will be 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 found to not 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 Complaints Board's 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 a special cause of action.

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

In general, the time limits for filing complaints are:

No prequalification: 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 Section 6 and Sections 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 as a party. Such decisions are made in accordance with the relevant rules in the Danish Public Administration Act (*forvaltningsloven*). The complainant will normally be given the opportunity to make additional submissions when the Complaints Board has settled the issue of access to documents and before the Complaints Board makes the substantive decision in the case. In any case, thus regardless of the complainant's restricted access to documents, 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, see 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, see 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, see 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 oral proceedings, 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 is a leading case or complex, whether statements are necessary or desirable, whether there is a need for a demonstration of the issue in dispute 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 afterwards. Oral proceedings will normally take 4-5 hours, but in major cases, they may take up to 1-2 days. No oral proceedings were conducted in 2023.

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

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

In connection with substantive decisions and decisions on damages, the Complaints Board will consider the issue of costs. So does the Complaints Board in cases when the complaint is withdrawn and one of the parties so requests. The Complaints Board may order that the unsuccessful party fully or partly covers 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).

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

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

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

- Complaints of contracting authorities' refusal to grant access to documents in a procurement procedure where the Complaints Board is the appeals body according to Section 37 of the Access to Public Administration Files Act. However, the Complaints Board is not the appeals body in complaints concerning the refusal to grant access to cases on the performance of agreements concluded as a result of a procurement procedure.
- 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.

Cases on access pursuant to the Access to Public Administration Files Act differ significantly from the cases concerning violations of the public procurement rules that are heard by the Complaints Board in accordance with the Complaints Board Act. Reference is made to chapter 3 of the 2016, 2017, 2018, 2019 and 2020 Annual Reports for a detailed description of this part of the Complaints Board's case law in cases concerning

access to documents. In March 2024, the Danish Competition and Consumer Authority published guidelines on access to documents in procurement procedure cases.

In the middle of 2020, the Complaints Board decided to publish decisions on access to documents to a greater extent The following is a brief account of selected decisions on access to documents from 2023 which are likely to be of interest to a wider audience and which have all be published at the Complaints Board's website.

Decision of 3 January 2023, DiaLab, Dansk Diagnostika- og Laboratorieforening v the Central Denmark Region

DiaLab requested the Central Denmark Region for access to documents in, *i.a.*, the Region's correspondence with other authorities, including regions, concerning the decision to procure 68 million self-tests in December 2021. The Region refused to grant access to the information referring to the exclusion provision in Section 33(1), paragraph (5) of the Access to Public Administration Files Act. The Region's reason for the refusal was that a complaint or a case was a reasonable possibility and that the Region therefore had the right to ask for directions concerning the basis for being able to use Section 8(5) of the Public Procurement Act without public access to the internal decision-making process and correspondence. The Region also claimed that the employees, among other things because of the time pressure connected to the handling of the COVID-19, had corresponded in a free and informal manner and that the consideration for proper working conditions according to the special nature of the matter required that access to this correspondence should not be granted.

The Complaints Board found that these considerations in the nature and substance of the existing information could not justify a refusal of access to documents under Section 33(1), paragraph (5) of the Access to Public Administration Files Act.

Decision of 31 January 2023, Kompan Danmark A/S v the Municipality of Frederiksberg

Kompan requested the Municipality of Frederiksberg for access to documents in the successful tender with appendices in procurement procedures for a playground. The Municipality granted partial access to the documents, however, the Municipality excluded a number of information under Section 30(1), paragraph (2) of the Access to Public Administration Files Act. The Complaints Board changed the Municipality's decision as the Complaints Board found that, *i.a.*, CVs, including data about names, telephone numbers and email addresses of tenderers' or partners' employees, cannot generally be excluded from access to documents under Section 30(1), paragraph (2) of the Access to Public Administration Files Act. The same applied to data about places of employment, education, competences, roles etc. Nor did the Complaints Board find grounds to assume that the composition of the specific employee team in connection with the procurement procedure was an expression of such a special composition of employee teams generally used by the tenderer for tenders concerning this type of services that it would be grounds for excluding information under Section 30(1), paragraph (2) of the Access to Public Administration Files Act.

Decision of 17 February 2023, journalist's request for access to material concerning procurement procedures for the establishment and operation of charging points in the Municipality of Jammerbugt

A journalist requested the Municipality of Jammerbugt for access to the procurement documents, tenders received and correspondence with the tenderers in procurement procedures for the establishment and operation of charging points.

The Municipality granted partial access to the documents as the Municipality excluded a number of information under Section 30(1), paragraph (2) of the Access to Public Administration Files Act. Among other things, the Complaints Board noted that price specifications and unit prices generally constitute confidential information which, in case of disclosure, involves a potential risk of reducing the tenderer's competitiveness in any future procurement procedures causing a substantial financial loss. As it was found that there were no compelling reasons calling for a different outcome, the Complaints Board found that price specifications should be excluded from access to the documents under Section 30(1), paragraph (2) of the Access to Public Administration Files Act. The listed total prices could not be considered price specifications in the same way and therefore could not be excluded from access to the documents. Thus, the Complaints Board took into account that the total prices had been calculated based on a number of more detailed listed price specifications, and the total prices on their own therefore did not constitute information about the tenderer's specific pricing. The Complaints Board also found that information about business strategies, service and operations, delivery options and the establishment method concerned production conditions and market strategies for specific product types which could be excluded from access to the documents under Section 30(1), paragraph (2) of the Access to Public Administration Files Act. As regards information in the evaluation report, the Complaints Board found that only certain types of information, including, *i.a.*, delivery times and installation times, time schedules and information about support and service, could be excluded from access to documents under Section 30(1), paragraph (2) of the Access to Public Administration Files Act. The remaining information in the evaluation report matched the content of other documents in the case. This information could therefore not be excluded from access to the documents.

Decision of 16 March 2023, Gavdi A/S v DSB

Gavdi requested DSB for access to a number of information in a contract concluded between DSB and a supplier. In this case, the Complaints Board considered, *i.a.*, access to information about the customer's services, testing of test strategies and programmes, operations and maintenance, co-operation organisation, including CVs, prices, data processing agreements, notes and correspondence between the contracting authority and the successful tenderer.

The Complaints Board found that the supplier's description of services and service constituted information about production conditions and business strategies which could be excluded from access to documents under Section 30(1), paragraph (2) of the Access to Public Administration Files Act. Information about the customer's services, including a list of competence profiles, use of resources, file numbers and expectations for the physical setting could not be fully or partly excluded from access to the documents as the information did not concern business conditions under Section 30(1), paragraph (2) of the Access to Public Administration Files Act. The Complaints Board also considered whether information about the testing of, *i.a.*, test strategies and programmes could be excluded from access to documents. The Complaints Board found that this information constituted information about production conditions which could be excluded under Section 30(1), paragraph (2) of the Access to Public Administration Files Act. In the assessment of whether information about operations and maintenance could be excluded from access to documents under the

same provision, the Complaints Board found that certain specific information about employee competences were described in general terms only and that the information could therefore not be excluded from access to the documents while other information about operations and maintenance, which did not concern employee competences, could be excluded. Information about prices, including the establishment fee, service fee and hourly rates, could be excluded from access to documents under Section 30(1), paragraph (2) of the Access to Public Administration Files Act as disclosure could involve a potential risk of reducing the tenderer's competitiveness. The Complaints Board then considered whether the substance of the tender concerning a data processing agreement could be excluded from access to documents. The Complaints Board found that the information constituted information about production conditions and business relations which could, on that background, be excluded from access to documents under Section 30(1), paragraph (2) of the Access to Public Administration Files Act. Finally, the Complaints Board considered the correspondence between the contractor and the tenderer, and in the assessment of whether this information constituted business-sensitive information, the Complains Board found that the information only described in overall terms that a meeting had been held between the parties. This information therefore was not of such a nature that the information was subject to the scope of application for Section 30(1), paragraph (2) of the Access to Public Administration Files Act, and the information could not be excluded from access to the documents.

Decision of 27 April 2023, Yunex GmbH and Yunex Traffic Austria GmbH v Sund & Bælt A/S

Yunex, which had participated in a procurement procedure, requested access to documents. Sund & Bælt excluded some documents prepared by two technical consultants in connection with the preparation of the requirement specifications and the assessment of the candidates' professional and technical capacity. Sund & Bælt's reason was that it was a matter of internal documents excluded from access to documents under Section 23(1), paragraph (1) of the Access to Public Administration Files Act. About the specific circumstances, Sund & Bælt stated that both consultants had been subject to Sund & Bælt's powers of direction exclusively, that the consultants had been given office space, a computer and email addresses at Sund & Bælt, that the consultants had acted on terms equal to Sund & Bælt's other employees, that the consultants were subject to confidentiality for an indefinite period of time, also in relation to their usual employers, and that the documents which the consultants had prepared only existed in Sund & Bælt's systems and had not been exchanged with any third parties. The Complaints Board found that there were no grounds to disregard Sund & Bælt's assessment that the documents were of an internal nature and therefore could not be excluded under Section 23(1), paragraph (1) of the Access to Public Administration Files Act. Among other things, the Complaints Board took into account that the technical consultants had participated in the process because of their professional capacity within the relevant area and had acted under powers of direction from Sund & Bælt and therefore had not acted as employees at their other place of employment during their participation in the procurement procedure. The Complaints Board then considered whether information in the documents could still be disclosed under the duty of extraction in Section 28 of the Access to Public Administration Files Act. The Complaints Board found that the information in relation to the correspondence concerning the evaluation of tenders contained Sund & Bælt A/S' preliminary considerations only and therefore was not an expression of information of an actual nature. As regards the remaining information in the material, the Complaints Board assessed that it was of insignificant importance to the case and therefore was not subject to a duty of extraction. There therefore were no grounds to disregard Sund & Bælt A/S' assessment that the documents contained no information subject to a duty of extraction.

Decision of 13 July 2023, Plandent A/S v the Municipality of Middelfart

Plandent, which had participated in an annulled procedure, requested the Municipality of Middelfart for access to a participant's total tendered price. The Municipality refused the request. The Complaints Board first considered whether the total tendered price could be excluded from access to the documents under Section 30(1), paragraph (2) of the Access to Public Administration Files Act and found in those regards that this was not the case. The Complaints Board then considered whether the Municipality of Middelfart could, in the specific circumstances, exclude the total tendered price from access to documents under Section 33(1), paragraph (3) of the Access to Public Administration Files Act providing the possibility of restricting the right of access to the extent necessary to protect important public economic interests, including the performance of public commercial activities. The original procedure had been annulled because the Municipality had only received two tenders. The Municipality stated that a repeat procurement procedure was to be organised that same year and that it would not be necessary to make significant changes to the procurement documents in connection with the repeat procurement procedure. Thus, the shopping cart used would consist of the same positions and demanded products with a few adjustments, and the tenderers were to fill the shopping cart according to the same terms as the annulled procurement procedure. The Complaints Board found that the Municipality had established the existence of a specific risk that in the repeat procurement procedure, the Municipality would not receive tenders which would express competitive prices if access to the price information had been granted. Thus, the Municipality had established that it was necessary to restrict the access to protect important public economic interests.

Decision of 13 July 2023, Mediq Danmark A/S v the City of Copenhagen

Mediq, which had participated in a procurement procedure, requested the City of Copenhagen for access to, *i.a.*, the other unsuccessful tenderers' tenders. The Municipality's assessment was that Mediq could not be granted access to the tenders submitted by the other unsuccessful tenderers as Mediq could not be considered eligible to complain under Section 6(1), paragraphs (1)-(4) of the Act on the Complaints Board for Public Procurement and therefore was not entitled to access to the documents under the Access to Public Administration Files Act, see section 5 a of the Public Procurement Act. The Complaints Board stated that according to the wording and the travaux preparatoires, Section 5 of the Public Procurement Act was to be understood to mean that the issue concerning the right to complain was to be seen in relation to the procurement procedure ("the case") as such and not in relation to each tenderer. As Mediq, being an unsuccessful tenderer, undoubtedly had a legal interest in accordance with Section 6(1), paragraph (1) of the Act on the Complaints Board for Public Procurement and therefore was eligible to complain, the Municipality had not been entitled to preclude access to the documents from the other unsuccessful tenderers referring to Section 5 a of the Public Procurement Act. As the City of Copenhagen had refrained from making a decision on access to documents from the other unsuccessful tenderers based on an incorrect interpretation of Section 5 a of the Public Procurement Act, the Complaints Board remitted the case.

Decision of 13 July 2023, Johan Mellerup v the Municipality of Rudersdal

A citizen requested the Municipality of Rudersdal for access to engineer and architect notes, the list of tenders and written declarations from the selected tenderer in procurement procedures for the expansion and modernisation of a care facility. The Municipality had restricted the citizen's access to the documents referring to Section 5 a of the Public Procurement Act according to which access to documents is restricted

to those eligible to complain under the Act on the Complaints Board for Public Procurement concerning the case which the request for access concerns and for mass media. The citizen then filed a complaint to the Complaints Board against the Municipality's decision on access to documents stating that much information did not specifically concern the substance of the tender. Following a review of the travaux preparatoires, the Complaints Board found that the citizen's interest was not of such a nature that he was eligible to complain under Section 6(1) of the Complaints Board Act. Thus, the citizen was not able to gain access to tenders or information from tenders under the Access to Public Administration Files Act, see Section 5 a of the Public Procurement Act. Nor was the citizen able to gain access to information in the tenders under Section 14 of the Access to Public Administration Files Act according to a principle corresponding to the additional openness principle.

Decision of 8 December 2023, Nordiske Medier v Mediq Danmark A/S

Nordiske Medier requested the Complaints Board for access to a statement of claim in a pending complaints case. The Complaints Board conducted a hearing of the complainant that claimed that claims as well as arguments in the statement of claim should be excluded from access to the documents. The Complaints Board found that the information in the statement of claim could not be considered to be subject to Section 30(1), paragraph (2) of the Access to Public Administration Files Act. Thus, the Complaints Board took into account that the information was of such a general and overall nature that it did not constitute specific descriptions of, *e.g.*, technical procedures or business strategies.

2. DECISIONS IN SELECTED AREAS

2.1 Introduction

All substantive decisions and decisions on compensation are published on the Complaints Board's website at www.klfu.dk. Interim decisions granting suspensive effect and decisions on access to documents are also published if they are of general interest. Below follows a description of a number of decisions from 2023 that have all been published at the Complaints Board's website. Some of the cases were leading cases. Others deal with issues that, regardless of their specific nature, are likely to be of interest to a wider audience.

The decisions are categorised as follows:

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

The decisions are categorised by the issues specifically considered in the decision as several aspects can be highlighted in each case.

2.2 Selected interim decisions and decisions

2.2.1 Competitive tendering obligation, direct award and amendment of contracts

Decision of 25 April 2023, KN Rengøring v/Henrik Krogstrup Nielsen v Herlev Municipality

The case concerned a procurement procedure for a contract on cleaning services and window cleaning in Herlev Municipality. The Municipality had terminated the contract with the former supplier due to material breach and concluded a cover contract/interim contract with a new supplier for a period of approx. 9½ months pursuant to Section 80(5) of the Public Procurement Act (Article 32(2) of Directive 2014/24/EU). The former supplier filed a complaint with the Complaints Board claiming that the conditions for applying Section 80(5) had not been met. The complainant was successful. Economic sanction.

Following a procurement procedure pursuant to Title II of the Public Procurement Act, Herlev Municipality concluded a contract with KN Rengøring on cleaning and window cleaning at a large number of locations in the Municipality. After approx. 2 months, the Municipality complained about insufficient cleaning. The Municipality gave notice that continued breach of the contract could lead to termination of the contract. The

cleaning performed was regularly quality-tested, and as the cleaning continued to not reach the requested level in the Municipality's view, the Municipality terminated the contract after approx. six months, giving the reason material breach.

