

**Case C-737/22**

**Request for a preliminary ruling**

**Date lodged:**

1 December 2022

**Referring court:**

Østre Landsret (Denmark)

**Date of the decision to refer:**

11 November 2022

**Applicant:**

Staten og Kommunernes Indkøbsservice A/S

**Defendant:**

BibMedia A/S

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**ØSTRE LANDSRET**

**(High Court of Eastern Denmark)**

**ORDER**

**of 11 November 2022**

...

**Staten og Kommunernes Indkøbsservice A/S**

...

v

**BibMedia A/S**

- 1 ... The case has been brought by Staten og Kommunernes Indkøbsservice A/S (the procurement service of the Danish State and municipalities) ('SKI') against Audio Visionary Music A/S ('AVM') and concerns the legality of a procurement

procedure carried out by SKI concerning a framework agreement for the provision of library materials and preparatory services in relation to this.

- 2 The Østre Landsret (High Court of Eastern Denmark, Denmark) has in accordance with Article 267(2) of the Treaty on the Functioning of the European Union (TFEU) decided to request a preliminary ruling from the Court of Justice of the European Union (Court of Justice) concerning the interpretation of the ban on negotiations which can be deduced from the case-law of the Court of Justice on the fundamental principles of equal treatment and transparency as expressed in Article 18(1) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC ('the Public Procurement Directive'). Furthermore, the Court of Justice is requested to give an opinion on whether the scope of the ban on negotiations is affected by the fact that this is an open procedure for separate lots (see Articles 27 and 46 of the Public Procurement Directive).

### **CIRCUMSTANCES AND PROGRESS OF THE CASE**

- 3 The applicant, SKI, is a central purchasing body owned by the Danish State and Kommunernes Landsforening, which is the association and interest organisation of the Danish municipalities. SKI was set up to streamline and professionalise public procurement, including through the development, procurement and operation of framework agreements on behalf of SKI's customers (state and municipal contracting entities).
- 4 At the time of the procurement, AVM was active in the market for preparatory services for library materials. With effect from 1 March 2021 BibMedia A/S acquired all of the shares in the company. AVM was subsequently dissolved by being merged with BibMedia A/S, which entity is therefore party to the proceedings.
- 5 On 4 February 2020 SKI put out to tender Framework Agreement 50.05 for library materials, relating to the provision of library materials and preparatory services. The framework agreement is divided into eight lots and has an overall estimated value of between DKK 748 million and DKK 1.021 billion. The lots which are relevant to the case are 'Lot 1 Danish books and sheet music (East)' with an estimated value of DKK 253 million and 'Lot 2 Danish books and sheet music (West)' with an estimated value of DKK 475 million.
- 6 All of the lots involved a framework agreement with one supplier, and the award criterion was the lowest price. Tenders comprised information on some basic data about the tenderer, a completed European Single Procurement Document (ESPD) and a completed list of offers with an indication of the prices for a relatively modest number of product lines per lot.
- 7 When the procurement documents were published, point 3.1 of the specifications stated the following concerning the model for the award of Lots 1 and 2:

*'Lots 1 and 2 are interdependent, (see point 3.1.1), and if a tenderer submits a tender for one of these lots, tenders are automatically submitted for both lots. No exceptions may be made to this, and thus it is not possible to only submit a tender for one of the two lots concerning Danish books and sheet music.*

*Apart from the above, there are no restrictions as to how many or how few of the lots a tenderer can/should submit tenders for.*

*SKI expects to award a contract to one supplier per lot. The same supplier can be awarded several lots.*

*The market for library materials is characterised by there being only a few specialised suppliers and potential tenderers. Danish books and sheet music constitute the largest product area in terms of turnover and are commercially important for the potential tenderers. In order to safeguard competition in the market in the future, Danish books and sheet music are divided geographically into two lots. The participating customers are divided in two between these, East and West respectively. Annex A and Sub-Annexes A.1 and A.2 show which municipalities belong to Lot 1 Danish books and sheet music (East) and Lot 2 Danish books and sheet music (West).'*

8 Point 3.1.1 of the specifications also revealed that:

*'Danish books and sheet music were put out to tender as a so-called "East/West model", which means that the intention is to award one supplier in Eastern Denmark and another supplier in Western Denmark, but that the same proposed prices will apply for all customers regardless of whether the customers are located in Eastern or Western Denmark.*

*The tenderers submit prices for profit margin and preparation which must be the same – and will apply – for both the Lot for Eastern Denmark and the Lot for Western Denmark.*

