New Bill amending the self-cleaning rules

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On 9 July 2019, the Danish Competition and Consumer Authority published for consultation a Bill amending the Danish Public Procurement Act. In this newsletter we will look at the Bill and its importance.

The background for the Bill is the European Commission's issue of a letter of formal notice on 25 January 2019 as the first stage of an infringement procedure against Denmark and a number of other EU member states. The Commission listed 49 issues that were found to constitute deficient implementation of the classic Public Procurement Directive 2014/24/EU of 26 February 2014.

The Commission's primary criticism of the Danish implementation is that several parts of the Directive have not been directly implemented in the Danish Public Procurement Act, but appear solely from the legislative history behind the Act. In addition to these deficiencies, the Commission has pointed out four areas in which the wording of the Public Procurement Act is not fully consistent with the wording of the Directive. Furthermore, the Commission points out three situations where sub-provisions from the Public Procurement Directive have not been included in the Public Procurement Act. The Danish Government previously thought that only 13 of the issues would give rise to amendments to the Act, but the Bill contains 19 amendments.
AMENDMENTS TO THE SELF-CLEANING RULE
IN SECTION 138

Since the primary reason for the amendments is that the state of the law appears from the legislative history and not directly from the wording of the Act, the amendments proposed in the Bill are not substantive amendments. However, section 138 contains a new sub-section (3) on self-cleaning.

The proposed provision implies that a bidder cannot make use of self-cleaning if the bidder has been excluded by final judgment from participating in procurement or concession award procedures by virtue of section 79(1) of the Danish Penal Code concerning disqualification. Accordingly, such bidder is definitively excluded from participating in procurements during the period of exclusion resulting directly from the judgment and has no right to attempt self-cleaning. This follows from article 57(6), 4th paragraph, which has not previously been implemented in the Public Procurement Act.

Hence, if an enterprise has been excluded by judgment from participating in procurement procedures, see section 79(1) of the Danish Penal Code, for a period of e.g. two years, the enterprise cannot self-clean for two years from the date of the final judgment. According to section 138(5) of the Procurement Act, which will become section 138(6) upon enactment of the Bill, a bidder who by final judgment or issue of a fine notice has been found guilty of acts covered by the compulsory grounds for exclusion in section 135(1) must be excluded by the contracting entity from participating in procurement procedures for 4 years from the date of the judgment or adoption of the fine notice. Thus, after expiry of, for example, two years during which the enterprise is excluded from procurements, the enterprise will be excluded from participating in procurements for another two years if it cannot

Read the Danish Government's reply to the European Commission's letter of formal notice (in Danish).
submit documentation proving a sufficient self-cleaning process.

The exclusion period for breach of the mandatory grounds for exclusion is generally four years, see section 138(5). However, an enterprise may by judgment be excluded from participating in procurements for up to five years, see section 79(1) of the Danish Penal Code. If that is the case, the enterprise must be excluded during the entire longer period appearing from the judgment and will have no self-cleaning opportunity - notwithstanding that the exclusion period is generally four years. In the Bill published for consultation, this has been ensured by altering the wording of section 138(5).

KROMANN REUMERT'S COMMENTS

The possibility of excluding enterprises from participating in procurements by judgment under section 79(1) of the Danish Penal Code - which prevents self-cleaning and may result in a longer exclusion period than the normal four years - is very narrow. As far as we know, the courts have never under the authority of section 79(1) of the Danish Penal Code excluded any enterprises from participating in procurements.

The Bill contains few substantive amendments, and the points presented above are not expected to be of any significance either. The evaluation of the Public Procurement Act is underway and is expected to be completed in the first half of 2020. The intention is that any amendments to the Act are to be submitted subsequently.

Read the Bill that has been submitted for consultation (in Danish).