

Chapter 1

Introduction and key findings

Most Danish companies can be categorised as small and medium-sized enterprises (SMEs)¹. If SMEs do not fully contribute to creating competition for public contracts, it may mean that the prices of contracts increase and that public expenditure is therefore increased, as competition is restricted to a small part of the market and is thus not as effective as it could be. Effective competition for contracts will support growth in the productivity of Danish business.

The Danish Public Procurement Act, which came into effect on January 1, 2016, introduced a number of measures intended to improve SME access to competition for public contracts. For example, the procuring entity has to justify not choosing to divide a contract into smaller partial contracts.

When small businesses wishing to bid for a public contract are faced with requirements regarding e.g. sales volume, it can make them consider joining up with other companies to form a consortium to bid for the contract. Collaboration can also increase the chance of winning a tender if the contract is large and complex, compared to the type of tasks a company usually works with.

When two or more competitors join together in a consortium, there is also a risk that competition for the specific contract is weakened. This can happen e.g. if the companies would have been able to bid for the contract separately or if the collaboration goes beyond the specific contract. This contrasts with consortia which contribute to increased competition for public contracts by their specific bids leading to more bids per tender. Similarly, collaboration in consortia can generate efficiency gains which are beneficial to the procuring entity. As a rule, these beneficial consortia are legal under the Danish Competition Act.

There may be good reasons why a tender is planned and designed as it is. For example, a turnover requirement by the procuring entity may reflect the need to ensure a certain financial capacity with the companies party to the contract. Similarly, the tendering of framework agreements and large tenders, where multiple procuring entities join together, may ensure economies of scale and thus more efficient use of public resources.

In order to map the extent to which procuring entities emphasise turnover volume as a selection criterion, the Danish Competition and Consumer Authority has mapped the entities'

¹ Here, the point of departure is the definition of SMEs used in the preparation of the Competition and Consumer Authority's analysis of small and medium-sized enterprises' participation in tenders. In this analysis, the SME concept was limited to focusing on companies where participation in bidding in connection with a public tender took a disproportionately heavy toll on the company's capacity in relation to the company's core business. This demarcation was operationalised as companies with fewer than 50 employees and an annual turnover/total annual balance not exceeding EUR 10 million. This definition is narrower than the EU definition of SMEs, which includes 99.7 percent of all Danish companies. You can read more on the definition of the SME concept in Annex 1 to the analysis of small and medium-sized companies' participation in tenders.

use of eligibility and selection criteria in restricted tenders². The mapping, carried out in collaboration with Rambøll, covers all restricted tenders conducted in the period 1 January 2015 to 30 April 2016. In total, the mapping includes approx. 1,000 tenders.

Based on the mapping, the Competition and Consumer Authority has prepared this report, which focuses on describing the results relevant to the consortium issue, including use of sales volume as a selection criterion. In addition, other available data are incorporated to illustrate SME participation in the tenders of public authorities, as well as companies' participation in consortia.

The main conclusions from the mapping regarding procuring entities' choice of eligibility and selection criteria are shown in Box 1.1 below.

Box 1.1

Main conclusions

Procuring entities' choice of eligibility criteria

What applies:

The Danish Public Procurement Act states that, as a rule, no requirements for turnover exceeding two times the contract value may be imposed made in assessing the eligibility of tenderers.

Results of the mapping:

- » In 28 percent of the restricted tenders, the procuring entity emphasises turnover as a criterion for eligibility
- » Government procuring entities most frequently emphasise turnover as a selection criterion. In 59 percent of the government tenders, the procuring entity emphasises turnover as a criterion for eligibility, while for municipal procuring entities the figure is 19 percent.
- » Turnover is most frequently used as a criterion for eligibility in tenders of IT services. In 60 percent of tenders carried out in this area, turnover is emphasised by the procuring entity.
- » In 34 percent of tenders comprising tendering of a framework agreement, procuring entities emphasise turnover as a selection criterion.

Procuring entities' choice of selection criteria

What applies:

The Danish Public Procurement Act does not lay down any restrictions in relation to the use of turnover as a selection criterion when choosing between companies which meet the eligibility requirements.

Results of the mapping:

- » In 19 percent of the restricted tenders, the procuring entity emphasises turnover as a criterion for selection.
- » In the mapping, there is one example of turnover as the sole criterion for selection - corresponding to 0.1 percent of the tenders included in the survey. A turnover requirement as a selection criterion thus almost always occurs in combination with other types of selection criteria.