*The tenderer who submits the most economically advantageous tender will be awarded the contract to be the supplier of Lot 2 Danish books and sheet music (West).*

*The tenderer who submits the second most economically advantageous tender will be awarded the contract to be the supplier of Lot 1 Danish books and sheet music (East). However, this tenderer must accept that the award of the contract as the supplier in Eastern Denmark requires the tenderer to supply the framework agreement's products and services to the customers in Eastern Denmark for exactly the same prices that the tenderer with the most economically advantageous offer has tendered and will supply for in Western Denmark.*

*If the tenderer with the second most economically advantageous tender does not agree to be the supplier in Eastern Denmark, the opportunity passes to the tenderer with the third most economically advantageous tender, who must*

*likewise accept that the award of the contract as the supplier in Eastern Denmark requires the tenderer to supply the framework agreement's products and services to the customers in Eastern Denmark for exactly the same prices that the tenderer with the most economically advantageous offer has tendered and will supply for in Western Denmark.*

*If this tenderer does not agree to be the supplier in Eastern Denmark either, the opportunity passes to the next tenderer on the list, and so on. If the list of tenderers with tenders which satisfy the contract conditions is exhausted and no supplier for Eastern Denmark is found from among them, the supplier who is awarded the contract for Western Denmark will also be awarded the contract for Eastern Denmark. In this event, this supplier will be the supplier for the whole of Denmark, that is to say for both Lots 1 and 2, and will supply throughout the entire country for the same prices.*

*For the tenderers, the East/West model means that, if the evaluation should show that they have submitted the most economically advantageous tender, they agree that they must give the other tenderers full access to their proposed prices, in the first place to the tenderer with the second most economically advantageous tender and, if that tenderer does not agree to be the supplier in Eastern Denmark, to the next on the list, and so on.*

*The reason why the supplier with the most economically advantageous tender is awarded Western Denmark is that a higher turnover can be expected to be achieved in Western Denmark than in Eastern Denmark. Thus the tenderer who is awarded Eastern Denmark should also be aware that, in accepting the terms for being the supplier in Eastern Denmark, the tenderer must ensure that, under the prices imposed, it can achieve a profitable business in relation to its own costs even though turnover may be expected to be lower in Eastern Denmark than in Western Denmark. The distribution of the expected turnover between Eastern and Western Denmark respectively is specified in A.1.'*

- 9 On 3 March 2020, the closing date for the submission of tenders, SKI received tenders from AVM and from BibMedia A/S (the only two serious suppliers in the market). Both tenderers submitted tenders for all of the lots.
- 10 The evaluation was able to establish that BibMedia A/S had submitted the most economically advantageous tender (lowest price) for all of the lots, while AVM had submitted the second most economically advantageous tender for all of the lots.
- 11 As a consequence of the model for the award of Lots 1 and 2 described in the specifications, SKI approached AVM with an offer for the award of Lot 1 (East) provided that AVM accepted that it would have to supply at the prices which BibMedia A/S had submitted as the lowest bidder and which AVM was informed of at the time of this contact.

- 12 AVM accepted this, whereupon SKI sent a communication of the award decision on 21 April 2020.
- 13 AVM then lodged a complaint, on 30 April 2021, with Klagenævnet for Udbud (the Danish Complaints Board for Public Procurement, Denmark, ‘the Complaints Board’). The Complaints Board was set up for the purpose of fulfilling Denmark’s obligations under the Remedies Directives and has the task of handling complaints about possible violations by public contracting entities of the *udbudsloven* (Law on Public Procurement), the EU’s public procurement directives, the Treaty on the Functioning of the European Union (TFEU) and the principles of equal treatment and transparency, etc. deriving therefrom and the *tilbudsloven* (Law on Tender Procedures).
- 14 The Complaints Board gave a decision on 14 January 2021 in case C-20/05105: *Audio Visionary Music A/S v Staten og Kommunernes Indkøbsservice A/S*, where the Complaints Board concluded as follows:

*‘[SKI has] infringed the principle of equal treatment (see Paragraph 2(1) of the Law on Public Procurement and Paragraph 56 of the Law on Public Procurement), by applying a procedure to the awarding of Lots 1 and 2 according to which the tenderer who has submitted the second best offer can change its tender after the deadline for submission of the tender and thereafter be awarded Lot 1.’*

- 15 The Complaints Board justified its decision, among other things, thus:

*‘this is a case of an open procedure and once a tenderer has submitted its tender, the tender cannot in principle be amended, either on the initiative of the contracting authority or on the initiative of the tenderer.*

