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# Public Procurement & Government Contracts

Norway

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# NORWAY

## Law and Practice

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## 1. General

### 1.1 Legislation Regulating Procurement of Government Contracts

In Norway, public procurement is regulated by the Public Procurement Act. The Public Procurement Act regulates the general principles for public procurement, and this is accompanied by several regulations that set out more detailed rules of each sector. These regulations are as follows: the Public Procurement Regulation, the Utilities Regulation, the Defence and Security Regulation and the Regulation on Concessions Procurement. In addition, there is a separate Regulation on the Complaints Board for Public Procurement. This regulates the procedural rules applicable to the Norwegian Complaints Board.

### 1.2 Entities Subject to Procurement Regulation

Public procurement applies to government authorities, county and municipal authorities, bodies governed by public law, associations with one or more of the three foregoing bodies, public enterprises that carry out utility activities, as defined in international agreements that Norway is party to, and other entities engaged in utility activities on the basis of exclusive rights or special rights, as defined in international agreements that Norway is party to.

### 1.3 Type of Contracts Subject to Procurement Regulation

When contracting authorities mentioned above enters into contracts regarding works, supplies and services, the contracts are subject to public procurement regulation if the estimated value is equal to or exceeds NOK100,000 excluding VAT. The minimum value thresholds for all contracts that are subject to procurement regulation are NOK100,000 excluding VAT.

When it comes to establishing what part of the public procurement regulation applies to an individual contract, it depends on the estimated value of the contract. The national threshold is NOK1.3 million for works, supplies and services contracts. The threshold for public services contracts for social and other specific services is NOK7.2 million.

Part II of the public regulation will apply to contracts with an estimated value between NOK1.3 million and the EU threshold.

Part III of the public regulation will apply to contracts with an estimated value over the EU threshold. The EU threshold is NOK1.3 million for government's supplies and services contracts, NOK2.05 million for other contracting authorities that are subject to the public procurement regulation, and NOK51.5 million for works contracts.

Part IV will apply to contracts for health and social care services over NOK7.2 million.

Part V will apply to design contests with an estimated value over NOK1.3 million.

Regarding concession contracts, the EU threshold is NOK51.5 million.

In the utility sector the threshold is NOK4.1 million for supply and service contracts. For works contracts in the utility sector, the threshold is NOK51.5 million, and NOK9.6 million for health and social care contracts. Aside from the latter, the threshold is the same in the defence and security sector.

### 1.4 Openness of Regulated Contract Award Procedure

Any interested party from any jurisdiction can attend a regulated contract award procedure.

However, right holders of the public procurement regulation are, according to the Public Procurement Act, businesses that are established in accordance with the legislation of an EEA state and have their main administration or principal place of business in such a state. The same applies to businesses that are granted rights under the WTO agreement on public procurement or other international agreements that Norway is obliged to follow.

### 1.5 Key Obligations

There are several key obligations of note under the public procurement legislation. The first to highlight is the obligation to ensure that public funds are utilised as well as possible, and that the purchases contribute to a competitive business sector. It is important that contracting authorities act with integrity so that the public has confidence that public procurement takes place in a socially responsible manner.

A second obligation to highlight is that the contracting authorities are obliged to publish a contract notice for all contracts that have an estimated value over the national threshold. This obligation ensures transparency in the public sector while stimulating competition in the business sector.

When it comes to the key obligations of the public procurement legislation, it is equally necessary to highlight the general principles. The general principles are competition, equal treatment, foreseeability, verification and proportionality. Essentially, the general principles can form an independent basis for duties and rights for contracting authorities and bidders, which means that the general principles must be observed.

## 2. Contract Award Process

### 2.1 Prior Advertisement of Regulated Contract Award Procedures

For contracts subject to the Procurement Regulation part II (exceeding the national threshold), tender procedures shall be published in the Norwegian Database for Public procurements (“Doffin”).