² It should be noted that selection criteria in section 140 of the Public Procurement refers to criteria for qualitative selection in Directive 2014/24/EU while selection criteria in section 145 refers to the limitation of the number of applicants in the Directive.

- » In those cases where the procuring entity emphasises more than one selection criterion, there are no examples of turnover being the criterion given the most weight.
- » In 77 percent of the restricted tenders, the procuring entity emphasises turnover as a criterion for selection. References are the most frequently used selection criterion and the one which is given the greatest weight in the selection.
- » In 19 percent of the tenders comprising tendering of a framework agreement, procuring entities emphasise turnover as a selection criterion.
- » A turnover requirement as a selection criterion is no more prevalent in the tendering of framework agreements than in the tendering of individual contracts.
- » In 25 percent of the tenders conducted on behalf of a group of procuring entities or a central procurement unit, turnover is emphasised as a selection criterion.

The mapping shows that up to 1/5 of procuring entities emphasise turnover in the selection of the eligible companies which are eventually invited to bid. Turnover, however, is not the decisive criterion. Thus, companies' references are given the greatest overall weight in connection with the selection. In most cases, this means that size measured by turnover does not determine whether companies meeting the eligibility requirements are selected to submit a final bid for the contract.

At the same time, the mapping shows that the use of turnover as a selection criterion is not more widespread in the tendering of framework agreements than in tenders not concerning framework agreements.

On the basis of the mapping, it is not possible to determine whether the requirements imposed by procuring entities in the eligibility assessment and the selection, respectively, are inappropriate. This will depend on an individual assessment of each tender.

Procuring entities have an interest in ensuring that there is effective competition for the contract and that the best companies bid for the contract. At the same time, procuring entities have an interest in reducing transaction costs for themselves, but also for bidders, as the bidders' costs are fully or partially passed on in the price of the public contract.

On this basis, it can be generally noted that, whenever a contract is tendered, procuring entities should actively consider which eligibility and selection criteria ensure that competition for the contract is sharp and that the most suitable companies participate. In this context, a company's size is not necessarily a suitable criterion for whether the company is the bidder best qualified to perform the tendered contract.

1.1 Tender rules and consortia

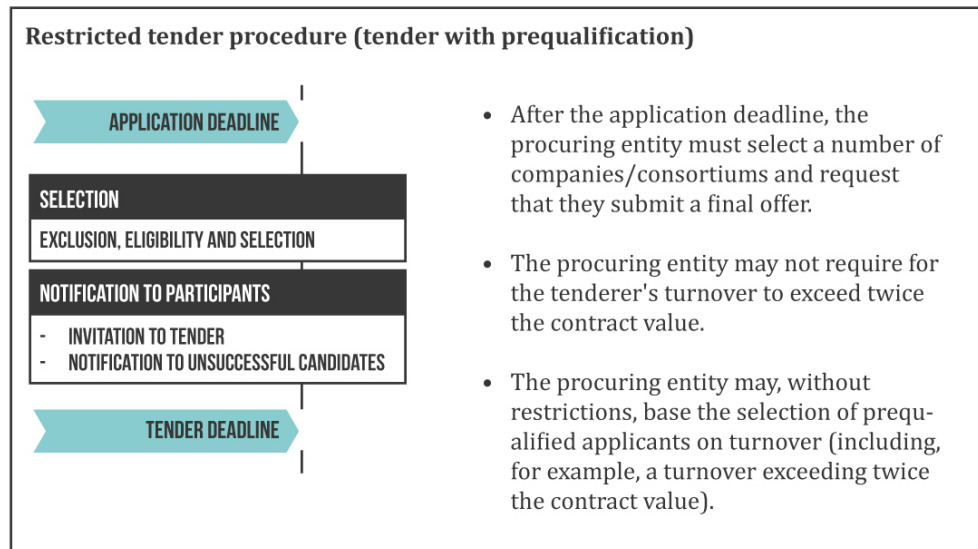
The tender area is primarily regulated by the Danish Public Procurement Act, which came into force on 1 January 2016. As regards tender law, a consortium is an agreement-based cooperation between two or more companies entered into with a view to bidding for a public contract. The Danish Public Procurement Act in itself places no restrictions on companies forming a consortium to jointly bid for a tendered contract. Consortia should be treated like all other bidders in the tender process and cannot be disadvantaged or advantaged in relation to other bidders.

It would not be consistent with the Danish Public Procurement Act to directly require that only consortia can bid on a specific contract³. Similarly, it would not be consistent with the Act to require a Danish company to bid jointly with a foreign partner.