A few days after the termination of the contract, Herlev Municipality concluded an interim contract with a new supplier for a period of approx. 9½ months. The interim contract was concluded without a procurement procedure. According to the Municipality, it was comprised by the exemption from the obligation to call for tenders in Section 80(5) of the Public Procurement Act.

KN Rengøring filed a complaint with the Complaints Board claiming that the conditions for applying Section 80(5) of the Public Procurement Act had not been met.

The Complaints Board stated that Section 80(5) of the Public Procurement Act is a narrow exemption provision and that it is for the contracting authority to prove that the conditions for applying the provision have been met. According to the case law of the Court of Justice of the European Union, a requirement for applying the provision is the existence of 1) an unforeseeable event, 2) a condition of urgency of a compelling nature that does not allow observance of the time limits required in other procedures and 3) a causal connection between the unforeseeable event and the resulting compelling condition of urgency.

The Complaints Board established that a situation did not exist which the Municipality could not have foreseen. In its assessment, the Complaints Board considered that, *i.a.*, for a period of time, the Municipality had known of the issues that led to the termination of the contract. Condition no. 1) concerning the existence of an unforeseeable event had therefore not been met.

The Complaints Board then established that the Municipality had not met the burden of proof that compelling reasons existed that made it impossible to meet the time limits for a normal procurement procedure or for an accelerated procedure. Thus, the Complaints Board took into account that, *i.a.*, the Municipality had not given any detailed information that missing cleaning and window cleaning at, *e.g.*, schools would involve a serious health risk. Condition no. 2) had therefore not been met either.

Finally, the Complaints Board stated that a new cover contract must be limited to what is necessary, and if the contract could be divided, only those parts of the contract which relates to the compelling reasons are comprised while the other parts must be put out to tender according to the normal rules. The Municipality had not met the burden of proof that it was strictly necessary to conclude an interim contract on all services in the previous contract for a period of 9½ months.

Consequently, the Complaints Board annulled the award decision. As the contract had been performed, there were no grounds to declare the contract ineffective. Instead, the Municipality was ordered to pay an economic sanction of DKK 840,000.

Decision of 28 June 2023, MED-EL Nordic AB v Capital Region of Denmark (referred to the courts of law)

A complaint that a Region's temporary agreements with some suppliers had been concluded without a procurement procedure was not allowed as sufficient grounds did not exist to disregard the Region's estimate that the value of the agreements did not exceed the threshold.

In December 2017, the Capital Region of Denmark concluded a framework agreement concerning the delivery of cochlear implants and accessories with four suppliers, including MED-EL. The award model was a direct award according to a cascade model with the possibility of choosing a different supplier than the one to which the cascade model was pointing based on a number of defined medical considerations.

In 2020, MED-EL expressed dissatisfaction that the company, which was number three in the framework agreement, was given the fewest number of agreements among the four framework agreement holders. As the Region maintained that the award model was followed, MED-EL complained to the Complaints Board claiming that all procurement in the framework agreements was to be considered as having taken place without a procurement procedure and therefore had to be declared of no effect. In the Complaints Board's decision of 21 April 2021, MED-EL's complaint was not allowed.

In the summer of 2021, the Region established that due to the impact which the COVID-19 had on the hospital service and general shortage of resources, adapting and organising new procurement documents and launching a new procurement procedure in direct continuation of the expiry of the existing contracts on 31 March 2022 would be a problem. The Region found it necessary to cover the procurement need for an interim period between contract expiry and a new procurement procedure by concluding a temporary contract for that period. The Region concluded interim agreements with three of the former suppliers starting on 1 April 2022. The interim agreements were to be in force until terminated. The fourth supplier, MED-EL, had contacted the Region to receive information of how the Region would buy cochlear implants until a new agreement had been concluded. The Region replied that a change in its procurement need meant that the Region's total purchase of implants for a period of 12 months would not exceed the threshold for procurement procedures under Title II of the Public Procurement Act. The Region added that many operations had been cancelled due to the COVID-19, including operations for which products had already been bought. Among other things, the Region therefore had an overcapacity of implants which changed the procurement need.

In June 2022. MED-EL stated that if the company was not awarded an agreement on the delivery of implants like the other three suppliers plus a guaranteed turnover, MED-EL would file a complaint with the Complaints Board claiming that the interim agreements were to be declared of no effect. The Region replied that MED-EL could be awarded an agreement with no guaranteed turnover which was on the same terms as the other suppliers. MED-EL then filed a complaint with the Complaints Board.

The Region requested the complaint dismissed giving the reason that MED-EL had no legal interest in it, but the Complaints Board did not allow the claim for dismissal.

MED-EL claimed that the Region had acted contrary to the principles of equal treatment and transparency in Section 2 of the Public Procurement Act in that it had concluded the temporary agreements without a procurement procedure.

The Complaints Board did not allow MED-EL’s claim giving the reason that based on an overall assessment, there were not fully sufficient grounds to disregard the discretion which the Region had exercised concerning the value of the procured products. Thus, it was taken into account that the Region had a large number of implants on hand that could be used for upcoming operations, and patient procurement was not to be included when calculating whether the threshold had been exceeded.

Decision of 26 September 2023, Konsortiet Abena A/S and Coloplast Danmark A/S v Esbjerg Municipality, Middelfart Municipality, Vejle Municipality, Herning Municipality, Fanø Municipality, Vejen Municipality, Varde Municipality and Billund Municipality

The case concerned an open procurement procedure for a framework agreement on ostomy products to citizens with grants under Section 112 of the Danish Act on Social Services (serviceloven). The complaint was filed by an unsuccessful tenderer. Questions concerning services subject to a competitive tendering obligation Information about grounds for exclusion in the Executive Order of Public Procurement. Found that the contracting authorities had violated the procurement procedure rules by not stating a maximum amount or maximum value of the use of the framework agreement, and the award decision was therefore annulled.

The Complaints Board initially considered whether a bilateral agreement had been put out to tender as that was decisive as to whether it was a service subject to a competitive tendering obligation, thus whether the Complaints Board was competent to consider the case. According to the procurement documents, the Supplier had to make a grant system available to the municipalities in addition to the delivery of ostomy products, the supplier had to train the municipal employees in using the system and prepare guidelines in the use of the system, and the supplier was obliged to provide nursing consultancy to the municipal employees in the term of the agreement in the form of consultancy by telephone or personal consultancy. The Complaints Board found that it was a matter of a procurement procedure for a supplier agreement under Section 112(2) of the Act on Social Services which was bilateral and therefore subject to a competitive tendering obligation.

The Complaints Board then established that for a contracting authority to state which voluntary grounds for exclusion that apply in the contract notice only is in accordance with Section 128(2) of the Public Procurement Act (Article 49 and Article 51(2) of Directive 2014/24/EU), the provisions on voluntary and mandatory exclusion grounds and Annex V part C of the Public Procurement Directive. It is therefore not necessary for the contracting authority to expressly state the mandatory grounds for exclusion in the contract notice.

The case also raised the issue of stating the maximum value in the framework agreement. The contracting authorities had completed II.1.5) and II.2.6) of the contract notice, stating an amount of approx. DKK 116 million. However, the contracting authorities had stated a maximum value of DKK 140 million during the procurement procedure in connection with the questions/answers. The Complaints Board referred to the judgment of the Court of Justice of the European Union in Simonsen and Weel and stated that an expected maximum value and an estimated annual consumption do not constitute a fixed maximum limit and therefore could not be considered a statement of the maximum amount or the total maximum value of the products to be delivered. On that basis, the municipalities did not meet the requirement of stating in contract notices or other procurement documents a maximum amount or maximum value of the products to be delivered in accordance with the contract notice.

The Complaints Boar decided to annul the award decision referring to the missing statement of the maximum amount or total maximum value of the framework agreement.

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

Interim decision of 17 January 2023, Fitness Engros A/S v the Danish Ministry of Defence's Acquisition and Logistics Organisation (FMI)

FMI had violated the procurement procedure rules by not stating how the tenderers were to document that the weightlifting equipment tendered met the specifications of the weightlifting federation IWF (International Weightlifting Federation). It was therefore likely that the procurement procedure would be annulled.

It was also stated that Section 41(1) of the Public Procurement Act (Article 42(3) of Directive 2014/24/EU) was to be interpreted to mean that the standard concept refers to a standard drawn up by specified standardisation organisations, which IWF was not, and that a condition can only be stated as a minimum requirement for the service put out to tender if it is clear to the tenderers how to state or verify that the minimum requirement has been met.

The case concerned a procurement procedure under Title II of the Public Procurement Act for a framework agreement on the delivery of gymnastics equipment. The complaint was filed by Fitness Engros whose tender FMI had rejected giving the reason that some of the weightlifting equipment offered did not meet the requirements of the procurement documents. However, based on the procurement documents, it had not been clear to the tenderers how and with what content to state the documentation of "equivalent", including that the documentation could not be obtained from the manufacturer and that a certificate or a report had to be available from an independent third party before the documentation could be approved. Thus, there had been discrimination between tenderers that had chosen IWF for certification and other tenderers.

Thus, a prima facie case was not made out concerning part of the claim, however, as the urgency condition had not been met, the complaint was not granted suspensive effect. FMI subsequently annulled the procurement procedure, and Fitness Engros then withdrew the complaint. The interim decision was therefore the Complaints Board's final decision.

Decision of 16 February 2023, Microsoft Danmark ApS v Ørsted Services A/S

There were no grounds to interpret Article 77 of the Utilities Directive to mean that a qualification procedure in accordance with the provision cannot concern framework agreements. In connection with the application of the qualification procedure, the contracting authority had provided sufficient information about the value of the framework agreement. It was also stated that as a rule, it is lawful to make changes concerning conditions that have been marked as being subject to negotiation in advance, for example negotiation requirements (which was referred to as standard requirements in the specific procurement procedure) and that a requirement methodology, where the procurement documents did not differentiate between evaluation requirements, standard requirements and minimum requirements, was not opaque and unfit.

The case concerned a competitive procedure with negotiation under the Utilities Directive for a framework agreement on an IT service. Prequalification of candidates took place through a qualification system.

The complaint was filed by Microsoft whose final tender Ørsted rejected as non-compliant.

The Complaints Board found that according to the wording of Article 44, Article 47 and Article 51 of the Directive, it was possible to apply a qualification system for procurement procedures for a framework agreement and that it was not contrary to the purpose of qualification systems or the consideration for effective competition. Microsoft's claim in those regards was therefore dismissed.

The Complaints Board also found that the qualification system had been published through a notice which contained the necessary information and that in its calling for requests for prequalification in accordance with the rules on the application of a qualification system, Ørsted had stated an estimated total amount and an assessed maximum amount. Ørsted had therefore met the obligation of providing the information mentioned.

Differentiation had been made between evaluation requirements, standard requirements and minimum requirements in the procurement documents. Only the response to evaluation requirements was part of the evaluation of tenders. Standard requirements could be negotiated during the procurement procedure. However, standard requirements could not be amended if the amendments constituted changes to fundamental elements. Minimum requirements could not be negotiated. Any deviations in terms of standard and minimum requirements in the final tender would be handled as reservations. if the tenderers' final tender had reservations in relation to minimum requirements, the tender would be rejected. On the other hand, if the reservation concerned standard requirements, it would be attempted to fix a price of the reservation. If it was not possible to fix a price of the reservation with the necessary certainty and objectivity, the tender would be rejected as non-compliant. The Complaints Board established that the requirement methodology was clearly described in the procurement documents and that the various requirement types had been applied accordingly. The procurement documents were therefore not too unclear to form the basis of a lawful tender assessment and award decision.

Interim decision of 21 March 2023, EV Infra Denmark ApS v the Municipality of Køge

Requirements for financial and economic capabilities must be related and be reasonably proportionate to the need to ensure the successful tenderer's ability able to perform the contract, taking into account the subject-matter of the contract and the purpose of ensuring genuine competition. The contracting authority had not established in the case that a requirement for positive equity met those requirements. The prima facie requirement was therefore not met.

The case concerned a repeat procurement procedure under the Concessions Directive (Directive 2014/23/EU) for a contract on the establishment and operation of charging points for electric vehicles.

In the conditions of concession, the Municipality of Køge had made a requirement for the tenderer's equity for the past three financial years to be positive. The Municipality had made no other requirements for the tenderers' financial and economic capabilities. In connection with the evaluation of tenders, the Municipality excluded EV Infra giving the reason that they did not meet the minimum requirements for financial and economic capabilities. EV Infra, which had a positive equity of DKK 40,000, was a newly established subsidiary of a foreign company.

The Complaints Board initially established that the second sentence of Article 38(1) of the Concessions Directive requires that the candidates' financial and economic situation must be related and reasonably proportionate to the need to ensure the ability of the concessionaire to perform the concession, taking into account the subject-matter of the concession and the purpose of ensuring genuine competition.

The Complaints Board then stated that the requirement for the tenderers' economic and financial capabilities made by the contracting authority – when isolating that requirement – merely excluded tenderers that had had negative operations within the past three years which had caused lost equity. Furthermore, the requirement excluded tenderers that had not existed long enough to be able to present accounts for three financial years. Under the conditions of concession, however, the requirement could not lead to the exclusion of newly established companies as the conditions of concession required that tenders could be submitted by tenderers that had existed for less than three financial years.

The Municipality had not explained in detail the purpose of the requirements and had not explained that the requirement was related and reasonably proportionate to the need to ensure the successful tenderer's ability to perform the concession. When excluding EV Infra, nor had the Municipality explained in detail why EV Infra had not sufficiently established its economic capabilities.

The Complaints Board therefore found that the Municipality of Køge had not established that EV Infra did not meet the requirement for financial and economic capabilities. However, as the condition of urgency had not been met, the complaint was not granted suspensive effect. The Municipality subsequently annulled the award decision, and the complaint was withdrawn. The interim decision was therefore the Complaints Board's final decision.

Decisions of 22 March and 10 May 2023, Branch of Trend Micro Emea Limited v the Capital Region of Denmark

Requirements for software to be compatible with the contracting authority's existing IT environment were fair and proportionate.

The case concerned the procurement of "Endpoint protection software" through a dynamic procurement system concerning standard software (SKI 02.06).

In the procurement documents, the Capital Region of Denmark had required the software to be compatible with the Region's existing firewall and sandbox solution. The requirements made meant that a number of software products, including the endpoint protection software from the complainant, did not meet the conditions and that those products could therefore not be offered.

The Complaints Board initially referred to Section 40(1) and (4) of the Public Procurement Act (Article 42(1) of Directive 2014/24/EU) and its travaux preparatoires according to which, *i.a.*, the contracting authority, in accordance with the principle of proportionality, can only make requirements that are proportionate to the value and objectives of the contract and in consequence, only requirements that are necessary and appropriate for the completion of the purposes intended can be made. Furthermore, reference is made to the principle of equal treatment, stating that similar conditions must not be treated differently and that different conditions must not be treated similarly unless such different treatment is justified by objective

reasons and are proportionate. As a result, the contracting authority can establish the technical specifications so that only certain economic operators have access to the public procurement if these requirements are fair. Furthermore, the contracting authority must not use the technical specifications to create unjustified obstacles to the competition or in other way artificially restrict competition. As a result, it will only be possible for the contracting authority to establish requirements for technical specifications which have an anti-competitive effect if the contracting authority can state fair grounds to make the requirements.

The Complaints Board then had different opinions as the President of the Complaints Board found that the requirements established were proportionate and fairly reasoned in relation to the consideration of keeping and utilising the existing infrastructure in order to contribute to increased IT security and minimised risks while the expert member found that in its general references to, *i.a.*, "safety-related, organisational, technical and economic reasons", the contracting authority had failed to meet the burden of proof that the requirements were fair and proportionate.