*Thus, the principles of equal treatment and transparency in connection with an open procedure preclude any form of negotiation between the contracting authority and a tenderer. If, following an approach by the contracting entity, a tenderer is given the opportunity to amend (reduce) the price offered to a specified lower price, this means that there is an opportunity for the tenderer to amend an essential term of its tender, namely the exact amount of the offer contained in the original tender, in a way which benefits the contracting entity and which gives the tenderer the opportunity to improve its price and thereby its offer with a view to being awarded the contract. In accordance with standard practice, this type of procedure would be contrary to the ban on negotiations.*

*The question is whether the fact that in this particular procurement such a procedure is described in the specifications means that the procedure in this case may be considered to comply with the principles of equal treatment and transparency and is therefore lawful. The Complaints Board finds that the ban on negotiations in an open procedure cannot be derogated from solely on the basis that SKI has described the East/West model in the specifications, as was the case here.’*

- 16 On 9 July 2021 SKI initiated legal proceedings before Retten i Glostrup (Glostrup District Court, Denmark) against, inter alia, this part of the Complaints Board's decision. On 7 December 2021 the case was referred to the Østre Landsret (High Court of Eastern Denmark) ruling at first instance.

## DANISH PROCUREMENT RULES

- 17 Directive 2014/24/EU (Public Procurement Directive) has been implemented into Danish law through Law No 1564 of 15 December 2015 as subsequently amended (Law on Public Procurement).
- 18 Paragraph 2 of the Law on Public Procurement implements Article 18(1) of the Public Procurement Directive and concerns the general principles of the Law. The provision has the following wording:

*Paragraph 2. In public procurement procedures, a contracting entity shall comply with the principles of equal treatment, transparency and proportionality pursuant to Titles II-IV.*

*Subparagraph (2) An open procedure may not be designed with the intention of excluding it from the scope of this law or of artificially limiting competition. Competition shall be considered to be artificially limited where the design of the procurement is made with the intention of unduly favouring or disadvantaging a single or certain economic operator(s).*

- 19 Paragraph 49 of the Law on Public Procurement implements Article 46(1) to (3) of the Public Procurement Directive. Subparagraph 3 of the provision concerns the requirements for the division of contracts into lots, and it reads:

*Section 49.*

...

*Subparagraph (3). A contracting entity shall state the following in the contract notice:*

*(1) whether the tenderer may submit tenders for one, for several or for all of the lots,*

*(2) whether the tenderer can be awarded one, several or all lots and, if that is the case, how the lots or groups of lots can be combined, and*

*(3) the objective and non-discriminatory criteria or rules which will govern the award of lots, including how the lots are awarded when the criteria or rules would otherwise result in one tenderer being awarded more lots than the maximum number which the tenderer can be awarded.*

- 20 Paragraph 56 of the Law on Public Procurement concerns the procedural rules for public procurement and implements parts of Article 27 of the Public Procurement Directive. The provision has the following wording:

*Paragraph 56. In open procedures, any interested economic operator may submit a tender in response to a contract notice. The contract notice shall contain the information set out in part C of Annex V to Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65). The contracting entity shall use the standard form (see Paragraph 128(3)).*

### **APPLICABLE PROVISIONS OF EUROPEAN UNION LAW**

- 21 The provisions of EU law to which this case relates are chiefly the fundamental principles of equal treatment and transparency as laid down in Article 18 of the Public Procurement Directive and the scope of the ban on negotiations in relation to lots (see Article 46 of the Public Procurement Directive and the ‘open procedure’ procurement procedure in accordance with Article 27 of the Public Procurement Directive).

### **THE APPLICANT’S SUBMISSION**

- 22 SKI disputes that it has infringed the principle of equal treatment as set out in Article 18(1) of the Public Procurement Directive with the East/West model used. The chosen design of the procurement, is, notwithstanding the use of the ‘open procedure’ procurement process, lawful and complies with the provisions of public procurement law, including the principle of equal treatment and the principle of transparency and the ban on negotiations derived therefrom as well as public procurement case-law.
- 23 The main consideration behind the East/West model was the desire to safeguard competition for those services covered by Lots 1 and 2, since the latter was the largest product area in the procurement in terms of turnover. It is essential in that connection to note that there is no private market involving similar services and that there are no other contracting entities offering similar contracts. Therefore, SKI’s framework agreement in fact represents the entire market. Market operators who are not awarded a lot therefore risk being left on the sidelines or even going out of business. Thus the market for this product area has for many years suffered from periods with little or even no competition at all, which can be very detrimental to SKI’s customers and ultimately to taxpayers. Therefore, during the procedure for the framework agreement, SKI was strongly focused on safeguarding competition to the greatest extent possible, including through the division of this part of the procurement into two lots (East and West) and through the use of a model which in principle permits two different suppliers, which is consistent with the underlying aims of Article 46 of the Public Procurement Directive (see recital 79 of that directive). This recital states that ‘[w]here