The “restricted tender” procedure

The “restricted tender” procedure, described in sections 58-60 of the Danish Public Procurement Act, is characterised by the tender being divided into two phases: an application phase and a bidding phase. This is illustrated in the figure below.

Figure 1.1 Procedure for restricted tenders



Any company may participate in the application phase, but only tenderers invited to do so by the procuring entity may submit a bid. The procuring entity may limit the number of tenderers. Seen in isolation, this reduces competition, but it can also ensure that only the best companies participate and that transaction costs are limited for both the procuring entity and the tenderer. Access to use of the “limited tender” procedure is unrestricted. The procuring entity will thus always be able to choose to use this procedure.

Based on the published criteria for exclusion, eligibility and selection, the procuring entity invites the stipulated number of applicants to bid for the contract - and the second phase has begun.

Regardless of which tender procedure is chosen by the procuring entity, as a rule the entity will establish a number of eligibility criteria. The assessment of a company's eligibility determines whether that company can be considered for performing the tendered contract. The eligibility

³ Cf. section 139, subsection (2) of the Danish Public Procurement Act. It follows from the Danish Public Procurement Act that the procuring entity cannot require a group of financial players to have a specific legal form.

assessment must therefore ensure that the procuring entity enters into a contract with a company that is suitable.

In assessing the applicant's eligibility, a requirement regarding minimum turnover may be imposed but cannot exceed two times the value of the contract⁴. This condition has been introduced in order to allow smaller companies to bid for public contracts, as high minimum requirements for applicants' or tenderers' turnover can preclude smaller companies from bidding or "force" small companies into consortia in order to satisfy the turnover requirement.

The condition also applies to the tendering of framework agreements. In the case of framework agreements, minimum turnover requirements should be set based on the expected maximum value of specific contracts to be performed simultaneously. If this value is not known, the requirement should be based on the estimated value of the framework agreement. The turnover requirement may therefore be relatively high in cases where the framework agreement's estimated total contract value is used as the basis for assessment, while in reality the framework agreement covers over a range of smaller, individual procurements for which smaller companies would be able to bid.

When a contract is tendered under a "restricted tender" procedure, the procuring entity must select a number of companies from among those found to be eligible and invite them to submit a final offer for the contract. In connection with the selection, the procuring entity may emphasise a number of criteria, including references, turnover, etc. There are no restrictions with respect to using turnover as a selection criterion when the procuring entity selects which eligible companies will be invited to submit their offers. Here, the procuring entity can thus sift out the smallest of the eligible companies using a turnover or other requirement, should the entity consider it appropriate.

1.2 SME participation - knowledge from previous analyses

In the past, various forms of analysis etc. have been conducted which can tell us something about the extent of the challenges relating to SME participation in public authorities' tenders and company participation in consortia. Key findings from previous analyses are listed in the box below.

Box 1.2
Main conclusions from other analyses

Small and medium-sized enterprises' participation in tenders

- » SMEs participated in the competition for approx. two thirds of the contracts tendered by public authorities.
- » SMEs won about half of the tenders included in the study where the procuring entity revealed the winner.
- » Out of the approx. 300 different suppliers in SKI, almost one fifth have fewer than 10 employees and one third have fewer than 20 employees.

Tendering of framework agreements and consortia

- » In its 2015 analysis "Public procurement via central framework agreements", the Competition and Consumer Authority found no immediate signs that central framework agreements affected the market structures in the long term when viewed across all the agreements considered.

⁴ However, cases where there are special risks associated with the construction works, services or deliveries are excluded. Cf. section 142, subsection (2). This must, however, be justified.

- » At general level, the central framework agreements from SKI, the Central Procurement Programme and the interregional and intermunicipal procurement communities made up a small proportion of total public spending.
- » There were consortia in four of the Central Procurement Programme's 25 framework agreements and 14 of SKI's 39 voluntary framework agreements.
- » The consortia seem present mainly in framework agreements related to consulting services, including in IT, engineering and architectural services.
- » The most common reason for companies to bid as part of a consortium was not being able to provide the full range of services individually (35 percent).
- » Approx. one in four respondents indicated that the company could have bid alone but that bidding as part of a consortium was most financially advantageous.

Sources:

Competition and Consumer Authority, "Small and medium-sized enterprises' participation in tenders", 2013

Ski.dk: <https://www.ski.dk/Viden/Sider/Kan-SMVer-blive-leverandorer.aspx>

The Competition and Consumer Authority, "Public procurement via central framework agreements", 2015