



Legal aspects of sustainable food procurement

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The ground rules for public procurement in EU-member states

- Art. 18 of the procurement directive for goods and services (Dir. 2014/24/EU) defines the ground rules for all public procurement within the scope of the directive:
- Economic operators from all member states shall be treated equally and no discrimination based on nationality is allowed.
- The contracting authority shall act in a transparent and proportionate manner.
- The ground rules are linked to the “four freedoms” that forms the core of the inner market of the EU.

No rules without exemptions

- The procurement directive contains a myriad of different exemptions to the ground rules. All applicable under different circumstances.
- We start with the simplest of all – Procurement below the thresholds in art. 4.
 - Currently 214.000 € for goods and most services for sub central contracting authorities like municipalities.
 - 750.000 € for social and other specific services listed in Annex XIV to the procurement directive (“light-services”).
- Contracts below the thresholds are not considered within the scope of the directive, thus enabling the contracting authority to actively seek to buy local goods when procuring.

Calculating contract value and splitting contracts

- To ensure the applicability of the provisions in the directive, there are detailed rules on calculating contract value when deciding whether a contract falls below the thresholds. These are set out in art. 5.
- **Art. 5.2:**

“Where a contracting authority is comprised of separate operational units, account shall be taken of the total estimated value for all the individual operational units. Notwithstanding the first subparagraph, where a separate operational unit is independently responsible for its procurement or certain categories thereof, the values may be estimated at the level of the unit in question.”
- **Art. 5.3:**

“The choice of the method used to calculate the estimated value of a procurement shall not be made with the intention of excluding it from the scope of this Directive. A procurement shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons.”

Calculating contract value and splitting contracts

- As per art. 5.2, one possible way to ensure that most contracts would be exempt from the procurement directive is to transfer the financial and practical responsibility for procurement from the central municipal government to the single operating units like individual schools and kindergartens. A common procurement strategy can be set for the individual units, which they must adhere to.
- The disadvantages of this strategy is however obvious. When transferring responsibility all central control is lost, and by all accounts the individual units will not be able to negotiate as well as when central specialists procure larger amounts.
- Some contracts would probably be above the thresholds as well, and the individual units rarely possess the resources to tender contracts in compliance with the procurement directive.

Calculating contract value and splitting contracts

- As per art. 5.3, contracts cannot be subdivided with the effect of preventing them from falling within the scope of the directive, unless justified by objective reasons.
- While the above seems fairly obvious, it's not quite as clear when a reason for subdivision is sufficiently objective.
- However, one goal of the newest procurement directive was to facilitate greater access for SME's to compete for public contracts. This goal is integrated in art. 46. Thus, art 46.1 states:

Contracting authorities shall, except in respect of contracts whose division has been made mandatory pursuant to paragraph 4 of this Article, provide an indication of the main reasons for their decision not to subdivide into lots

Calculating contract value and splitting contracts

- It is agreed amongst most practitioners (at least in Denmark), that an objective reason for subdividing contracts is, that a separate market for the specific goods exist.
- This in turn means, that all food procurement made by a municipality doesn't necessarily have to be added all together when calculating contract value. Instead, the contracting authority can view the value of contracts for certain goods independently.
- **Example:** If a separate market for e.g. honey exists (meaning that there are several suppliers offering only honey and honey-related products as their only goods) the contracting authority can objectively justify splitting a contract for honey and honey-related products from other food procurement, and viewing the value of the contract individually when calculating whether it falls below the thresholds of the directive.
- The main advantage to this approach is, that the contracting authority can actively seek out local suppliers. The main disadvantage on the other hand, that it takes a lot of resources to conclude and manage a lot of individual contracts.

Indirect ways of affecting the origin of the delivered goods

- Most municipalities in Denmark procure food via large single procurement contracts with a food service supplier. These contracts are always above the thresholds and as such within the scope of the procurement directive.
- This means, that the contracting authority cannot directly request local goods, or set other geographical demands for the origins of the goods. As such, objective indirect demands related to the goods, their methods of production and delivery of them, are the way forward.
- One such example can be to request a certain label on the goods to document specific environmental, social or other characteristics where relevant. This is allowed as per art. 43 of the procurement directive.
- Another and more creative way, could be to include other services in the contract that are objectively geographically limited. E.g. making it a requirement in the contract, that the supplier must also let school children from the municipality visit a farm that delivers to the municipality, as part of their education. This obviously have to be within a reasonable distance. Education services are part of the "light-services" listed in annex XIV.

Finishing remarks

Times up!

Thank you for your attention.

Any quick questions?