As the President has the casting vote in case of parity of votes, see Section 10(5) of the Complaints Board Act, the complaint was not allowed.

Decision of 24 April 2023, Meldgaard Miljø A/S v Afatek A/S

The successful tenderer had a legal interest in filing a complaint, see Section 6(1) of the Complaints Board Act. Use of an accelerated procedure under Section 57(5) of the Public Procurement Act (Article 27(1), second paragraph and Article 27(2)-(4) of Directive 2014/24/EU) was wrongful.

Two in actual fact simultaneous open procurement procedures under Title II of the Public Procurement Act for a service concerning the disposal of slag had been launched as accelerated procedures under Section 57(5) of the Public Procurement Act (Article 27(1), second paragraph and Article 27(2)-(4) of Directive 2014/24/EU) with a time limit for submission of tenders of 15 days. Meldgaard, which had won both procurement procedures, filed a complaint claiming that, *i.a.,* the use of an accelerated procedure and a time limit for submission of tenders of 15 days had been wrongful.

Afatek requested the complaint dismissed referring to Meldgaard not having a legal interest. In the alternative, Afatek denied the claims concerning Section 57(5) of the Public Procurement Act (Article 27(1), second paragraph and Article 27(2)-(4) of Directive 2014/24/EU). Afatek acknowledged some other violations.

The Complaints Board noted that the concept "legal interest" in Section 6(1) of the Complaints Board Act must be broadly interpreted in accordance with the judgments of the Court of Justice of the European Union in C-249/01 and C-492/06. Before as well as right after the procurement procedure in question, Afatek had launched similar procurement procedures using an accelerated procedure and had stated in the contract notice that it was a matter of a "recurring open procurement procedure". Meldgaard was to be considered one of relatively few operators in the relevant market and had asked questions about the reason for using the accelerated procedure during the procurement procedures. Afatek had stated that the accelerated procedure was to be expected to be used in the future as well.

On that basis, Meldgaard had a specific and direct interest in clarifying whether the use of the accelerated procedure was in accordance with the procurement procedure rules. The Complaints Board therefore did not allow the claims for dismissal.

Section 57(5) of the Public Procurement Act (Article 27(1), second paragraph and Article 27(2)-(4) of Directive 2014/24/EU) apply where an "urgent need" with the contracting authority makes it impossible to meet the 30-day time limit in Section 57(2). During the repeat procurement procedures for which the accelerated procedure had been used, Afatek had stated the following reason: "Limited storage space for slag". Thus, Afatek had changed the exemption provision concerning an accelerated procedure in Section 57(5) of the Public Procurement Act (Article 27(1), second paragraph and Article 27(2)-(4) of Directive 2014/24/EU) to a standard procedure for Afatek. Nor could the time limit be reduced from 30 to 15 days without a specific reason.

The Complaints Board allowed the claims that it had been wrongful to use the accelerated procedure and to reduce the time limit to 15 days.

Based on an overall assessment, the Complaints Board dismissed the claims for annulment. The Complaints Board took into account that Meldgaard had used the complaints to gain clarification of the limits of Afatek's repeat use of an accelerated procedure but had also declared itself fully willing to abide by the tenders submitted in the two procurement procedures.

Decision of 11 May 2023, Dustin A/S v Staten og Kommunernes Indkøbsservice A/S (SKI)

Open procurement procedure under the Public Procurement Act for a framework agreement with two lots on the delivery of computers with related services and IT equipment for administrative use (lot 1) and for use in schools (lot 2). The lots were awarded to the same tenderer. The complaint was filed by the former supplier of both lots whose two tenders were non-compliant. In the interim decision of 12 September 2022, the complaint was granted suspensive effect. The contracts were then concluded. A number of claims that, i.a., changes in the requirement specification could not be made without a new procurement procedure were not allowed. It was undisputedly stated in the e-catalogue that the successful tenders were non-compliant within several points. Provided that SKI would have realised this before the conclusion of the contract if the e-catalogue had been prepared before the conclusion of contracts as established in the tender specifications and not later in the process (Dissent). Annulment of the award decisions.

SKI launched an open procurement procedure under the Public Procurement Act for a framework agreement with two lots on the procurement of computers with related services and IT equipment for administrative use and for use in schools. Each lot was to be awarded to one supplier. The estimated value of both lots was DKK 3.237 bn. The maximum value was stated to be DKK 4.657 bn. The award criterion was Price. The procurement procedure was conducted using the electronic procurement system ETHICS.

SKI received four tenders for lot 1 and three tenders for lot 2, including tenders from Dustin and from Comm2IG for both agreements.

Dustin's tenders were non-compliant as only empty documents had been uploaded. SKI awarded both lots to Comm2IG. Dustin then filed a complaint. The complaint was not granted suspensive effect as the condition of urgency had not been met, and SKI concluded contracts with Comm2IG right afterwards.

Two presidents and two experts participated in the consideration of the case, see Section 10(4) of the Complaints Board Act.

The complaint contained 16 claims:

Claim 1 concerned a violation of Section 2 of the Public Procurement Act in that the time limit for the submission of tenders had been extended through a notice for supplementary information which had not been submitted to the EU Publications Office until the day after the time limit had expired. According to Section 93(3) of the Public Procurement Act (Article 47 of Directive 2014/24/EU), the time limit for the submission of tenders must be stated in the contract notice, and the corrigendum should therefore have been sent to the Publications Office before the expiry of the applicable time limit. The rules of the Public Procurement Act on "Determining time limits and the opening of tenders" have been drawn up to support observance of the leading principles of equal treatment and transparency. The claim was allowed. As the violation had not had any specific and significant impact, it did not lead to an annulment of the award decisions.

Claims 2-10 concerned various changes to the requirement specifications during the procurement procedure. The decision contains a review of the contracting authority's right to make insignificant and significant changes without a new procurement procedure versus changes to fundamental elements that require a new procurement procedure.

Claim 2 only concerned a clarification of the procurement documents, and the tenderers were appropriately informed. Claim 3 concerned a typing error which must have been clear to all professional operators. The tenderers were appropriately informed. Claim 4 clearly concerned a correction of incorrectly formatted text. Claim 5 concerning lot 2 partly concerned a linguistic clarification of the procurement documents which was merely an expression of a change of the requirement specification itself. The claim partly concerned a change of the requirement for an integrated touch screen following which it was made possible to offer a wide range of products in a subproduct group. It had not been established that it was a matter of a change which could have had an impact on potential tenderers' participation in the procurement procedure or could have distorted competition. It was therefore not a matter of a change of a fundamental element. On the other hand, it was a matter of a significant change which required an extended time limit for the submission of tenders in accordance with the situation, see Section 93(4), paragraph (2) of the Public Procurement Act (Article 47 of Directive 2014/24/EU). Claim 6 concerning lot 2 concerned a change of the requirement for battery capacity in certain computers and made it possible to offer a wider range of products for the relevant product groups. It had not been established that it was a matter of a change which could have had an impact on potential tenderers' participation in the procurement procedure or could have distorted competition. It was therefore not a matter of a change of a fundamental element. On the contrary, it was a matter of a significant change which meant that the time limit for submitting tenders pursuant to Section 93(4), paragraph (2) of the Public Procurement Act (Article 47 of Directive 2014/24/EU) had to be extended, which it was together with the change of the requirements for touch screens, see claim 5. Just like claims 5 and 6, claim 7 concerned lot 2 and involved a change through which "Sleeves" were exempted from the requirement that all equipment had to be original equipment from the manufacturer of the laptop. It had not been established that the change could have had an impact on potential tenderers' participation in the procurement procedure or could have distorted competition. On the contrary, it was a matter of a significant change which meant that the time limit for submitting tenders pursuant to Section 93(4), paragraph (2) of the Public Procurement Act (Article 47 of Directive 2014/24/EU) had to be extended,

which it was together with the changes that were comprised by claims 5 and 6. Claim 8 concerning lot 1 and claim 9 concerning lot 2 were a matter of the total number of changes having to be considered as fundamental by their nature and therefore required new procurement procedures. Claim 10 concerned the duration of some of the extensions of time limits which SKI had determined because of the changes, see Section 93(4), paragraph (2) of the Public Procurement Act (Article 47 of Directive 2014/24/EU).

None of the claims were allowed based on very elaborate and detailed reasons.

Claim 11 concerning lot 1 and claim 12 concerning lot 2 were about a violation of Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) and Section 42 (Article 42(4) of Directive 2014/24/EU) in that the technical specifications referred to specific brands. Referring to the judgment of 12 July 2018 by the Court of Justice of the European Union in C-14/17, VAR and ATM, the Complaints Board established that Section 42(2) of the Public Procurement Act (Article 42(4) of Directive 2014/24/EU) is an exemption provision which is to be interpreted in a restrictive sense. The parties had concurrently accepted that the contracting authority – in many open procurement procedures in which the procurement of IT programmes is included, including operating systems etc. – has a fair and legitimate need for newly procured software to be compatible with the existing IT environment. Dustin had not proved that the many references in the requirement specification to specific brands, trademarks etc. did not guarantee compatibility with the buyers' existing IT environment. Referring to the contracting authority's wide discretion when estimating their procurement needs, the claims were not allowed.

Claim 13 concerning lot 1 and claim 14 concerning lot 2 were about a violation of Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU). According to the e-catalogue and the associated product descriptions and data sheets, the tenders from Comm2IG were non-compliant within several points which indisputably could not have been established by SKI when submitting their tender. Dustin claimed that in the required review of the e-catalogue prior to the conclusion of contracts, SKI would have realised that Comm2IG's bid was non-compliant in both lots. SKI claimed that the e-catalogue had not been made prior to the conclusion of contracts. The non-compliance therefore raised contractual issues only.

The majority of the Complaints Board stated that the tender specifications were to be interpreted to mean that no contracts would be concluded until the e-catalogue had been prepared. Thus, the examination obligation in procurement law in connection with the preparation of the e-catalogue which SKI had imposed on itself when organising the procurement procedure would have led to the tenders by Comm2IG being rejected as non-compliant. SKI had therefore violated Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) in that they had not observed the process laid down and in that they had awarded contracts to Comm2IG despite non-compliance with the requirement specification within a number of areas.

There were dissenting opinions in terms of understanding the procurement specifications to mean that SKI could choose between signing the contracts before or after the preparation of the e-catalogue and in terms of not considered the verification to be material verification to make sure that the products met the requirement specification.

Thus, the claims were allowed.

Claim 15 concerning lot 1 and claim 16 concerning lot 2 on the annulment of the award decisions were then allowed because of the Complaints Board's assessment concerning claims 13 and 14.

Decision of 1 June 2023, MAN Truck & Bus Danmark A/S v Region Zealand, the Central Denmark Region, the North Denmark Region and the Capital Region of Denmark (referred to the courts of law)

Open procurement procedure under Title II of the Public Procurement Act for a framework agreement on the delivery of various types of ambulances. The complainant's claims that particularly concerned the circumstance that the successful tender did not meet a number of detailed requirements were not allowed.
Four regions had launched an open procurement procedure together for a framework agreement on the delivery of ambulances, speciality ambulances and vehicles for transport of patients lying down. MAN was an unsuccessful tenderer that claimed annulment.

Due to its nature and the value of the procurement procedure, the case was considered by two members of the Complaints Board's presidency and two experts, see Section 10(4) of the Complaints Board Act.

The Complaints Board initially stated that as MAN had not made any claims that concerned the actual evaluation of the tenders, the Complaints Board did not consider that, see the second sentence of Section 10(1) of the Complaints Board Act, even though MAMN seemed to have disputed the evaluation in its argumentation.

MAN claimed that the tendered vehicles did not meet a requirement for a maximum height of 2700 mm and would only meet the requirement if the undercarriage was lowered which would be contrary to a specified standard. MAN also claimed that the tendered speciality ambulances could not obtain the necessary approval, which was a requirement, due to the window configuration. Furthermore, MAN claimed that the successful tenderer had made reservations in that they had stated on some drawings presented with the tender in order to meet an evaluation requirement that the final product may deviate. Finally, MAN claimed that the tendered vehicles did not meet specified requirements for, *i.a.*, a storage solution, emergency lights and rounded edges and corners. MAN's argumentation was based on the drawings submitted by the successful tenderer. None of the claims were allowed.

An alternative claim that some of the requirements were unfit as minimum requirements was not allowed because they were not minimum requirements, and the Complaints Board found that the evaluation requirements that were about the presentation of drawings were not phrased in an unclear manner either.

The claim for annulment was not allowed.

Decision of 2 August 2023, S.A.S. SAF Helicopteres v the Central Denmark Region, the North Denmark Region, the Region of Southern Denmark, Region Zealand and the Capital Region of Denmark

The Danish regions launched a competitive procedure with negotiation together for the procurement of emergency medical helicopters. The procurement procedure was a repeat procedure, see the Complaints Board's decision of 12 January 2022. An unsuccessful tenderer complained about a change in some competitive parameters and about the evaluation model applied and requested that the complaint be granted suspensive effect. In its interim decision of 22 February 2023, the Complaints Board refused to grant the complaint suspensive effect as a prima facie case was not made out and did not allow any part of the claim in

its final decision of 2 August 2023. The Complaints Board's decision of 22 February 2023, Konsortiet Hems Denmark v the same contracting authorities, on suspensive effect concerns a different complaint about the same procurement procedure with partly the same claims. This complaint was withdrawn following the decision of a missing prima facie case.

Due to its nature and the value of the procurement procedure, the case was considered by two members of the Complaints Board's presidency and two experts, see Section 10(4) of the Complaints Board Act.

Claims 1-3 concerned the evaluation model, including whether it was sufficiently clearly mentioned in the procurement documents and whether the specific evaluation had been in accordance with the model. Among other things, the issue was whether the regions had been entitled to use supporting points in the evaluation without being specifically stated in the procurement documents. The Complaints Board found that the description of the evaluation model in the procurement specifications was sufficient and clear and that the evaluation had been conducted accordingly.

Claim 4 concerned the circumstance that it had been stated in the procurement documents that the tenderers could choose to use a hangar, free of charge, which the regions had not yet constructed at Ringsted Airfield to store a spare helicopter, or they could choose to use a different location for which the tenderers would then have to pay. The complainant claimed that the decision was of such significant economic importance that it was to be considered a hidden competitive parameter contrary to the principle of transparency and the principle of equal treatment. The Complaints Board found that there was no information about or indications that importance would be or had been attached to the choice of the location of the spare helicopter in connection with the evaluation of the tenders received.

Claim 5 concerned the circumstance that during the negotiations, a different tenderer had received information about what would be considered ergonomic challenges in the helicopter from a medical point of view. Considering the principle of equal treatment in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU), the regions decided to inform the other tenderers about that information. The Complaints Board found that by informing the other tenderers, the regions had offset the potential competitive advantage of the tenderer that had originally received the information.

Claim 6 concerned whether a number of changes to the procurement specifications were legitimate or whether they were to be considered changes of fundamental elements in the procurement documents. One of the changes could possibly distort competition to the benefit of some tenderers. However, as the changes were made at a point in time when the field of specific tenderers had been determined and none of the tenderers would gain a competitive advantage, the competition was not specifically distorted, and the amendment therefore did not constitute a change of fundamental elements.

Decision of 21 September 2023, Bravia Danmark A/S v the City of Copenhagen

During a procurement procedure for a framework agreement on technical installations, the contracting authority had a minimum requirement for a solvency ratio of 20% for "the two most recent available financial years". Established that the annual accounts of a limited company will become available at the time of the approval of the accounts at the company's annual general meeting. A tender which did not meet the minimum requirement was rejected.

In March 2023, the City of Copenhagen launched an open procurement procedure under Title II of the Public Procurement Act for a framework agreement on the renovation and establishment of technical building systems. The award criterion was best price-quality ratio.