For contracts subject to the Procurement Regulation part III (exceeding the EU threshold), the tender procedure must be published in Doffin and Tenders Electronic Daily (TED).

The publication must as a minimum include a description of the procurement, a deadline for receipt of requests for participation, registration of interest, or submission of tender, and must comply with the relevant Doffin publication form.

Contracting authorities may also make known their planned procurement procedures by way of a “guiding publication”. This must include a brief description of the planned procurements and may be published in TED, Doffin or through the contracting authority’s user profile.

### 2.2 Preliminary Market Consultations by Awarding Authority

The contracting authority may carry out preliminary market consultations before launching the tender procedure in order to prepare the procurement procedure and to inform the suppliers of their plans and needs.

The contracting authority may seek advice from independent experts, suppliers or other market players. The advice may be used in the planning of and during the procedure provided that the advice does not distort the competition or lead to breach of the principle of equal treatment.

### 2.3 Tender Procedure for Award of Contract

For contracts subject to the Procurement Regulation Part II (exceeding the Norwegian threshold), the contracting authority may use an open or restricted procedure and is free to clarify and negotiate, unless they have informed that they will not.

For contracts subject to the Procurement Regulation Part III (exceeding the EU threshold), the open or restricted procedure shall be used. Provided that certain conditions are met, the negotiated procedure, the competitive dialogue procedure and innovative partnership may also be used.

### 2.4 Choice/Conditions of Tender Procedure

The choice of tender procedures other than the open and restricted procedure is subject to the fulfilment of certain con-

ditions as stipulated in the Procurement Regulation. For example, the negotiated procedure may be used if the procurements character, complexity, legal or financial composition or inherent risk makes it necessary to negotiate.

### 2.5 Timing for Publication of Documents

The procurement documents shall be made available from the day of publication of the tender procedure in Doffin/TED or the date of invitation to participate in the procedure/confirm interest. These shall include a description of the product or service to be procured, the contractual terms, the requirements set for the tender and tenderer.

### 2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

For contracts subject to the Procurement Regulation Part II (exceeding the Norwegian threshold) there are no minimum time limits for the receipt of expressions of interest in a contract award procedure or the submission of tenders. However, the contracting authority must, when setting the deadline, take into account the complexity of the contract and the time it will take for the suppliers to provide their reply.

For contracts subject to the Procurement Regulation Part III (exceeding EU threshold), the Regulation stipulates various time limits for expressions of interest in a contract award procedure and the submission of tenders depending on the situation. The most important are mentioned below, but please note that these are subject to exemptions.

For open procedures the minimum time limit for the receipt of tenders is at least 30 days after publication. For restricted procedures and negotiated procedures, the minimum time limit for receipt of requests to participate shall be 30 days after publication, and the time limit for submitting tenders shall be at least 25 days after the invitation to tender has been sent. For a competitive dialogue and innovation partnership the minimum time limit for requesting participation is 30 days after publication, time limit for tender submission is not regulated.

These are minimum limits, the contracting authority must always when setting a deadline take into account the complexity of the contract and the time that the supplies will need.

### 2.7 Eligibility for Participation in Procurement Process

The Procurement Regulations sets out mandatory and optional criteria which interested parties must meet in order to be eligible for participation in a procurement process.

For contracts subject to the Procurement Regulation part II (exceeding the Norwegian threshold) the contracting authority

may set criteria related to the supplier's qualifications, including requirements related to economic and financial capacity and technical and professional qualifications. The requirements must be connected, and proportionate, to the delivery and be relevant in order to secure that the suppliers have the necessary qualifications to fulfil the contract.

For contracts subject to the Procurement Regulation part III (exceeding the EU threshold), the contracting authority may only demand that the suppliers fulfil qualification requirements related to the following: registration, authorisations, economic and financial capacity and technical and professional qualifications. The requirements must be connected to and proportional to the delivery.