*contracts are divided into lots, contracting authorities should, for instance in order to preserve competition or to ensure reliability of supply, be allowed to limit the number of lots for which an economic operator may tender; they should also be allowed to limit the number of lots that may be awarded to any one tenderer.’* By at the same time stipulating that both lots must be supplied for the same prices as were tendered by the tenderer who had submitted the most economically advantageous offer, SKI was also seeking to safeguard against speculation involving offering high prices for one of the lots to the detriment of SKI’s customers and ultimately taxpayers. If a tenderer was thus guaranteed at least one contract, it would be able to speculate by submitting tenders with high prices for both lots. This was countered by the requirement that a tenderer would have to supply for the same price as the successful tenderer for Lot 1.

- 24 Prior to the procurement, a market consultation was carried out. It was apparent from the feedback from the market that the market generally found the model both fair and compatible with supporting competition both tangibly and over the longer term. The response to the consultation received from BibMedia A/S, which also submitted a tender during the subsequent procurement (see above), included the following:

*‘SKI’s proposal to divide Lot 1 Danish books and preparation into an East/West model as described appears to us to be reasonable, since the model outlined will still motivate the tenderers to submit the most attractive offer in order to be awarded the largest share by volume. Having a number of suppliers for Lot 1 ensures strong competition in the years ahead, and that solutions and services will continue to be developed which will benefit libraries.’*

- 25 SKI maintains, therefore, that the model is perfectly in line with considerations based on merits, which are, furthermore, central to public procurement law, namely the need to ensure both an efficient use of public funds (see recital 2 of the Public Procurement Directive), and effective competition (see recitals 90 and 69 thereof), both in the specific procedure at issue and in the future with regard to the particular competitive situation specific to this market.

- 26 Hence, it is submitted in support of the lawfulness of the model:

- that the fact that the second cheapest tenderer is given the opportunity to accept supplying for the same prices as have been tendered by the cheapest tenderer and thus can be awarded Lot 1 does not imply a ‘negotiation’ contrary to the ban on negotiations in public procurement law, including those principles and considerations underlying the ban and Paragraph 56 of the Law on Public Procurement.
- that the East/West model, on the contrary, represents an objective, mechanical award procedure which is used after the ranking of the offers has been established and without any other interaction between SKI and the tenderer who submitted the second best tender other than the latter’s

acceptance of supplying under the terms stipulated in advance in the procurement documents and for the same prices that were tendered by the tenderer who had submitted the best offer.

- that it is also a case of an award procedure for lots, which is clearly and transparently described in the procurement documents. It in no way allows SKI freedom of choice in connection with the award of contracts contrary to the principle of transparency as set out in Article 18 of the Public Procurement Directive or enables the tenderer who submitted the second best tender to arbitrarily change its offer after the deadline for submission of the tender has expired, thereby placing itself in a better position than it was entitled to be in under the terms of the specifications, contrary moreover to the principles of equal treatment and transparency. On the contrary, the award of contracts proceeds within the predetermined parameters for the award of lots described in the procurement documents and within the parameters of Article 46 of the Public Procurement Directive, following a process which is also outside the influence of either SKI or the tenderers concerned.
- that the award of contracts in accordance with the East/West model is thus applied uniformly, based on the previous assessment of the tenders submitted on the basis of the established 'lowest price' award criterion and following a predetermined and clearly described procedure for the award of lots. Moreover, since the model is also used at a time when the ranking of the offers has been established (that is to say following the evaluation), there is no risk of any distortion of competition between the tenderers in the form of unfair discrimination.

#### **THE DEFENDANT'S SUBMISSION**

- 27 The defendant submits that the Complaints Board's decision and grounds are correct and should be upheld.
- 28 The principle of equal treatment in Article 18 of the Public Procurement Directive and Paragraph 2(1) of the Law on Public Procurement as well as the consequent ban on negotiations mean that a contracting entity is prevented from negotiating with a single tenderer in an open procedure. It makes no difference in this context that the contracting entity has described the opportunity to negotiate in the procurement documents.
- 29 The defendant submits that giving one tenderer the opportunity to change its offer after the deadline for submission of the tender so that it corresponds to the price of the lowest bidder constitutes negotiation.
- 30 It is the view of the defendant that this situation, where one tenderer is allowed to lower the price in their offer so that the price corresponds to the lowest bidder,

constitutes a change to the offer, which cannot be allowed after the deadline for submission of the tender.