The tenderers were required to have a solvency ratio of 20% for each of the two most recent financial years. Bravida's annual reports for 2020 and 2021 indicated a solvency ratio of more than 20%, and in the ESPD enclosed, Bravida referred to those financial years.

On 18 April 2023, Bravida's annual general meeting approved the 2022 annual report which showed a solvency ratio of less than 20%. The time limit for submitting tenders was on 26 April 2023. On 28 April, Bravida submitted the 2022 annual report to the Danish Business Authority. That same day, the accounts were published in CVR (business register).

On 23 May 2023, the City of Copenhagen asked for documentation for the financial information in Bravida's ESPD. On 28 May, Bravida's auditor submitted the 2021 and 2022 accounts with the auditor's report to the City of Copenhagen.

The City of Copenhagen then rejected the tender as non-compliant as the solvency requirement had not been met for 2022.

Bravida filed a complaint and particularly claimed that the 2022 accounts had not been available at the time of the submission of the tender as it had not been submitted to CVR until after the time limit for submitting tenders and that it had been a mistake that the auditor, on request, had submitted other annual reports then the ones mentioned in the ESPD.

The Complaints Board established that the annual report for a limited company – thus information about the solvency ratio – will become available at the time of their approval by the annual general meeting and not when submitted to CVR. Therefore, Bravida had been obliged to refer to the 2021 and 2022 annual reports in their ESPD, and Bravida therefore did not meet the solvency ratio requirement. Thus, the complaint was not allowed.

2.2.3 Evaluation, including choice of evaluation model

Decision of 6 January 2023, Mediq Danmark A/S v Høje-Taastrup Municipality, Brøndby Municipality, Køge Municipality and Odsherred Municipality (referred to the courts of law)

In its assortment tender, the contracting authority had sufficiently described the intended procurement, and the evaluation model was in accordance with Section 45(2) and Section 160(1) of the Public Procurement Act.

The case concerned a number of municipalities' procurement procedure for a framework agreement on the procurement of clinical nutrition and utensils. The procurement procedure for the framework agreement was conducted as an assortment tender. In the procurement documents, the municipalities had therefore not described each product comprised by the framework agreement but had rather referred to

12 specific product categories. Each of the 12 product categories contained a brief description of the category. Furthermore, the municipalities had stated the actual shopping cart with examples of products in all 12 product categories.

The Complaints Board found that the municipalities had then sufficiently described the intended procurement in the procurement documents.

The Complaints Board also found that the evaluation model described in the procurement documents according to which the contracting authority would make a fictive standard procurement in connection with the evaluation of tenders by selecting products comparable with the products in the shopping cart was in accordance with Section 45(2) of the Public Procurement Act. The comparison would be made based on an assessment of the type, size, weight, dimensions, material, durability, adjustability and purpose of the tendered products. For this purpose, the Complaints Board stated that, *i.a.*, these parameters had been objectively described and did not depend on the tenders received in a way that was based on the contracting authority's choice or assessment after the opening of tenders. The fact that the contracting authority had to make a professional estimate at the selection did not mean that the actual determination of the parameters/procedure of composing the shopping cart could be said to depend on the tenders received. Thus, the evaluation model described had been determined in accordance with Section 45(2) and Section 160(1) of the Public Procurement Act.

The assortment tender differed from a normal assortment tender as the municipalities had published the shopping cart based on which the evaluation would be done. In those regards, the Complaints Board noted that publishing the shopping cart is not advisable. The background is that this creates an incentive to only submit tenders of, *e.g.*, a good quality for those products that are included in the evaluation and cheaper products of an inferior quality for products that are not included in the evaluation.

Interim decision of 11 January 2023, Rambøll Danmark A/S v Biofos A/S

No requirement that reasons must be stated for the contracting authority's decision to annul an award decision and resume the evaluation of tenders. In connection with a new evaluation, the contracting authority is obliged to correct errors whether or not those errors formed the basis of the decision to annul the original award decision or whether they had been established subsequently.

The case concerned a restricted procedure for a framework agreement concerning consultancy on wastewater, machinery and treatment plants.

Rambøll was awarded a framework agreement in the first award decision. However, Biofos decided to annul the award decision and resume the evaluation of tenders according to Section 170(1) of the Public Procurement Act. The tenderers were informed of that decision with a brief reason. The reason contained information about errors found in the evaluation of tenders which led to the decision for annulment. Rambøll was unsuccessful in the new award decision.

In its interim decision, the Complaints Board established that Section 171(2)-(7) of the Public Procurement Act (Article 55(1) and (2) of Directive 2014/24/EU) requires the contracting authority to state the reasons for a number of specified decisions. However, the provisions do not require reasons to be stated for an annulment of an award decision for the purpose of resuming the evaluation. The Complaints Board stated

that this should be seen on the background that a decision about the annulment of an award decision is often followed up with a new award decision or with a decision of an annulment of the procurement procedure and that reasons for such decisions must be stated.

The Complaints Board also established that if the contracting authority in connection with a new evaluation finds errors in the original evaluation, the contracting authority is obliged to correct errors whether or not those errors formed the basis of the decision to annul the original award decision or whether they had been established subsequently. It was therefore not likely that Rambøll would be successful in its claim that in its new evaluation of tenders, Biofos was entitled to correct only those errors in the original evaluation which led to the decision to annul the original award decision.

The complaint was subsequently withdrawn, and the interim decision was thus the Complaints Board's final decision.

Decision of 2 June 2023, HB Care A/S v the Municipality of Esbjerg

The Municipality of Esbjerg launched an open procurement procedure under the Public Procurement Act for a framework agreement with one operator on medical, specialist, rehabilitation and specialised transport in the Municipality of Esbjerg. An unsuccessful tenderer filed a complaint about, i.a., some changes in the procurement documents and about the successful tender being non-compliant. The complainant also complained that the procurement documents were unclear and unfit to form the basis for awarding the framework agreement put out to tender and that the evaluation method was unfit to identify the most economically advantageous tender. The Complaints Board did not allow any part of the claim.

The procurement procedure concerned two lots divided according to the nature of the transport. One lot was significantly bigger than the other one. The procurement specifications contained a number of requirements for the transport put out to tender without using a categorisation such as minimum requirements and evaluation requirements. The Complaints Board stated that the circumstance that it had not been expressly stated which type of requirements was in questions did not in itself make the procurement specifications unclear and that it depends on the specific assessment whether a given change in the procurement specifications is within the framework of the rules relating to procurement law or whether it is a matter of a change of the fundamental conditions for the procurement procedure. HB Care claimed that all requirements were minimum requirements, thus fundamental conditions. The Complaints Board did not consider whether they were minimum requirements as the changes were merely considered clarifications of conditions that were supported in the procurement documents. The clarifications on their own could not have an impact on the field of potential tenderers, and it had not been rendered likely that the changes had shifted competition among the candidates.

The issue of the admissibility of the successful tender concerned the circumstance that in HP Care's opinion, the tender did not meet the maximum transport times per citizen as stated by the Municipality and that the successful tenderer had not calculated its tender in a way that made it possible to meet all requirements in the requirement specification in terms of time. The Complaints Board stated that there were no indications that a normal, attentive tenderer had not been able to establish which requirements belonged to which lot, and the fact that no passengers with special needs had been stated for lot 2, which was stated in those parts of the transport lists forming the basis for the transport planning of lot 1, did not make the basis

of calculation unclear. The circumstance that the Municipality had left it to the tenderers to assess and determine the necessary time to service the citizens in connection with entry and exit did not make the tenders incomparable. Using, *i.a.,* random sample checks, the Municipality had ensured that no tenderers would plan transport, thus calculate the total mileage, which could in fact not be realised in accordance with the requirements in the requirement specification. On that basis, and as the evaluation model had indisputably been described in accordance with Section 160(1) of the Public Procurement Act, the evaluation model was suitable to identify the most economically advantageous tender.

Decision of 2 August 2023, S.A.S. SAF Helicopteres v the Central Denmark Region, the North Denmark Region, the Region of Southern Denmark, Region Zealand and the Capital Region of Denmark

The decision is discussed in detail in section 2.2.2 Requirements for tender specifications, including minimum requirements, and organisation of procurement procedures.

Decision of 18 August 2023, Yunex GmbH v Sund & Bælt Holding A/S

Competitive procedure with negotiation under Title II of the Public Procurement Act for a system for the administration of tolls. The complaint had been filed by an unsuccessful applicant for prequalification and contained several claims referring to the circumstance that the complainant should have been prequalified. The case concerned a procurement procedure for two contracts on the acquisition of, training in and servicing of a "Road Enforcement System" at a total value of more than DKK 226 million. At the expiry of the time limit, Sund & Bælt had received requests for prequalification of which three were accepted. Yunex, one of the three candidates which had not been prequalified, claimed annulment of the prequalification decision.

Among other things, Yunex claimed that Sund & Bælt had exceeded the limits for its discretion in connection with its assessment of the references presented by the prequalified candidates. The Complaints Board found no grounds to set aside the discretion exercised.

Yunex also claimed that contrary to Section 171(2) of the Public Procurement Act (Article 55(1) and (2) of Directive 22014/24/EU), Sund & Bælt had not given Yunex a sufficiently clear reason for the benefits held by the prequalified candidates. That view was not allowed either.

Yunex also claimed that Sund & Bælt had been prevented from taking into account some of the references to which one of the prequalified candidates had referred in its application just like the relevant candidate had not demonstrated experience with one of the fields which was required in the procurement documents, and the application was therefore non-compliant. In relation to both of those claims, the Complaints Board stated that there was no basis to dispute the accuracy of the information from the applicant.

The same applicant had also forgotten to sign its ESPD. In those regards, the Complaints Board found that the missing signature clearly was a procedural error and that Sund & Bælt in this case had reserved the right to use the correction procedure under Section 159(5) of the Public Procurement Act (Article 56(1) and (3) of Directive 2014/24/EU). The subsequent correction was therefore allowed.

Finally, Yunex' claims that the Complaints Board had to "establish" that Sund & Bælt had to "conduct an effective verification" of the same applicant's information and that the Complaints Board had to order prequalification of Yunex were dismissed.

Interim decision of 31 October 2023, Sysmex Nordic Aps v Region Zealand

According to the procurement specifications, the qualitative evaluation of tenders should be conducted through a relative assessment of the tenders relative to one another. Not established that the contracting authority had not used an absolute assessment instead.

Region Zealand launched an open procurement procedure for a framework agreement on the delivery of laboratory equipment with the award criterion best price-quality ratio. It had been stated in terms of the five qualitative subcriteria that there would be a relative assessment of the tenders relative to one another and that they would be given points on a scale from 1-100. A wide range of so-called B requirements were part of the qualitative competitive parameters. To a great extent, the tenderers had to describe their fulfilment of each B requirement.

The Region received three tenders. The Region selected the successful tender and rejected the tender from Sysmex as being non-compliant. Sysmex then filed a complaint in the standstill period claiming that the rejection was wrongful and that the evaluation of the quality of the two other tenders had not been relative as determined. Sysmex also claimed annulment of the award decision.

The Region maintained that Sysmex' tender was non-compliant and claimed dismissal of the claim concerning the evaluation of the two other tenders.

The Complaints Board did not allow the claim for dismissal.

About the evaluation, the Complaints Board stated that the Region had decided to assess the tenders "relatively", meaning relative to each other rather than a normal "absolute" assessment where the tenders are evaluated according to the degree to which each tender fulfils the requirements. At the same time, the Region had stated that "[the] more the Contracting Authority finds that the tender meets the contracting authority's B requirements, the better the Contracting Authority will evaluate the tender."

According to the evaluation report, the two tenders for the same 37 B requirements had both been given 100 points, and both had been given 0 points for the same four B requirements. The majority of the 41 B requirements for which the two tenderers had been given the exact same assessment concerned specific qualitative criteria where the tenderers had to prepare a detailed description of how the requirement would be met.

The Complaints Board found that there was a presumption against the two tenders being so similar that the tenders systematically had to be given the same number of points with an interval of 0-100 in a relative, qualitative assessment to the extent stated in the evaluation report. The Complaints Board therefore found that the Region had not met the burden of proof that the assessment of the tenders in relation to the qualitative subcriteria had been with a mutual comparison of the tenders. The Region had therefore not used the evaluation model stated in the procurement specifications.

It was therefore likely that the annulment claim would be allowed. A prima facie case was therefore made out.

The Complaints Board did not consider the issue of whether Sysmex' tender was non-compliant.

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

Region Zealand then annulled the award decision and did a new evaluation following which Sysmex' tender was once again considered non-compliant, and the same tenderer was the successful tenderer.

Sysmex filed a complaint in the new standstill period and made the same claims as in the first complaint, including concerning the annulment of the new award decision. Sysmex also claimed, *i.a.*, violation of Section 137 of the Public Procurement Act (points (a), (b), (d), (g) and (i) of Article 57(4) of Directive 2014/24/EU) and, in connection with stating the exclusion grounds, violation of Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) and Section 160 when determining the evaluation model and annulment of the procurement procedure.

Region Zealand then annulled the procurement procedure, and Sysmex withdrew the complaint. The interim decision was therefore the Complaints Board's final decision.

Decision of 17 November 2023, Capgemini Danmark A/S v the Danish Agency for Development and Simplification of the Danish Ministry of Taxation

Mini-tender under Title II of the Public Procurement Act on the delivery of a team of consultants to conduct testing and development assistance concerning an IT system. Complaint about the evaluation of the tenders in relation to the subcriterion quality and about insufficient reasons was not allowed. No annulment.

The Danish Agency for Development and Simplification launched a mini-tender within a framework agreement on IT development services. A test team of up to 24 consultants ("resources") was to be tendered. The award criterion was best price-quality ratio with the subcriteria Price (30%) and Quality (70%). In the evaluation, the resources made available by the supplier would be taken into account, including the extent to which the resources had relevant competences and experience at a high level in relation to the role and execution of the development assistance. It would be assessed how the quality of the resources in the role could affect the quality level when executing the development assistance.

The Agency received four tenders. in terms of price, Capgemini's tender was just below a tender from Netcompany, but Netcompany was given 7 points for the subcriterion Quality compared to Capgemini's 4. The Agency therefore awarded the contract to Netcompany.

Capgemini filed a complaint claiming that the Danish Agency for Development and Simplification had violated Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU), Section 160(1) and Section 164 (Article 67(4) of Directive 2014/24/EU) in its evaluation of the quality of the tenders by taking into account circumstances which were not in accordance with the description of the conditions in the mini-tender. Capgemini particularly claimed that it had not been right to take into consideration the tendered consultants' sector knowledge and the composition of the resources. Furthermore, each of the tendered consultants' CVs should have been reviewed and evaluated, which had not happened.

The Danish Agency for Development and Simplification particularly claimed that sector knowledge was closely related to the descriptions of the requested consultant categories listed in various appendices. Capgemini's tender also described the tendered consultants' experience with the public sector and private sector as well as experience with assessment systems. Sector knowledge was therefore within the framework of the natural understanding of the criterion. In accordance with the procurement specifications, the combined competence and experience of the resources – documented by the 16 CVs that formed part of the tender – were evaluated, not each CV.

The Complaints Board established that it was expressly stated in the mini-tender documents that the Danish Agency for Development and Simplification would take into account the experience of the resources within the relevant area. Regardless of the fact that the word "sector knowledge" had not been mentioned in the mini-tender requirements, it was not beyond something that any reasonably informed and normally diligent tenderer would consider would be taken into account It was clearly stated that the procurement procedure concerned a test team which had to meet the requirements described. The manner in which the tendered resources were composed in relation to fulfilment of the requirements was therefore within the framework of the descriptions in the procurement documents. As it was also clearly stated that the task had to be solved by a test team, Gapgemini could not have an expectation that there would be an evaluation of each CV in the award decision.