## **2.8 Restriction of Participation in Procurement Process**

The contracting authority may limit the number of participants in the restricted procedure, the negotiated procedure, in a competitive dialogue and in an innovation partnership. The Procurement Regulation sets out a minimum number of tenderers in order to secure competition. For procedures subject to the Regulation part II the contracting authority must include at least three tenderers. For procedures subject to the Regulation part III, the contracting authority must include at least five tenderers in a restricted procedure and at least three tenderers in a negotiated procedure, a competitive dialogue and in an innovation partnership.

The selection of tenderers must be done on the basis of objective and non-discriminatory criteria set out in the tender publication. They must be verifiable and relevant for the specific procurement and may not lead to arbitrary discrimination of the tenderers. The criteria may be, but is not limited to, the criteria for qualification and must be accompanied by documentation requirements.

## **2.9 Evaluation Criteria**

The evaluation of tenders shall be based on certain award criteria set by the contracting authority, and requirements related to the documentation of these. The award criteria must be objective, non-discriminating and suitable to identify the best tender.

For procedures subject to the Procurement Regulation part II (exceeding the Norwegian threshold) the criteria may be for example price, quality, life-cycle costs, environment, social elements and innovation. The contracting authority may use the same criteria as qualification criteria and award criteria provided that they are connected to the delivery.

For procedures subject to the Procurement Regulation part III (exceeding the EU threshold), award of contract must be based

on either the price, cost (using a cost-effectiveness approach such as life-cycle) or the best price-quality ratio, which shall be assessed on financial and qualitative criteria such as quality, availability, organisation, service or technical capacity.

## **3. General Transparency Obligations**

### **3.1 Obligation to Disclose Bidder/Tender Evaluation Methodology**

In the tender documentation, the contracting authority is ordered to disclose both the qualification requirements and the award criteria of which tenders are evaluated. The qualification requirements need to be fulfilled by the bidder in order for the bidders to participate in the contract award procedure. If the contracting authority uses the contract award procedures restricted procedure, negotiated procedure, competitive dialogue and innovation partnership, the contracting authority can set a lower, or upper, limit to numbers of already qualified bidders by using objective and not-discriminatory selection criteria. The selection criteria must be disclosed in the public notice or in the tender documentation.

When it comes to the evaluation methodology, the contracting authority is not obliged to disclose this in the public notice or the tender documentation. However, the contracting authority needs to stipulate the evaluation methodology within the opening of tenders.

The qualification requirements, the selection criteria and the award criteria need to be disclosed in the tender documentation, which is published at the same time as the public notice.

### **3.2 Obligation to Notify Interested Parties Who Have Not Been Selected**

If the chosen contract award procedure is restricted procedure, negotiated procedure, competitive dialogue or innovation partnership, the contracting authorities can, by the use of selection criteria, choose to not invite interested bidders to submit tenders. The contracting authority is obliged to provide the bidders that are not selected with a written notice of the selection. The notice shall include the reasons for the selection. Such selection is not relevant for open procedure, where the contracting authority have no authority to select just some of the interested bidders to submit tenders. All interested bidders can submit tenders in an open procedure.

### **3.3 Obligation to Notify Bidders of Contract Award Decision**

Before the contract is concluded, the contracting authority is obliged to notify to bidders the contract award decision. The notification to the bidders has to include a reason for the con-

tract award decision and a standstill period. The notification also needs to include the name of the chosen bidder, and a statement of the characteristics and relative benefits of the selected tender in accordance with the award criteria.

### **3.4 Requirement for Standstill Period**

There has to be a standstill period between the notification of the contract award decision and the conclusion of the contract. The minimum standstill period is ten days, counting from the day after notification of the choice of bidder is sent.