- 31 Therefore, the East/West model used by SKI constitutes negotiation within the meaning of the Public Procurement Directive.
- 32 The defendant also submits that such a procedure cannot lawfully be used in relation to the ‘open procedure’ procurement procedure in accordance with Article 27 of the Public Procurement Directive (see Paragraph 56 of the Law on Public Procurement). Thus, this type of award procedure does not provide the opportunity for negotiation, including by giving a single tenderer the opportunity to change its offer after the deadline for submission of the tender.
- 33 SKI should instead have conducted the procurement within the parameters set out in the Public Procurement Directive, and there is the opportunity to use lawful procedures, which to a large extent fulfil the aims which SKI wishes to achieve with the East/West model. Thus a contracting entity can divide a contract into lots, and it is lawful to restrict the opportunity for the same tenderer to win all of the lots so that competition is safeguarded in the future. However, it is not possible within the procedures laid down in the Public Procurement Directive to both obtain a number of possible suppliers and to have them with identical prices. Contracting entities must, therefore, choose between one single tenderer winning all of the lots with the same price or the lots being awarded to several different tenderers but with different prices. If a contracting entity chooses to restrict the opportunity for the same tenderer to be able to be awarded all of the lots, the contracting entity must then accept the second lowest tenderer’s price for the smaller lot.

#### **THE REASON FOR THE QUESTIONS**

- 34 The case-law of the Court of Justice concerning the principle of equal treatment and the principle of transparency in the Public Procurement Directive and the scope of the consequent ban on negotiations concerns, inter alia, the limits on a contracting entity’s handling of reservations in the tender and the limits on a contracting entity’s retrospective collection and inclusion of information (see, inter alia, the judgment of the Court of Justice of 10 October 2013, *Manova A/S*, C-336/12, EU:C:2013:647, and of 11 May 2017, *Archus and Gama*, C-131/16, EU:C:2017:358), or collection of information which is missing or imprecise in a tender which has been submitted (see judgment of 29 March 2012, *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191).
- 35 Furthermore, the Court of Justice appears to have addressed the scope of the ban on negotiations in relation to the replacement of undertakings on whose capacity the tenderer intends to rely (see, inter alia, judgment of 3 June 2021, *Rad Service Sri Unipersonale and Others v Del Debbio SpA and Others*, C-210/20, EU:C:2021:445).

- 36 Common to previous practice seems to be the fact that the scope of the ban on negotiations is interpreted in relation to a contracting entity's possibility for remedying the fact that the candidate/tenderer does not fulfil the requirements in the procurement documents, and, therefore, concerns situations where a candidate/tenderer potentially acquires a legal status to which, according to the procurement documents, it was not entitled, and which, consequently, is contrary to the fundamental principles of EU law (see judgment of 22 June 1993, *Commission of the European Communities v Kingdom of Denmark*, C-243/89, EU:C:1993:257; judgment of 25 April 1996, *Commission of the European Communities v Kingdom of Belgium*, C-87/94, EU:C:1996:161; and judgment of 7 April 2016, *Partner Apelski Dariusz v Zarząd Oczyszczania Miasta*, C-324/14, EU:C:2016:214).
- 37 However, the Court of Justice does not appear to have had the opportunity to address the extent to which the ban on negotiations in connection with the opening for competition of lots in the 'open procedure' type of award procedure prevents a tenderer who has not submitted the most economically advantageous tender from, after the deadline for submission of tender has expired, and in accordance with the predetermined terms in the specifications, being given the opportunity to accept supplying the proposed services for one lot for the same price as a tenderer who has submitted the most economically advantageous tender and who, therefore, is awarded another lot.
- 38 The Østre Landsret (High Court of Eastern Denmark), which in this case is the court of first instance, finds on this basis that it is necessary to refer the question to the Court of Justice as set out below.

## IT IS ORDERED THAT:

- 39 The Court of Justice be requested to answer the following question:

*Do the principles of transparency and equal treatment in Article 18 of the Public Procurement Directive and the consequent ban on negotiations preclude a tenderer who has submitted the second most economically advantageous tender in connection with an open procedure for separate lots (see Articles 27 and 46 of the Public Procurement Directive) from being given the opportunity, after the deadline for submission of the tender has expired, and in accordance with the predetermined terms in the specifications, to supply the proposed services within a lot under the same terms as a tenderer who has submitted the most economically advantageous tender and who, therefore, is awarded another lot put out to tender at the same time?*

...