Thus, the claims were not allowed.

A claim for violation of Section 171(4), paragraph (2) of the Public Procurement Act (Article 55(1) and (2) of Directive 2014/24/EU) claiming that a satisfactory explanation of the award decision had not been given was not allowed either.

Finally, a claim for annulment and a claim that the contract was to be declared of no effect were not allowed.

2.2.4 Framework agreements

Decision of 28 February 2023, Mediq Danmark A/S v the Municipality of Aarhus

Unclear how statements of amounts in the contract notice were to be understood. Annulment of the award decision.

In April 2021, Aarhus Municipality put a framework agreement out to tender with one supplier on the delivery of urology and fecal incontinence products to citizens with a Section 112 grant and to nursing depots in the Municipality. The duration of the framework agreement was two years but with the option of extending twice for up to 12 months. In field II.1.5) of the contract notice, the estimated total value of the framework agreement was stated to be DKK 68 million, and in field II.1.6) of the contract notice, the estimated value of the framework agreement was stated to be DKK 17 million According to the procurement documents in the case, it was also stated that the Municipality had estimated the value of the framework agreement to be DKK 17 million a year and that the amount of DKK 68 million was the estimated value for the possible term of four years for the entire framework agreement. In those regards, Aarhus Municipality had stated in the procurement documents that, *i.a.*, the stated anticipated annual consumption was an

approximate figure based on a qualified estimate, anticipated consumption patterns and statistical information from previous accounting periods and that the consumption numbers were not an expression of a guaranteed volume but merely were meant to give the impression of the potential scope. The Municipality had also stated that all the stated volumes could vary infinitely and be different from year to year in the contract period.

Tenders were submitted by three companies following which Aarhus Municipality decided to conclude a contract with one of the companies and concluded the contract. Mediq, one of the other tenderers, later filed a complaint with the Complaints Board claiming that Aarhus Municipality had violated the principles of equal treatment and transparency in that it had not stated a maximum amount or maximum value of the products to be delivered according to the framework agreement.

The Complaints Board allowed the claim and stated as its reason that the specifications referred to in the procurement documents did not contain a clear specification of the maximum amount or total maximum value of the products to be delivered. Thus, Aarhus Municipality had not met the requirement of fixing a maximum limit for the use of the framework agreement, see the judgment of 17 June 2021 by the Court of Justice of the European Union in C-23/20, Simonsen and Weel.

Nor had Aarhus Municipality met the burden of proof that the missing specification of the maximum amount or value had not meant that potential tenderers had refrained from submitting a tender, and the procurement procedure was therefore annulled. The Municipality had claimed that instead of annulling the award decision, the Complaints Board should order the Municipality to legalise the procurement procedure through an agreement with the successful tenderer laying down that the amount of DKK 68 million constituted the maximum value of the framework agreement so that the Municipality could not conclude more contracts based on the framework agreement. In those regards, the Complaints Board noted that there were no grounds to order the Municipality to legalise the procurement procedure when the contract had already been concluded based on the procurement procedure.

Decision of 26 September 2023, Konsortiet Abena A/S and Coloplast Danmark A/S v Esbjerg Municipality, Middelfart Municipality, Vejle Municipality, Herning Municipality, Fanø Municipality, Vejen Municipality, Varde Municipality and Billund Municipality

A detailed account of the decision is provided in section 2.2 Competitive tendering obligation, direct award and amendment of contracts.

Interim decision of 10 November 2023, Onemed A/S v Fællesudbud Sjælland represented by Slagelse Municipality

Fællesudbud Sjælland represented by Slagelse Municipality launched an open procurement procedure under the Public Procurement act for a framework agreement with one operator on the delivery of ostomy aids. An unsuccessful tenderer filed a complaint about, i.a., the successful tender being considered compliant and about the manner in which the contracting authority had stated the value of the contract in the contract notice. The Complaints Board did not allow the complaint.

Claim 1 concerned whether the successful tenderer's tender was non-compliant as it had no statement of one product number in a series. Claim 4 concerned whether the evaluation model had been described sufficiently clearly. According to a specific assessment, it was not likely that these claims would be allowed.

Claim 2 concerned whether the procurement documents were unfit and therefore could not form the basis of a lawful award decision. The procurement procedure was designed so that it was required that ostomy bags and ostomy rings could be used across series. Onemed claimed that this meant that, *i.a.*, the products could not meet the MDR regulation while the contracting authority and the successful tenderer claimed that bags and rings were separately approved by MDR and were already used across series. Based on its specific assessment of evidence, the Complaints Board found that the procurement documents were not unfit.

Claim 3 concerned whether the specification of the maximum value and anticipated value in the contract notice were correct which the Complaints Board found no reason to criticise.

A prima facie case was therefore not made out, and the conditions for granting the complaint suspensive effect had therefore not been met. The complaint was subsequently withdrawn, and the interim decision was thus the Complaints Board's final decision.

2.2.5 Obtaining further information

Decision of 29 August 2023, Scania Danmark A/S v I/S REFA

The case concerned an open procurement procedure under Title II of the Public Procurement Act for delivery and servicing and repair of refuse vehicles. As REFA announced that the contract would be awarded to Ejner Hessel A/S, Scania filed a complaint with the Complaints Board.

The Complaints Board established that REFA had violated Section 159(2) of the Public Procurement Act (Article 56(1) and (3) of Directive 2014/24/EU) in that they had not verified until after the conclusion of the contract whether Ejner Hessel's tender met the reference requirement. According to the wording and travaux preparatoires of the provision, the verification obligation must be met before the award decision. The Complaints Board did not consider whether the violation could justify the annulment of the award decision.

The Complaints Board also established that REFA had violated the principles of equal treatment and transparency in that they had considered the successful tender although some of the tendered vehicles did not meet a minimum requirement of being equipped with LED lights. Based on that violation, the Complaints Board annulled the award decision.

Interim decision of 13 September 2023, HMK Bilcon A/S v the Danish Ministry of Defence's Acquisition and Logistics Organisation (FMI)

The case concerned an open procurement procedure for a framework agreement concerning the servicing of the Danish Defence's mobile tank systems and tank vehicles.

A number of minimum requirements had been established in the procurement documents for, *i.a.*, garage facilities. According to the procurement documents, the tenderers had to confirm that they met the minimum requirements, but except for that, there was no requirement for the tenderers to provide documentation to prove it.

The Complaints Board stated that the minimum requirements for the garage facilities did not have to be met already at the time of the submission of tenders. The successful tender – in which the tenderer had replied ”YES” to meeting the minimum requirements – therefore did not meet the established minimum requirements according to its terms.

In its reference to the judgment of 15 June 2012 by the Supreme Court in the Montaneisen case, the Complaints Board stated that a contracting authority is obliged to verify – and, if relevant, react to – information of which the contracting authority only becomes aware after the award decision, but before the conclusion of the contract. However, the Complaints Board did not find grounds to set aside the contracting authority's assessment that no further verification of the information and documentation in the tender than had already been done by the contracting authority should be done before the conclusion of the contract. Thus, the Complaints Board took into account that in its tender, the successful tenderer had replied in the affirmative to meeting the minimum requirements, that no documentation for meeting the minimum requirements had to be enclosed and that none of the minimum requirements could be required met already at the time of the submission of the tender and that the successful tenderer had subsequently, on the contracting entity's request, confirmed that they met the minimum requirements.

No prima facie case was made out, and the complaint was not granted suspensive effect. The complaint was subsequently withdrawn. The interim decision was therefore the Complaints Board’s final decision.

2.2.6 Abnormally low tenders

Interim decision of 20 June 2023, Damgaard Rådgivende Ingeniører ApS v Sønderborg Varme A/S

A tender with an hourly rate of DKK 1 was abnormally low as the tender to all intents and purposes did not comprise the relevant employee categories which the hourly rate concerned. This would mean that the work performed would be significantly more expensive than contemplated at the price evaluation.

The case concerned a restricted procedure for a comprehensive consulting service agreement in connection with the roll-out of district heating around Nybøl and Vester Sottrup with a total value of DKK 10 million.

In their tenders, the tenderers had to state hourly rates for a number of employee categories, and it was also stated that if the tenderers did not state an hourly rate, the contracting authority would consider it to mean that a price of DKK 0 had been submitted which was binding on the tenderers. The evaluation model was designed so that an evaluation price would be calculated for each employee category based on the tendered price times the number of hours which each employee category was expected to work. The anticipated number of hours for each employee category was stated in the procurement documents.

Damgaard stated as follows for the categories “engineer/architect/landscape architect: 4-9 years of experience” and tendered a rate of DKK 1 per hour for ”CAD/BIM operator/technical designer”. Following Sønderborg Varme's inquiry about the low prices, Damgaard stated that they did not intend to use resources

on the mentioned employee categories as Damgaard did not have any employees in those categories. Damgaard also stated that the environmental, social and labour obligations had not been set aside. Furthermore, Damgaard stated that the prices had been set according to "market strategic considerations".

Sønderborg Varme then rejected Damgaard's tender as abnormally low.

The Complaints Board stated that there was no basis to disregard Sønderborg Varme's assessment that the tendered rates were abnormally low. Among other things, the Complaints Board stated that it should be considered that Damgaard did in fact not tender employees in the employee categories "engineer/architect/landscape architect: 4-9 years of experience" and "CAD/BIM operator/technical designer". The work would rather be performed by other employee categories than contemplated in the procurement documents which would mean that the work performed would be significantly more expensive than in the price evaluation.

The circumstance that it had been stated in the procurement specifications that items in the schedule of rates which were not completed would be considered tendered to be performed at DKK 0 and the fact that the tenderer was bound by that when performing the work did not prevent the heating plant from rejecting the tender with the reason that the tendered rates were abnormally low. The Complaints Board also stated that such missing information would normally be considered reservations in terms of price which would have meant that the specifications of DKK 0 should have been capitalised.

Thus, the conditions for granting suspensive effect had not been met. The complaint was subsequently withdrawn, and the interim decision was thus the Complaints Board's final decision.

Decision of 22 August 2023, Roche Diagnostics A/S v Region Zealand

The case concerned a procurement procedure for a contract on the delivery of analytical equipment for hospitals and a framework agreement on carrying out analyses. The complaint was filed by an unsuccessful tenderer that claimed that the successful tender did not meet the established minimum requirements and that at the very least, the minimum requirement was unclear and unfit. Furthermore, the contracting authority should have asked for an explanation for price and costs as the successful tenderer seemed abnormally low. No parts of the complaint were allowed.

Roche claimed that the Region should have rejected the tender from the successful tenderer as non-compliant as the tender did not meet the minimum requirement of including a water plant to the extent necessary. In any circumstance, the minimum requirement was phrased in such an unclear manner that it was unfit to form the basis for submitting a tender. The tendered price from the successful tenderer seemed abnormally low, and the Region should therefore have requested an explanation of prices and costs from the successful tenderer prior to the award decision, see Section 169(1) of the Public Procurement Act (Article 69 of Directive 2014/24/EU).

The Complaints Board established that there were no grounds to find that the tender from the successful tenderer did not meet the minimum requirement. The minimum requirement was phrased in a clear manner. Furthermore, there were no grounds to disregard the Region's assessment that the successful tenderer's price did not seem abnormally low. Thus, the complaint was not allowed.

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

Decision of 6 January 2023, Mediq Danmark A/S v Høje-Taastrup Municipality, Brøndby Municipality, Køge Municipality and Odsherred Municipality (referred to the courts of law)

Pursuant to Section 13(1) paragraph (3) of the Complaints Board Act, the Complaints Board could not issue an order to terminate a contract concluded.

The case concerned a number of municipalities' procurement procedure for a framework agreement on the procurement of clinical nutrition and utensils.

Among other things, Mediq claimed that pursuant to Section 13(1) paragraph (3) of the Complaints Board Act, the Complaints Board should order the Municipality to terminate the framework agreements concluded, see Section 185(2) of the Public Procurement Act. In those regards, the Complaints Board stated that only in instances subject to Section 13(2) of the Act, meaning when a contract is declared of no effect, does the Complaints Board have the authority to order a contracting entity to terminate a contract. The obligation to terminate a contract in instances where an award decision has been annulled by a final decision or judgment, see Section 185(2) of the Public Procurement Act, is directly required by the provision. For that reason, the Complaints Board found that Mediq did not have an independent legal interest in the claim. The Complaints Board therefore dismissed the claim.

Decision of 24 April 2023, Meldgaard Miljø A/S v Afatek A/S

The decision is discussed in detail in section 2.2.2 Requirements for tender specifications, including minimum requirements, and organisation of procurement procedures.

Decision of 13 September 2023, DELPRO A/S v Energinet

Under the Utilities Directive, Energinet launched a competitive procedure with negotiation for a framework agreement on the performance of supervision and quality assurance tasks on Energinet's projects within cable and overhead line installations. An unsuccessful tenderer complained that in the negations with the complainant, Energinet had not pointed out flaws in the complainant's tender. Energinet requested that part of the complaint dismissed but was not successful. The unsuccessful tenderer also complained that in the qualitative tender assessment, Energinet had given the complainant's capacity negative weight although the tenderers' capacity was not part of the specifications in the procurement documents describing what would be taken into account. In its decision of 23 June 2023, the Complaints Board refused to grant the complaint suspensive effect as the condition of urgency had not been met and did not allow any part of the claim in its final decision of 13 September 2023.

Pursuant to Section 6(2) of the Complaints Board Act, a complaint can be dismissed if the complaint is unfit to form the basis of a consideration of the complaint. The complaint was filed by a complainant presenting his case in person in relation to whom the Complaints Board has a particular obligation to provide guidance, see Section 7 of the Public Administration Act. The guidelines should be seen in the context of the second sentence of Section 10(1) of the Complaints Board Act according to which the Complaints Board cannot award more to a party than that person has claimed and cannot consider conditions which have not been

claimed. A specific assessment of the complaint meant that the Complaints Board did not find grounds to dismiss the complaint although it did not contain any specific reference to the provision or principle which the complainant believed had been disregarded.

As regards claim 1, the Complaints Board thus stated that although it rests with the contracting authority to act in a transparent and proportionate manner, the contracting authority is not obliged to point out any significant flaw in the tenders during the negotiation meetings. However, the contracting authority's feedback to the tenderers must not be misleading. There were no grounds to establish that Energinet's feedback had been misleading. That part of the complaint was not allowed. See a similar decision in the Complaints Board's decision of 17 May 2023, Eurofins Miljø Luft A/S v Ørsted Bioenergy & Thermal Power A/S as discussed in section 2.2.9.

Concerning claim 2, Energinet and DELPRO agreed that it had not been stated in the procurement specifications that the tenderers' capacity formed part of the basis of evaluation. The phrasing of the reason for the award decision could indicate that Energinet had taken that into account nonetheless. Following a review of the facts of the case, there were no grounds to establish that Energinet had in fact included that circumstance, on the contrary, and the phrasing of the reason for the award decision could therefore not on its own lead to the possibility of claiming that Energinet had acted unfairly in connection with the award. That part of the complainant was therefore not allowed either.

Decision of 31 October 2023, Primatag A/S v Nykøbing Falster Boligselskab, afd. 13

A complainant who had been asked by one of the tenderers, to whom the complainant had previously submitted a tender in a different context, whether they wanted to submit a tender but did not submit a tender and refrained from offering themselves as a subsupplier. The complainant was not eligible to complain.

The case concerned a competitive procedure with negotiation for the renovation of 284 premises including roof cladding with felt roofing. It was stated in the procurement specifications that all felt roofing solutions should have a documented life of a minimum of 50 years in accordance with TGA 2018/004. It had been stated in a form which the tenderers had to complete that similar products could be tendered which met the procurement requirements for design, quality and function.