## **4. Review Procedures**

### **4.1 Responsibility for Review of Awarding Authority's Decisions**

There is no body generally responsible for overseeing or reviewing awarding authorities' decisions where a decision is not challenged by a third party. However, complaints may be filed before the Complaints Board for Public Procurement for review and decisions may be challenged before the courts, eg, in conjunction with damages claims or interim injunctions. Although not a common procedure, complaints may also be filed before the EFTA Surveillance Authority for review. The Complaints Board, the courts and the EFTA Surveillance Authority may only set aside awarding authorities' decisions, but do not have the authority to make a new decision.

Decisions of the Complaints Board are only advisory and thus no appeal procedure applies, but the dispute may nonetheless be brought in before the courts. Decisions of the Norwegian courts may be appealed before the appeal courts and a decision of the EFTA Surveillance Authority may be appealed before the EFTA court.

### **4.2 Remedies Available for Breach of Procurement Legislation**

A supplier may file a complaint before the Complaints Board for an advisory decision on the contracting authority's compliance with the procurement legislation. The Complaints Board may also impose penalty fines on the contracting authority in cases of illegal direct awards.

Further, the general courts may award damages, decide a contract without effect and shorten the term of the contract, in addition to granting interim injunctions during the standstill period to suspend the signing of contract.

### **4.3 Interim Measures**

Interim measures are available. If the supplier files an application for interim injunction before the court and the application is served on the contracting authority during the standstill

period, the application itself will suspend the contract signing. The courts may grant interim injunction to suspend the contract signing as long as the contract is not yet signed. The suspension applies until the dispute is settled in court.

### **4.4 Challenging Awarding Authority's Decisions**

Anybody with a legal interest and genuine need to have the lawfulness of the decisions, actions and/or omissions of the awarding authority assessed, has a standing to challenge the awarding authority's decision, eg, unsuccessful tenderers or tenderers who would otherwise participate for a contract which has been (illegally) awarded directly.

### **4.5 Time Limits for Challenging Decisions**

As the courts may not grant interim injunction if the contract has already been signed, an application for interim injunction has to be filed during the standstill period. The standstill period is normally ten days from the day after the date of award letter publication.

An application before the courts for declaring a contract without effect, shortening the term of the contract or imposing penalty fines must be filed within two years after the contract was signed. However, if the awarding authority has published a contract award notice in accordance with applicable procurement regulations or otherwise notified affected suppliers of the entering into contract, a 30-day time limit applies commencing from the day after the notice/notification. The 30-day time limit is suspended if a complaint concerning illegal direct award is filed before the Complaints Board, whereby a new 30-day time limit applies from the day after the date of the Complaints Board's decision.

A three-year general limitation period applies to damages claims.

### **4.6 Length of Proceedings**

The length of complaint proceedings before the Complaints Board varies depending on the caseload, but the processing time is currently 12 months. The contracting authority may, however, accept to suspend the contract signing awaiting the Complaints Board's decision and, if so, the complaint is prioritised with a current processing time of two months.

The length of proceedings before the courts (damages claims) also depends on the caseload of the relevant court and the complexity of the case at hand, but the dispute shall, as a main rule, be concluded within seven months if not appealed.

An application for interim injunction will automatically suspend the contract signing if served on the contracting authority within the standstill period. A court hearing normally follows

an application for interim injunction and the interim injunction process is normally concluded within two to four weeks.

## 4.7 Annual Number of Procurement Claims

The number of procurement claims (both damages claims and interim injunction cases) considered by the courts each year varies greatly, and not all decisions are publicly available. Based on publicly available court decisions from the years 2012 to 2019, the average number is 20.

Disregarding complaints withdrawn by the complainant, the Complaints Board has considered an average of 167 procurement claims in the years 2012 to 2019. Only counting the years 2016 to 2018, the average number is 132, showing a significant decrease of cases before the Complaints Board the previous years.

## 4.8 Costs Involved in Challenging Decisions

In addition to any costs to legal counsel, the complainant/plaintiff must pay a fee of NOK8,000 (NOK1,000 in cases of illegal direct award) when filing a complaint before the Complaints Board. Under certain circumstances the fee may be reimbursed by the Complaints Board, but otherwise the parties bear their own costs.