Primatag specifically claimed that the housing association had acted contrary to Section 40(4) of the Public Procurement Act (Article 42(1) of Directive 2014/24/EU) and the fundamental principles of equal treatment and proportionality in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) in that they had required the tenderers to have obtained a national, technical specification in the form of a TGA 2018/004 under paragraph (2) of Section 41(1)(g) (Article 42(3) of Directive 2014/14/EU) and that it was contrary to Section 42 of the Public Procurement Act (Article 42(4) of Directive 2014/24/EU) to refer to TGA 2018/004 without adding the phrase "or similar" to the reference just like the reference had an anti-competitive effect on the procurement procedure with no fair reason.

One of the tenderers, Enemærke & Petersen A/S, had asked Primatag whether they wanted to submit a tender, and Primatag had prepared a list of 25 tenders which Primatag had previously submitted to Enemærke & Petersen A/S. Primatag did not submit a tender and refrained from offering themselves as a subsupplier as they could not supply felt roofing that met the TGA 2018/004 requirement.

The Complaints Board therefore was not satisfied that such a set, collaborative relationship existed between Primatag and Enemærke & Petersen A/S or that it had been established in any other way that Primatag would be used as a subsupplier if Enemærke & Petersen A/S had been the successful tenderers that Primatag was to be considered as having a specific and direct interest in the Complaints Board's decision on the complaint, see Section 6(1), paragraph (1) of the Complaints Board Act.

A requirement that all felt roofing solutions should have a documented life of at least 50 years in the form of TGA 2018/004 (or similar) did not prevent Primatag from participating as a subsupplier with the effect that Primatag was to be considered eligible to complain.

The complaint was dismissed on that background.

2.2.8 Prequalification

Decision of 16 February 2023, Microsoft Danmark ApS v Ørsted Services A/S

The decision is discussed in detail in section 2.2.2 Requirements for tender specifications, including minimum requirements, and organisation of procurement procedures.

Decision of 16 June 2023, Revenue Collection Systems Denmark ApS v Rejsekort & Rejseplan A/S

The case concerned a procurement procedure for a framework agreement on "Software-as-a-Service and related services" under the Utilities Directive. The complaint was filed by an unsuccessful candidate that claimed that one of the prequalified candidates did not meet the reference requirement, that the criteria for the selection of prequalified candidates had not been stated in advance and that the contracting authority's assessment of the complainant's reference was unfair, opaque and discriminatory. The complaint was not allowed.

Revenue claimed that the application from one of the prequalified companies should have been rejected as the application did not meet the suitability criteria concerning technical and professional capabilities as the company had only stated two – not three – references that had been completed at the time of the application. In its selection of candidates, the contracting authority had also taken into account selection criteria and their weightings which had not been described in the contract notice or in the other procurement documents just as the contracting authority had used a point scale which had not been stated in the procurement documents. The contracting authority's evaluation of each reference in connection with the selection was unfair, opaque and discriminatory. In general, Revenue backed that view on the fact that in the notice to the company informing them that they had not been prequalified, it had not been stated how the contracting authority had reached the specific point score.

The Complaints Board established that the contracting authority had not set a minimum requirement for the quality and nature of the candidates' references. The reference from the company which Revenue believed did not meet the suitability criteria could therefore be included in the contracting authority's evaluation of the compatibility of the references to the framework agreement put out to tender. There were no grounds to establish that to a greater or lesser extent, this reference had not been comparable or relevant in relation to the framework agreement put out to tender. It was not contrary to the principles of equal treatment and transparency in Article 36(1) of the Utilities Directive or with Article 78(2) of the Directive

that the contracting entity had set out in the contract notice that special weight would be attached to references that showed experience with the supply of services which were comparable to main service ”B) The Solution” as it had been transparent to the candidates. The fact that the contracting authority had given the main service ”B) The Solution” a weight of 40% in the evaluation while the other main services each weighted 20% could not lead to a different outcome. In the contract notice, the contracting authority had set out that the contracting authority would use a point scale from 1-10 in the selection, and it was therefore transparent to the candidates that the points scale would be used. In those regards, it was not important that the contract notice did not contain a detailed description of each scale position.

The prequalification notice was not flawed. In those regards, the Complaints Board took into account that the contracting authority's notification contained an explanation of the assessment of both Revenue's and the prequalified candidates’ references in relation to each of the main services and the prequalified candidates’ total score and that it had been stated in the notification how the contracting authority had assessed the experience which the prequalified candidates had documented in their references and which of the prequalified candidates’ reference(s) had been weight-carrying in the contracting authority's assessment. Therefore, there were no grounds to annul the contracting authority’s decision on prequalification.

2.2.9 Competitive procedure with negotiation

Interim decision of 17 May 2023, Eurofins Miljø Luft A/S v Ørsted Bioenergy & Thermal Power A/S

The contracting authority has no obligation to point out any significant flaw in the tenders during a competitive procedure with negotiation, but the contracting authority's feedback must not be misleading. That was not the case. A prima facie case was not made out.

Via an existing qualification scheme, Ørsted launched a competitive procedure with negotiation under the Utilities Directive for a framework agreement on laboratory services for power plants. The award criterion was best price-quality ratio based on the evaluation technical price carrying a weight of 45% and various qualitative subcriteria carrying a weight of 55%. The tenderers were given points according to a scale that had been stated in the procurement specifications and that included the positions of 0-10 with 0 being the worst.

Following the negotiation meetings, Ørsted awarded the contract to FORCE Technology A/S.

Eurofins, which had also submitted a tender, filed a complaint and filed that, *i.a.*, Ørsted’s positive feedback at the second negotiation meeting concerning a sub-subcriterion had been misleading.

Ørsted had given feedback to the tenderers without informing them of the point score but had used colour markings. Red for 0-1 points, orange for 2-3 points, yellow for 4-6 points and green for 7-10 points. At the initial negotiation meeting with Eurofins, Ørsted had stated the colour marking yellow for the relevant sub-subcriterion and had elaborated on its critique. At the second negotiation meeting, Eurofins’ score concerning the sub-subcriterion was marked in green, and Eurofins did not change its tender subsequently. Eurofins’ final tender was given 7 points in relation to the sub-subcriterion.

Among other things, the Complaints Board stated that by using the green colour marking, Ørsted had not indicated that Eurofins would obtain a higher score than was the case. Furthermore, Ørsted was not obliged

to point out further improvement possibilities concerning that part of the tender. Thus, Ørsted had not misled Eurofins.

Eurofins also claimed that two subcriteria: "HS Targets and relevant HS initiatives" and "Training", which each carried a weight of 1.625% in the overall evaluation, were not related to the subject-matter of the contract. In those regards, Eurofins claimed that, *i.a.*, Ørsted wrongfully had taken into consideration whether the tenderers were certified according to ISO 45001 (or similar).

The Complaints Board established that Ørsted had not taken into consideration whether the tenderers were certified according to ISO 45001 (or similar) but had rather taken into consideration the tenderers' specific descriptions of how the tasks would be solved.

As it was not likely that Eurofins would be successful in its claim for annulment of the award decision, the complaint was not granted suspensive effect.

Eurofins then withdrew the complaint. The interim decision was therefore the Complaints Board's final decision.

Decision of 13 September 2023, DELPRO A/S v Energinet

The decision has been described in more detail in section 2.2.7 The Complaints Board Act, including suspensive effect and the Complaints Board's sanctions.

Decision of 22 September 2023, EG Danmark A/S v the Municipality of Frederikshavn

The Municipality of Frederikshavn launched a competitive procedure with negotiation for the procurement of an IT system divided into two lots to the Municipality of Frederikshavn. An unsuccessful tenderer, which had submitted a tender for one lot only, complained that the evaluation model was unclear, that the requirement specification was unclear, that it was unclear how a tender presentation would be included in the evaluation, that the Municipality had mixed together lots 1 and 2 and that the Municipality had not formally ended the negotiation process before the award decision had been made. Finally, it was claimed that the reason for the award decision was not satisfactory. The complainant requested that the complaint be granted suspensive effect. In its interim decision of 15 June 2023, the Complaints Board refused to grant the complaint suspensive effect as a prima facie case was not made out. The complainant maintained the complaint but did not wish to submit any further pleadings. In the decision of 22 September 2023, a decision was made in the case in accordance with the interim decision, and the claim concerning a lack of reasons, which the Municipality had acknowledged, was upheld whereas the remaining parts of the complaint were not allowed.

As regards the evaluation model, the Complaints Board established that the fact that EG had used a calculation based on an average which could lead to a different outcome than the one reached by the Municipality did not render the model unfit or opaque as it had not been described in the procurement specifications that one or more devaluation outcomes would be calculated as an average.

As regards the minimum requirements, the Complaints Board established that the use of words such "including", "i.a." or "e.g." could not in itself mean that a minimum requirement was influenced by an estimate

or that it was unclear. Following a specific assessment, nor could a reference stating that the tendered system had to "comply with current legislation relevant to the system" be considered as making the requirements unclear or influenced by an estimate.

In terms of the tender presentation, the Complaints Board established that, based on a specific assessment of the procurement specifications, it had been clearly stated that the tender presentation and demonstration were a supplement to the understanding of the written tender and not a separate competitive parameter. The fact that it would affect the assessment if it was found during the tender presentation or demonstration that a functionality was less functional than described in the written tender could not be interpreted to mean that the evaluation had been based on new information or oral tenders and tender elements.

The claim that lots 1 and 2 had been mixed was based on EG's assumption that during the negotiations with the successful tenderer, the Municipality had obtained knowledge of the price that EG had tendered. As there were no further indications of that but had been expressly stated in the negotiations with KMD that the two lots were to be considered separate tenders, the claim was not allowed.

According to the procurement specifications, one negotiation round would be held. The tender which EG submitted following a negotiation meeting was considered a "final tender". The Municipality therefore had not awarded the contract contrary to the procurement specifications.

In accordance with the Complaints Board's standard practice, the acknowledged violation concerning insufficient reasons could not lead to an annulment.

Interim decision of 28 November 2023, ABB A/S v Udviklingsselskabet By og Havn I/S

The case concerned an open procurement procedure under the Utilities Directive for a contract on the delivery of a land-based power plant for Oceankaj and Langeliniekaj at the Port of Copenhagen. The procedure was changed to a competitive procedure with negotiation without a contract notice based on the reason that both tender prices exceeded the contracting authority's budget. The complaint was filed by the unsuccessful tenderer claiming that, i.a., the conditions for switching to a competitive procedure with negotiation had not been met and that the contracting authority had not been entitled to extend a time limit during the open procedure. The Complaints Board did not allow any of the claims.

Udviklingsselskabet launched an open procedure. During the procurement procedure, Udviklingsselskabet extended the time limit for delivering one of the two land-based power plants with approx. 50 days and published a notice of the change and extended the time limit for submitting tenders. After having received two tenders, including from ABB, Udviklingsselskabet decided to switch to a competitive procedure with negotiation with no contract notice because the tenders received exceeded the determined budget.

Once the competitive procedure with negotiation had been completed and Udviklingsselskabet had determined to whom the contract should be awarded, ABB filed a complaint with the Complaints Board and claimed that the conditions for switching to a competitive procedure with negotiation with no contract notice had not been met and that Udviklingsselskabet could not have changed the main key date for delivering the works without having to launch a new procurement procedure as the main key date constituted a fundamental element which could not be changed without a new procedure.

In the interim decision on suspensive effect, the Complaints Board considered whether a prima facie case was made out, meaning whether the complaint seemed to be well-founded on a preliminary assessment.

The Complaints Board found that Udviklingsselskabet's budget had been determined before the open procurement procedure had been launched. As Udviklingsselskabet found that, on receipt of the tenders, the tendered prices exceeded the budget determined, Udviklingsselskabet was entitled to switch to a competitive procedure with negotiation in accordance with Article 50(1)(a) of the Utilities Directive. It was of no importance that the subsequently tendered prices in the competitive procedure with negotiation also exceeded the previously determined budget as the conditions for switching to a competitive procedure with negotiation with no contract notice had been met at the time when the decision was made.

The Complaints Board stated that the changed time of delivery for part of the total delivery did not constitute a change of a fundamental element. The Complaints Board took into account that the procurement documents did not give grounds to determine that it was a matter of a minimum requirement and that in connection with the change, Udviklingsselskabet published a notice of the change in which the time limit for submitting tenders was also extended. Thus, potential tenderers had had the possibility to inform themselves about the change, and they had the possibility to choose to submit a tender. The extension only concerned a minor part of the total delivery put out to tender and was of a briefer duration in relation to the total duration of the contract.

As a prima facie case was not made out, the complaint was not granted suspensive effect. ABB later withdrew the complaint. The interim decision was therefore the Complaints Board's final decision.

3. DANISH JUDGMENTS ON THE COMPLAINTS BOARD'S CASES

Judgment by the Western High Court of 5 April 22023, Horsens Municipality v Brd. Thybo A/S, see the decision by the Complaints Board of 15 March 2021.

In 2020, Horsens Municipality launched an open tender under the Act on Invitations to Tender for the principal contract in a school construction project. The award criterion was lowest price. According to the specifications for the tender, bids had to be in accordance with a "fixed time and fixed price".

The Municipality received five bids and decided to conclude a contract with the tenderer submitting the lowest bid whose bid contained the following requirement:"…, that the schedule is extended by min. 1 month. If that is not possible, DKK 200,000 exclusive of VAT must be added to the bid". Brd. Thybo, which had submitted the second lowest bid which was a little more than DKK 400,000 more expensive that the successful bid, filed a complaint with the Complaints Board.

In its decision of 15 March 2021, the Complaints Board established that Horsens Municipality had acted contrary to the principle of equal treatment in Section 2(3) of the Act on Invitation to Tender in that they had accepted the successful bid which contained a reservation in relation to a fundamental element: the schedule. The Complaints Board also allowed the claim for annulment of the Municipality's award decision.

Horsens Municipality brought that decision before the District Court in Horsens. In its judgment of 5 October 2022, the District Court upheld the Complaints Board's decision and also ordered the Municipality to pay damages of DKK 1 million to Brdr. Thybo to cover expectation damages.

The Municipality appealed that judgment to the Western High Court. In its judgment of 5 April 2023, the Western High Court found for the Municipality. The High Court stated that the successful tenderer partly had submitted an "ordinary bid" which was the bid with the price increase, which the Municipality had been entitled to accept, partly an "alternative tender", which was non-compliant.

The Eastern High Court's judgment of 10 October 2023, Eksponent ApS v the Municipality of Gentofte, see the Complaints Board's decisions of 29 April 2010 and 10 February 2021.

In an open procurement procedure for the design and implementation of a new website, the Municipality of Gentofte had set out the minimum requirement that the tenderers had to submit at least three references from similar jobs. Eksponent complained that the successful tenderer did not meet the minimum requirement. The Municipality then acknowledged that at least one of the references could not be used but allowed the successful tenderer to submit new references that met the minimum requirement. The subsequently submitted references that met the minimum requirement had existed before the time limit for submitting tenders.

As regards the Complaints Board as well as the District Court and High Court, the case concerned the interpretation of Section 159(5) and (6) of the Public Procurement Act (Article 56(1) and (3) of Directive

2014/24/EU) and the judgment of 10 October 2013 by the Court of Justice of the European Union in C-336/12, Manova.

The Complaints Board found for Eksponent in that the successful tender was non-compliant and annulled the award decision. In a later decision, Eksponent was awarded damages of DKK 1.2 million.

The District Court of Frederiksberg and the Eastern High Court found for the Municipality. The High Court stated that "it had not been sufficiently stated and cannot otherwise be deduced from the procurement specifications that non-compliance with the minimum requirement would mean a rejection. According to the procurement documents and Section 159(6) of the Public Procurement Act, the Municipality was therefore not prevented from requesting relevant information and documentation under Section 159(5) of the Act".

(The Complaints Board's decisions are discussed in the 2020 Annual Report, p. 41, and in the 2021 Annual Report, p. 35. The judgment by the District Court of Frederiksberg is discussed in the 2022 Annual Report, p. 46).

The judgment of 29 December 2023 by the District Court of Glostrup, Albertslund Municipality v Albertslund Tømrer og Snedker A/S, VVS & Varmeteknik A/S and HRH EL A/S, see the judgment of 7 March 2022 by the Complaints Board.

Albertslund Municipality had launched a competitive procedure with negotiation for framework agreements on workmen services, in the contract notice described as "common works". It was stated that the purpose of the negotiation was to allow the tenderers to optimise their tenders and ensure that the tenders were compliant and also to have the service description of the procurement procedure clarified, and adaptation of the procurement documents was therefore possible based on the negotiations.

The complaining companies complained that, *i.a.*, the procurement procedure had been launched as a competitive procedure with negotiation, see Section 61 of the Public Procurement Act (Article 26 of Directive 2014/24/EU).

The case was considered by two presidents and two expert members, see Section 10(4) of the Complaints Board Act.

The Complaints Board established that a competitive procedure with negotiation is to be considered a (relatively wide) exemption possibility in relation to the normal forms of procedure. It had not been proven that procedures without negotiation are not likely to lead to a satisfactory outcome, and the Municipality had acknowledged that it was a matter of standard services. Albertslund Municipality therefore did not have the authority to use the form of procedure competitive procedure with negotiation.

The Complaints Board therefore allowed the claim that the Municipality had disregarded the Public Procurement Act in that it had launched a negotiated procedure and annulled the award decisions (Dissent).

Albertslund Municipality brought the decision before the District Court of Glostrup and claimed that Albertslund Tømrer og Snedker A/S, VVS & Varmeteknik A/S and HRH EL A/S had to acknowledge partly that the Municipality had not disregarded the Public Procurement Act by having launched a competitive procedure with negotiation, partly that the award decisions should not be annulled.

According to the judgment of 29 December 2023 by the Court, Albertslund Tømrer og Snedker A/S, VVS & Varmeteknik A/S and HRH EL A/S v Albertslund Municipality admitted the claim. The conclusion of the judgment therefore corresponds to the Municipality's claims.

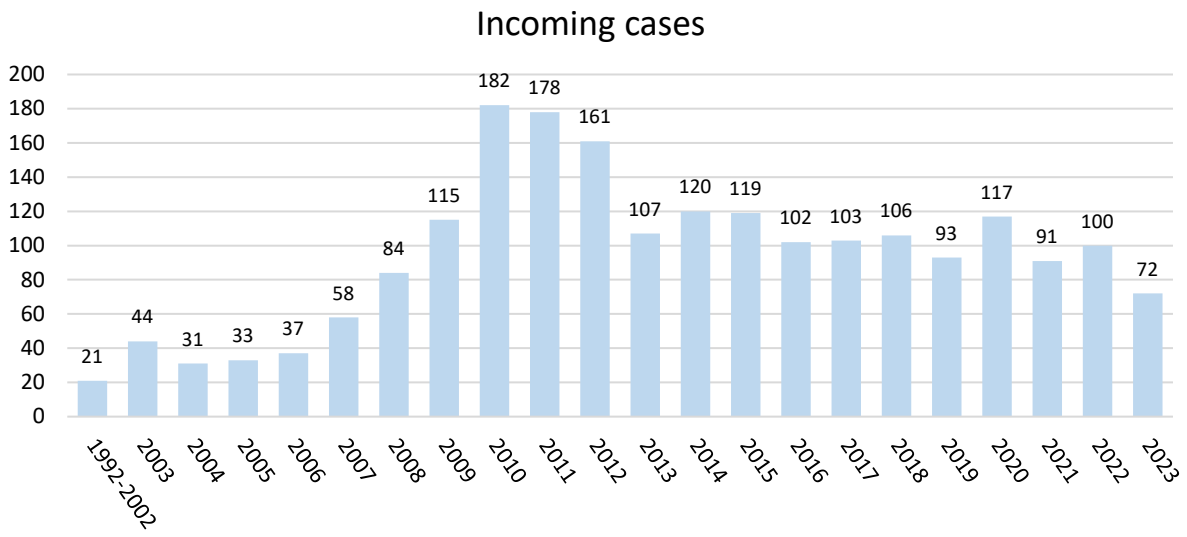
(The decision of 7 March 2022 by the Complaints Board is discussed in the 2022 Annual Report, pages 43-44).

4. THE COMPLAINTS BOARD FOR PUBLIC PROCUREMENT'S ACTIVITES IN 2023

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

4.1 Complaints received

The Complaints Board received 72 complaints in 2023. The below overview illustrates the development in the number of complaints received in 1999-2023.

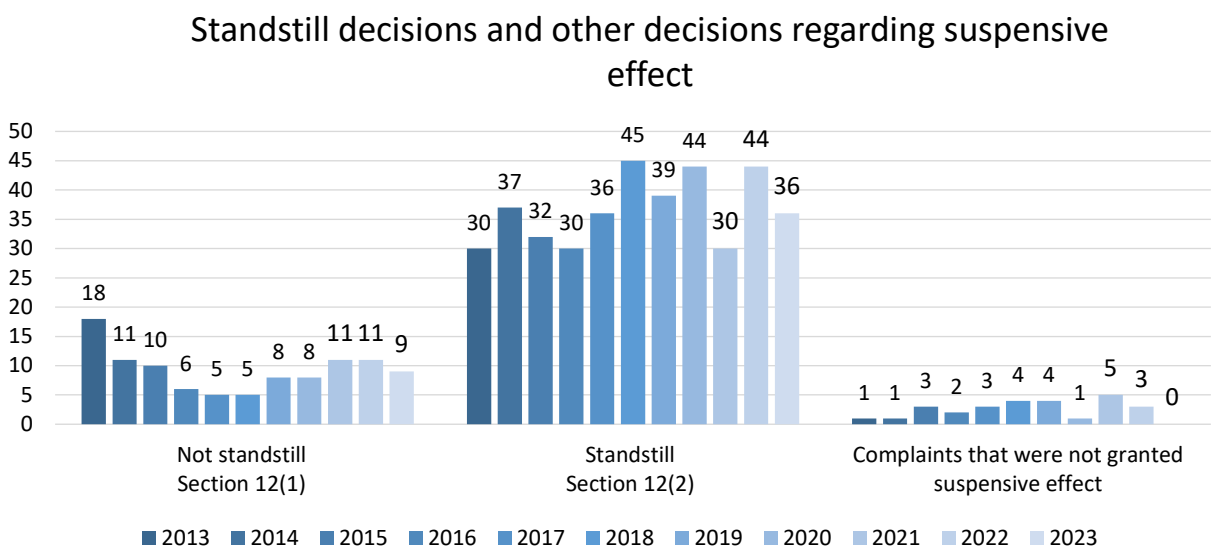


The number of complaints received in 2023 is somewhat below the level in 2022, and the number of complaints remains significantly lower than in 2010-2012.

4.2 Standstill cases and other decisions regarding suspensive effect

As shown below, in 2023, the Complaints Board made interim decisions in nine cases where a request for suspensive effect had been made under Section 12(1) of the Complaints Board Act, and interim decisions in 36 cases received in the standstill period under Section 12(2) of the Act, where the Complaints Board has a statutory time limit of 30 days to make its decision on whether to grant suspensive effect. In some cases where the condition of urgency has not been met, the Complaints Board's decision on suspensive effect are made in writing and not as an actual order. These decisions in writing are also included in the figures.

The number of standstill decisions and other decisions etc. regarding suspensive effect made in 2013-2023 is shown below.

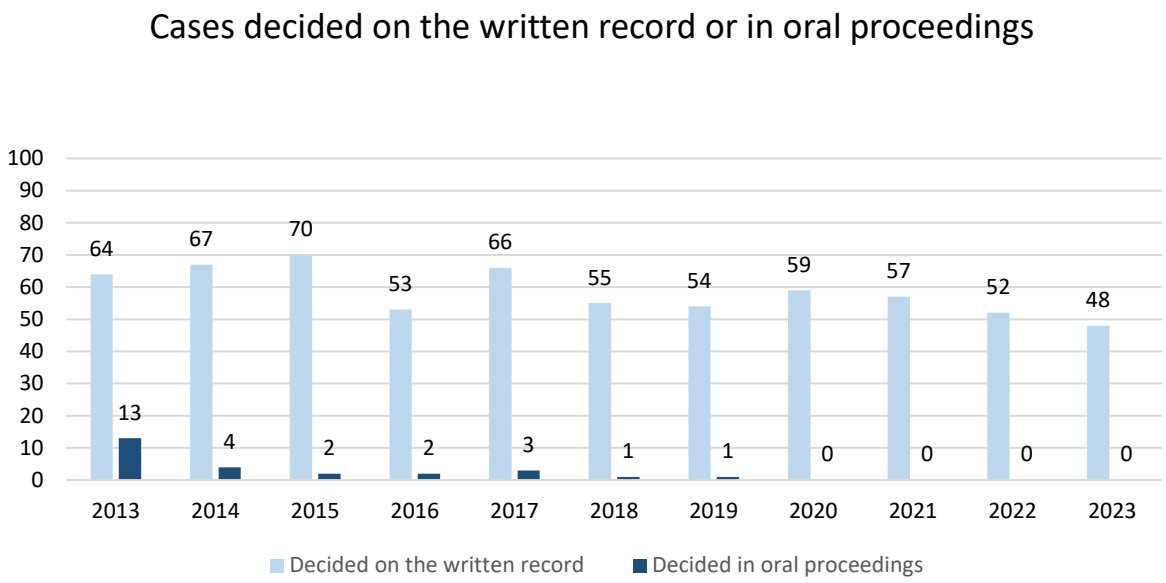


In a number of cases, the Complaints Board's decisions etc. regarding suspensive effect will lead to a withdrawal of the complaint due to the Complaints Board's prima facie order where the Complaints Board, based on a preliminary assessment, delivers an opinion on whether the public procurement rules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

4.3 Cases decided on the written record or in oral proceedings

The 40 cases in which the Complaints Board adjudicated on their merits in 2023 (see section 4.4) were all decided on the written record.

Below is an overview of cases considered on the written record and in oral proceedings, respectively, in the years 2013-2023.

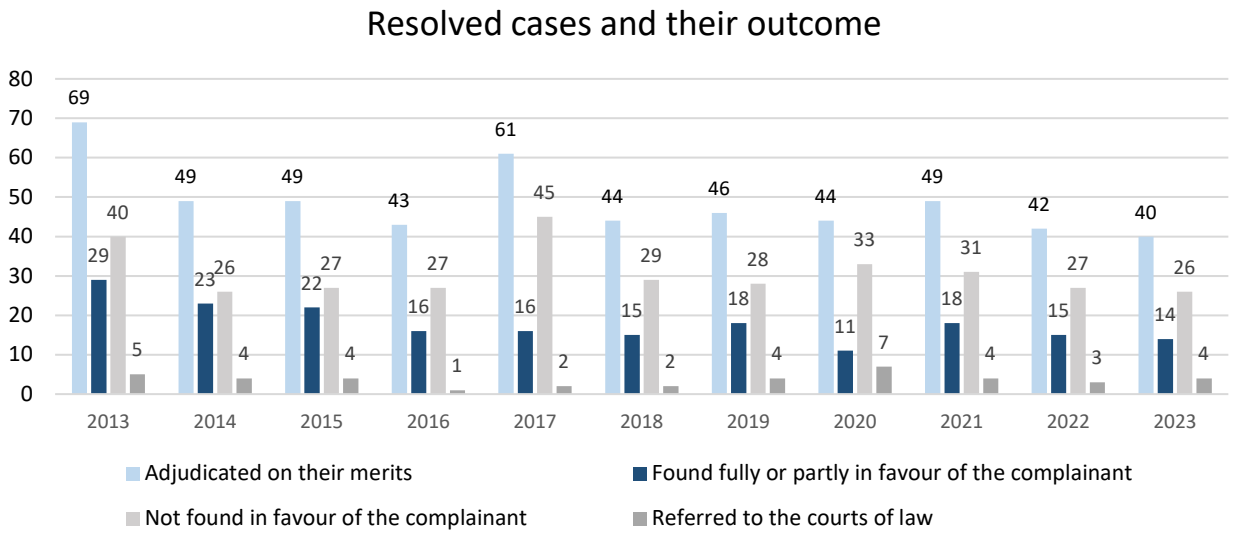


Note: These numbers include rejected cases.

The distribution of cases decided on the written record/cases adjudicated in oral proceedings shows that only very few cases are reviewed in oral proceedings. During the case preparation, the parties may request oral proceedings, but experience shows that this only happens in very few cases.

4.4 Resolved cases and their outcome

The Complaints Board adjudicated 40 cases on their merits in 2023. Of these cases, 14 complaints were fully or partly sustained, while 26 complaints were unsuccessful. In the majority of cases, the Complaints Board's decision is the final ruling in the case. Of these 40 decisions, only four were thus referred to the courts of law.



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

The below table shows that the percentage of successful cases in 2023 was approx. 35%, thus at almost the same level as in 2022 and 2021.

The figures in the graph and in the table below do not include prima facie decisions that become the final decision made in a complaint case. In 2023, the Complaints Board delivered 27 prima facie decisions. In four of these, the Board found that a prima facie case was made out (that the complaint seems to be well-founded). In all four cases, this led the contracting authority to annul the procurement procedure or withdraw its award decision after which the complaint was withdrawn. The interim decision thus became the Board's final decision.

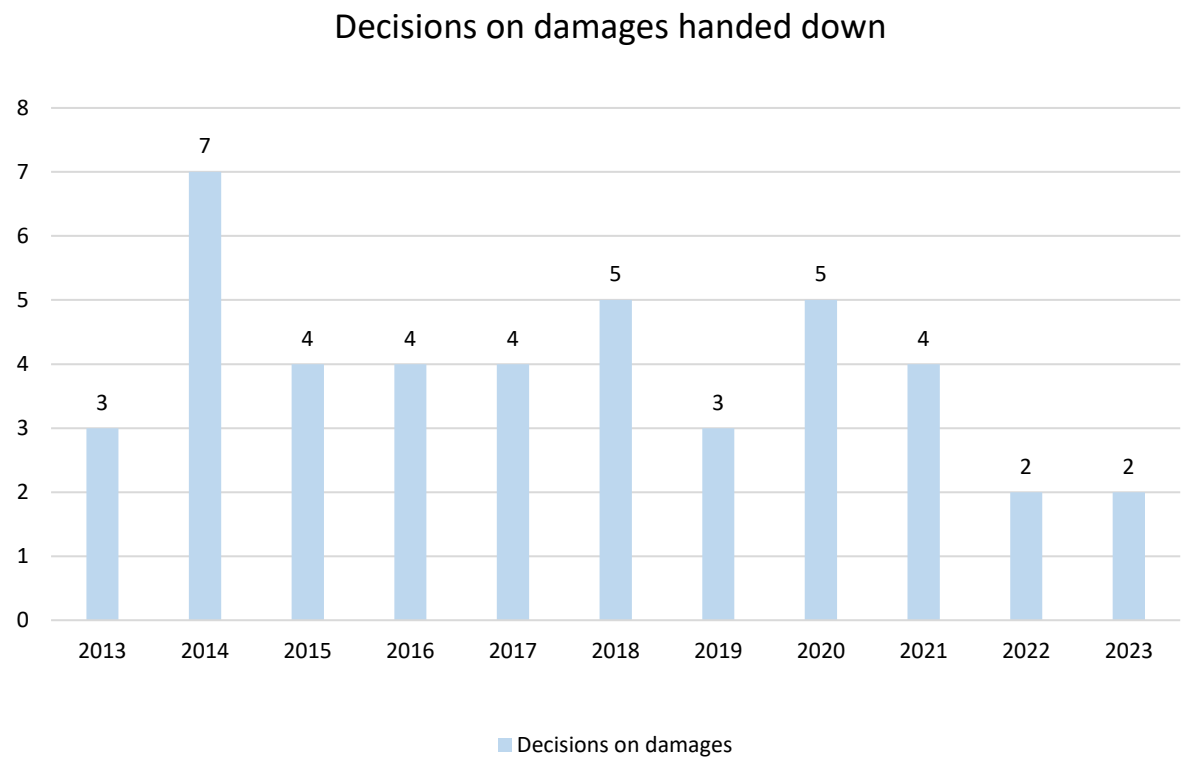
In 23 prima facie decisions, the Complaints Board did not find that a prima facie case was made out. In 15 of these, the complaint was withdrawn, and the interim decision thus became the Board's final decision.