The court fee is currently NOK2,930 for interim injunction cases, while the court fee for damages claims is currently NOK5,860 (with an additional NOK3,516 for each day in court). As a main rule, the successful party shall be reimbursed its costs from the other party, including any court fees and costs to legal counsel.

## 5. Miscellaneous

### 5.1 Modification of Contracts Post-award

Modifications of contract are regulated in the Procurement Regulation Chapter 28, which implements the EU Directive Article 72 and the Pisettext judgement (C-454/16). The contracting authority may modify contracts pursuant to a change clause in the contract and if the changes do not cause a price increase exceeding the threshold values or 10% of the contract value for product and service contracts, provided that the overall nature of the contract is not altered.

In some cases, changes may also include necessary additional deliveries, changes that are necessary due to circumstances that a diligent contracting authority could not foresee or changes on the supplier side if the contract. The following modifications shall always be deemed as substantial, and thus illegal:

- if the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates or for the

acceptance of a tender other than that originally accepted, or would have attracted additional participants;

- if the modification changes the economic balance of the contract or the framework agreement in favour of the supplier in a manner not provided for in the initial contract or framework agreement;
- if the modification extends the scope of the contract or framework agreement considerably; and
- where a new supplier replaces the one to which the contracting authority had initially awarded the contract in other cases than those explicitly mentioned in the Regulation.

### 5.2 Direct Contract Awards

The contracting authority may, in some cases, award a contract directly. This can occur when the procurement legislation is not applicable, such as when the public authority has awarded an exclusive right, when public contract are entered into between entities in the public sector, when the contract value is below the threshold and the product or when the service is exempted, such as real estate.

Furthermore, the Procurement Regulation provides for the possibility to award a contract directly (without a published procedure) for example when there is only one possible supplier, in cases where it is impossible to carry out a procedure due to urgency, after a failed procedure and substitute purchases. The main rule, however, is that there shall be competition and, therefore, the requirements for awarding a contract directly are fairly strict.

### 5.3 Recent Important Court Decisions

In relation to remedies, the Norwegian Supreme Court case “Fosen-Linjen” (HR-2019-1801-A) involving a claim for damages from a terminated tender procedure, has been of particular interest. The Fosen-Linjen case was subject to two EFTA court referrals before judgement was passed.

The judgement contains important statements on the basis for damages (thresholds for liability in relation to the positive and the negative contract interest), causation, the requirement for sufficient grounds for termination of a procedure and in regard of documentation requirements for award criteria.

In addition, ECJ’s ruling in C-216/17 (ATE Markas) has attracted national attention in the Norwegian public procurement community. The decision concerns framework agreements and states that there is in fact an obligation to state the maximum value under a framework agreement.

The ECJ further states that, once the maximum quantity estimate has been reached, “the agreement will no longer have any

effect” (paragraph 61). The implementation of this judgement is anticipated.

#### **5.4 Legislative Amendments Under Consideration**

There are no legislative amendments currently under consideration.

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**Arntzen de Besche Advokatfirma AS** has a market-leading, full-service procurement and antitrust practice, advising major national and international clients on a broad array of EEA/EU law issues such as procurements, antitrust, merger control, state aid and EEA law. In the procurement sphere, Arntzen de Besche is well-recognised for its extensive work acting on behalf of suppliers in a wide array of industries. The practice group is headed by Espen Bakken. Arntzen de Besche is consistently sought out to assist with complex, high-stakes mat-

ters, with the team frequently appearing before the EFTA Surveillance Authority, the European Commission and the EFTA Court. The firm has broad industry expertise, with particularly strong knowledge of the transport sector, defence and security, renewables life sciences and oil and gas. Arntzen de Besche is international in nature and the firm is highly experienced in assisting with cross-border mandates and has established close relationships with leading global and regional law firms.

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