Year	Full/partial finding for the complainant	Finding against the complainant
2013	42%	58%
2014	47%	53%
2015	45%	55%
2016	37%	63%
2017	26%	74%
2018	34%	66%
2019	39%	61%
2020	25%	75%
2021	37%	63%
2022	36%	64%
2023	35%	65%

4.5 Decisions on damages

In 2023, the Complaints Board made two decisions on damages.

The average length of proceedings for the issue of damages was approx. eighteen months.

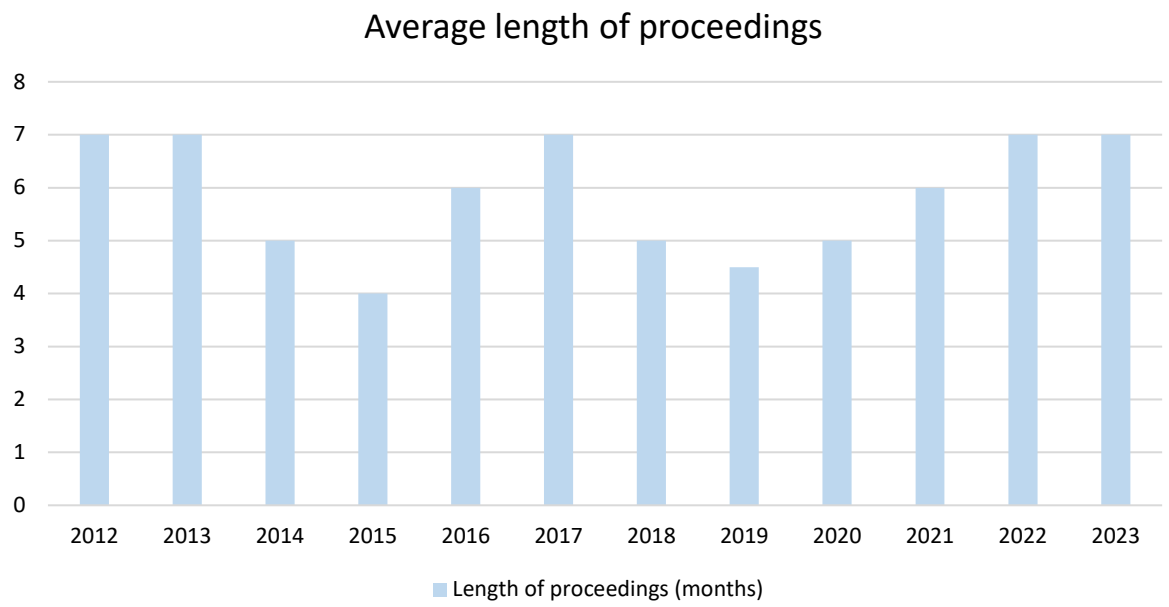


Experience shows that in many of the cases in which the Complaints Board has found fully or partly in favour of the complainant in its substantive decision, the issue of damages is resolved without the Complaints Board where the parties reach a settlement instead of letting it be up to the Complaints Board to decide the case in a decision on damages.

4.6 Average length of proceedings

The Complaints Board's average length of proceedings in 2023 was seven months.

Below is an overview of the development in the average length of proceedings for rejected cases and substantive decisions in months in 2012-2023.



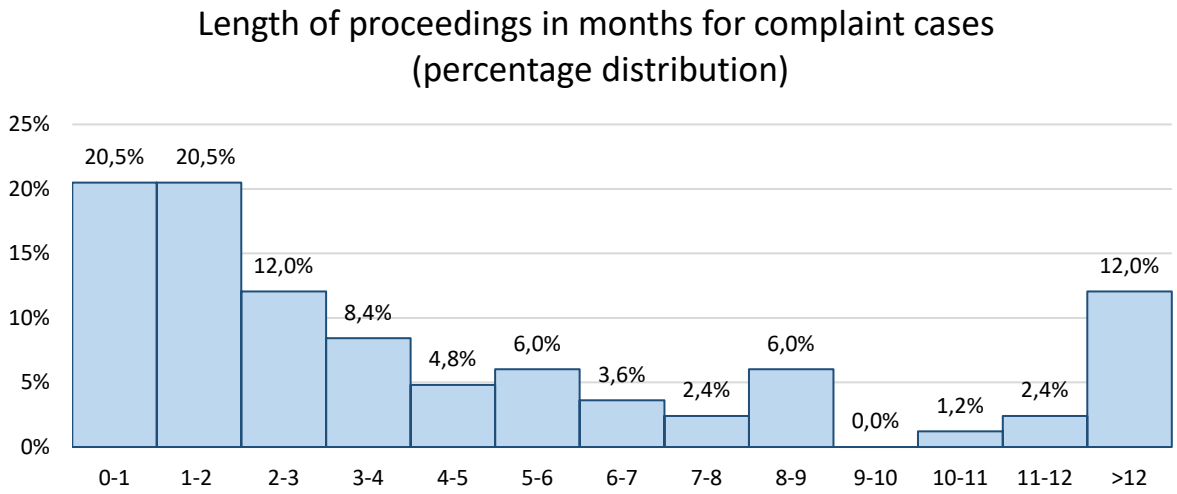
The average length of proceedings of seven months in 2023 is on a level with the length of proceedings in 2012-2013, 2017 and 2022.

At the end of 2023, there were 42 pending cases which is more or less equal to 2017-2022.

4.7 Length of proceedings in months for complaint cases (percentage distribution)

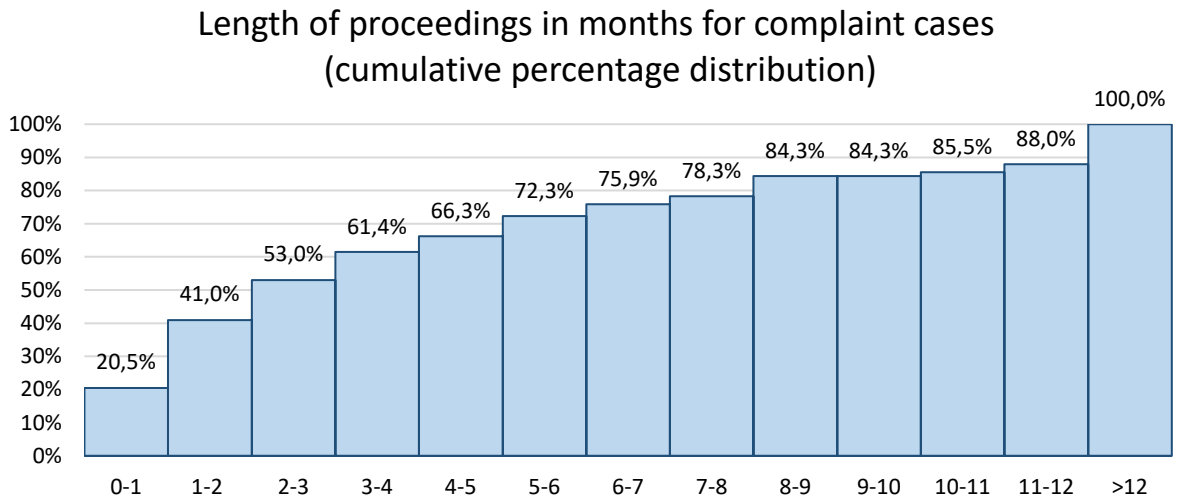
The figure below shows the percentage share of all cases that were closed within 0-1 month, 1-2 months etc. and more than 12 months in 2023. This includes all complaints, including cases where the complaint was rejected and cases where the complaint was withdrawn, including after the Complaints Board's prima facie decision. Decisions on damages, which are few and far between, are not included. Reference is made to section 4.8 below for an overview of the cumulative percentage distribution of the length of proceedings in months for complaint cases.

Proceedings are regarded as completed when the Board makes a substantive decision in the case or rejects the complaint or when the complaint is withdrawn. For more information about the length of proceedings in cases where a decision on damages is also made, see section 4.5.



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

The figure below shows the cumulative percentage distribution of the length of proceedings in 2023.

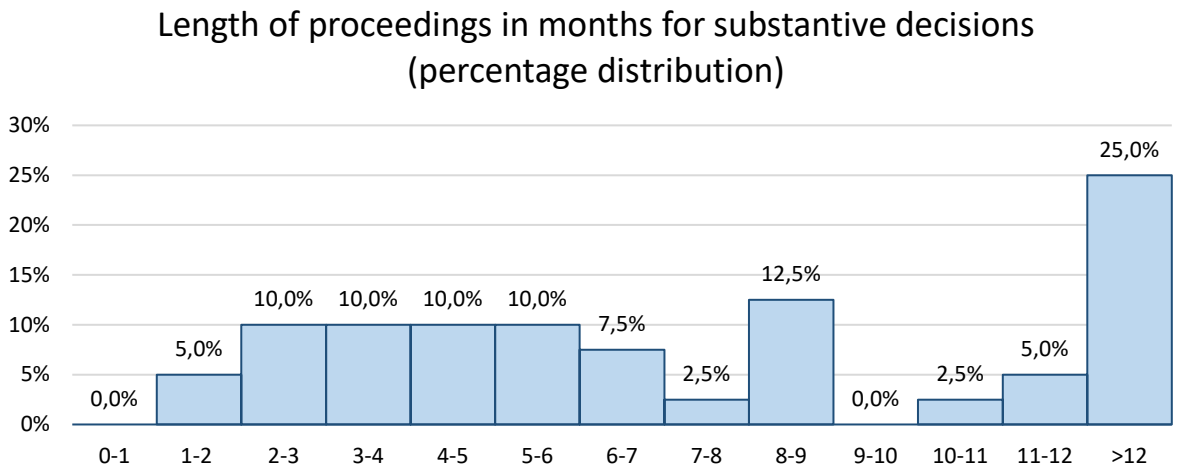


Approx. 20% of the cases were closed within the first month of receipt of the complaint in 2023 against approx. 23% in 2021 and approx. 24% in 2022. 41% of the cases were closed within the first two months of receipt of the complaint in 2023 against approx. 37% in 2021 and approx. 49% in 2022. It can also be seen that approx. 53% of all cases received in 2023 were closed within three months against approx. 46% in 2021 and 59% in 2022. The figures for 2023 include, *i.a.*, 35 cases where the complaint was withdrawn. In about half of these cases, the complaint was withdrawn following the Complaints Board's prima facie decisions where the Complaints Board makes a preliminary decision on whether the public procurement rules are to be considered violated. In addition, approx. 72% of the cases in 2023 were closed within five-six months of receipt of the complaint against approx. 75% in 2021 and approx. 73% in 2022, and approx. 84% of the cases are brought to a conclusion within nine-ten months against approx. 93% in 2021 and approx. 84% in 2022.

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

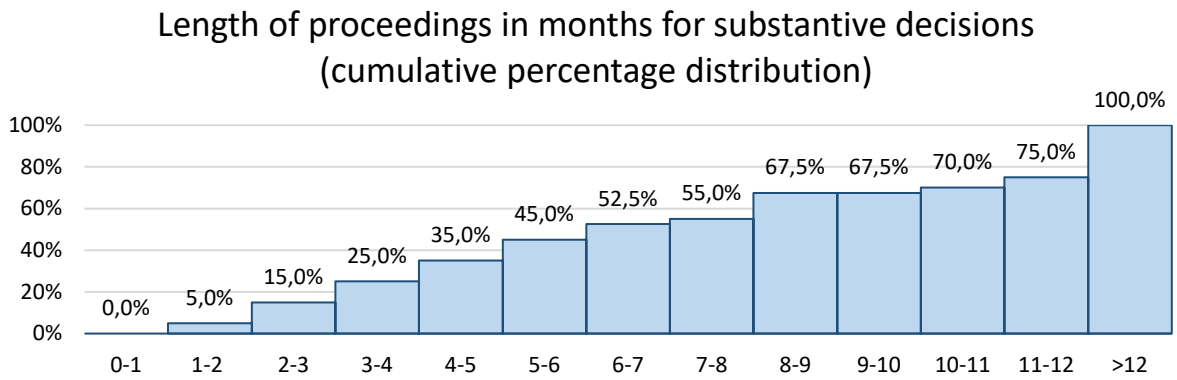
4.9 Length of proceedings in months for substantive decisions (percentage distribution)

The figure below shows the percentage share of all substantive decisions that were closed within 0-1 month, 1-2 months, 2-3 months etc. and more than 12 months in 2023.



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

The figure below shows the cumulative percentage distribution of the length of proceedings for substantive decisions in 2023.



The table shows that in 2023, substantive decisions were made within three-four months in 25% of the cases in which such a decision was made against approx. 20% in 2021 and approx. 26% in 2022. In 2023, substantive decisions had also been made within five-six months in 45% of cases against approx. 55% in 2021 and approx. 38% in 2022. It can also be seen that substantive decisions were made within seven-eight months in 55% of cases in 2023 against approx. 67% in 2021 and approx. 43% in 2022. The remaining 45% (2021: 33% and 2022: 57%) of cases where the length of proceedings was longer belong in

the category of particularly large and legally/technically complex cases which necessarily take longer to consider. With regard to the Complaints Board's length of proceedings for substantive decisions, it is important to note that the work does not only involve making the substantive decision but that in many cases, considerable resources go into making one or more decisions on suspensive effect and access to documents pursuant to the Public Administration Act, see section 4.2 above.

5. THE COMPLAINTS BOARD'S OTHER ACTIVITIES

The Complaints Board had a number of activities in 2023 in addition to hearing complaints.

Consultation responses

On 28 March 2023, the Complaints Board submitted a consultation response concerning draft bills to amend the Investment Screening Act and the Act on the Complaints Board for Public Procurement as well as the draft to the Executive Order on the application of sanctions concerning public contracts issued through Council Regulation (EU) 2022/576.

Participation in conferences etc.

The Complaints Board's President, Jacob O. Ebbensgaard, made presentations at the Danish State Procurement Conference on 29 March 2023.

On 30 March 2023, the President also made presentations for a number of officials from Ukraine who were visiting Denmark as part of the EU Delegation's Program "*Support to the public procurement reform in Ukraine*".

On 1 June 2023 in Stockholm and on 10 November 2023 in Brussels, the President attended meetings in Network of first instance procurement review bodies arranged by the European Commission.

The President and Kirsten Thorup, Vice-President, made presentations at JUC Procurement Conference on 2 November 2023. The Board's secretariat also attended the conference.

In October 2023, the Complaints Board's presidency and the secretariat paid a three-day visit to the Court of Justice of the European Union and the General Court. The programme had been put together especially for the Complaints Board and included attendance at court hearings as well as insightful and inspirational talks on general and procurement law issues with the Danish Judge at the Court of Justice of the European Union, Lars Bay Larsen, and the two Danish Judges at the General Court, Jesper Svenningsen and Louise Spangsberg Grønfeldt. There were also presentations and discussions with a number of the Court's specialists.