



Kærunefnd útboðsmála
Fjármálaráðuneytinu
b/t Ingunnar Hilmarsdóttur sérfræðings
Arnarhváli v/Lindargötu
150 REYKJAVÍK

Hafnarfirði, 23. febrúar 2016

Greinargerð varnaraðila fyrir kærunefnd útboðsmála vegna kæru neðangreindra aðila (tilgreindir hér fyrir neðan í kærendum) á hendur Hafnarfjarðarkaupstað dags 16. febrúar 2016 sem móttekin var af kærunefndinni 17. febrúar 2016.

Greinargerð þessi tekur til kröfu kærenda samkvæmt lið 1 í ofangreindri kæru dags 16. febrúar 2016.

Kærendur:

- a. Andrés Eyberg Magnússon, kt. 120455-5839 (Efstihóll ehf, kt. 430502-3360)
- b. All Iceland Tours ehf, kt. 530114-0740
- c. Björn Páll Angantýsson, kt. 030266-5289
- d. Björn Úlfarsson, kt. 260862-4649 (Aldey ehf, kt. 670701-2120)
- e. Haraldur Örn Arnarson, kt. 300161-3679 (Ferðaglaður ehf, kt. 610610-0720)

Umboð: Sveinn Andri Sveinsson hrl.

Varnaraðili: Hafnarfjarðarkaupstaður, kt. 590169-7579, Strandgötu 6, 220 Hafnarfirði

Umboð: Sigríður Kristinsdóttir hrl., bæjarlögmaður.



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Kröfur varnaraðila:

- 1) Varnaraðili krefst þess að kærinni verði vísað frá kærunefnd útboðsmála.
- 2) Varnaraðili gerir þær kröfur að hafnað verði kröfu kæranda um að innkaupaferli hans verði stöðvað um stundarsakir sbr. kröfu kæranda í 1. lið kæru dags 16. febrúar 2016.

Þá krefst varnaraðili þess að kröfu kæranda um greiðslu málskostnað úr hendi varnaraðila verði hafnað, en krefst jafnframt málskostnaðar úr hendi kæranda.

Málsatvik:

Í kæru eru málsatvik einungis rakin að hluta og því nauðsynlegt að ítreka nokkur atriði. Eins og fram kemur í kæru þá stóð Strætó bs að innkaupaferli um þjónustuna „Akstursþjónusta fatlaðs fólks og fatlaðra skólabarna.“ Við framkvæmd samningskaupanna var fylgt reglum veitutilskipunar nr. 2004/17/EB frá 31. mars 2004 og um samningskaupin var vísað til eftirfarandi CPV tilvísunarnúmera 60000000, 60130000 og 60112000. Samningskaupunum var skipt upp í tvo hluta, annars vegar samningskaupahluta A um innkaup á reglubundinni akstursþjónustu og hins vegar samningskaupahluta B tilfallandi akstursþjónustu. Kærendur tóku þátt í innkaupaferli vegna samningshluta B og voru gerðir rammasamningar við þá. Aðili að rammasamningunum er Strætó bs gagnvart kærendum. Kærendur gera reikninga á Strætó bs sem greiðir þá. Varnaraðili kom ekki að innkaupaferlinu, né að gerð rammasamninga við kærendur að því loknu.

Hin kærða ákvörðun fjölskylduráðs um að gera samning við leigubílastöð um akstur fatlaðs fólks sem getur nýtt sér leigubíla til ferðaþjónustu er tilraunaverkefni sem skal standa yfir í 4 mánuði. Ekki hefur verið ákveðið hvert verði framhaldið þegar tilraunatímabili líkur. Verkefnið er að þeirri stærðargráðu að ekki ber skylda til að bjóða kaupin sérstaklega út.

Málsástæður og lagarök:

1)

Varðandi kröfu varnaraðila um að kæru kæranda verði vísað frá nefndinni er á því byggt að varnaraðili er ekki aðili að rammasamningum kæranda. Í kjölfar innkaupaferlisins sem Strætó bs stóð að gerði Strætó



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Þs rammisamninga við kærundur. Varnaraðili er ekki aðili að rammisamningum kærenda. Varnaraðili kom ekki að innkaupaferlinu, né að gerð rammisamninga við tilboðsgjafa að því loknu. Varnaraðili er því ekki aðili í máli þessu og skal málinu því vísað frá vegna aðildarskorts varnaraðila.

2)

Varðandi þá kröfu varnaraðila að hafnað verði kröfu kærenda um að innkaupaferli hans verði stöðvað um stundarsakir er á því byggt að skilyrði 96. gr. laga um opinber innkaup nr. 84/2007 (OIL) séu ekki uppfyllt. Eins og rakið er í málavaxtalýsingu þá var við framkvæmd samningskaupanna fylgt reglum veitutilskipunar nr. 2004/17/EB frá 31. mars 2004 og um samningskaupin var vísað til eftirfarandi CPV tilvísunarnúmera 60000000, 60130000 og 60112000. Kemur það einnig fram í samningskaupagögnum sem kærundur hafa lagt fram sem fylgiskjal nr. 1. Veitutilskipunin var tekin óbreytt upp í íslenskan rétt með reglugerð nr. 755/2007. Í 1. mgr. 7. gr. OIL segir að lögin um opinber innkaup gildi ekki um samninga sem gerðir eru samkvæmt veitutilskipuninni.

Kærandi vísar til þess í kæru að í útboðsskilmálum hafi hvorki Strætó þs né einstökum sveitarfélögum verið heimilt að leita með akstur þann sem boðinn var út til annarra en rammisamningshafa. Vísar hann máli sínu til stuðnings til 34. gr. OIL og til greinargerðar með því ákvæði. Eins og áður segir fór hið kærða rammisamningsútboð hins vegar fram samkvæmt ákvæðum veitutilskipunarinnar 2004/17/EB, sbr. reglugerð 755/2007. Ákvæði 34. gr. laganna gildir því ekki um útboðið og stoðar kæranda ekki að vísa til þess, sbr. 7. gr. OIL. Í tilskipun þessari eru ekki settar neinar skorður við því að kaupandi í rammisamningi leiti þjónustu, vöru eða verka hjá öðrum en rammisamningshöfum.

Hafa verður í huga að þær tilskipanir ESB sem teknar hafa verið upp í íslenskan rétt, þ.e. útboðstilskipunin (2004/18/EB) og áðurnefnd veitutilskipun, fela ekki í sér skyldu kaupanda samkvæmt rammisamningi til að kaupa alla þjónustu, vöru eða verk sem falla undir rammisamning af rammisamningshöfum. Þetta kemur beinlínis fram í aðfararorðum nýrrar tilskipunar ESB sem til stendur að taka upp í íslensk lög á næstunni (2014/24/EU). Þannig segir í 61. tl. aðfararorðanna:



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“Contracting authorities should not be obliged pursuant to this Directive to procure works, supplies or services that are covered by a framework agreement, under that framework agreement.”

Sue Arrowsmith segir eftirfarandi um þetta í bók sinni *The Law of Public And Utilities Procurement*, Vol. 1, 3. útg. 2014, bls. 1110:

„This seems intended to affirm the generally understood position that the directive itself does not require contracting authorities using frameworks to undertake legal commitments to purchase [...]

Under the 2004 Public Sector Directive it is also open to Member States to require the use of framework agreement should they wish to do so.”

Þá kemur einnig eftirfarandi fram í riti Paulsen, Jakobsen og Kalsmose-Hjelmborg, *EU Public Procurement Law*, 2. útg. 2012, bls. 399:

“With a framework agreement the economic operator does not always have a justified expectation of minimum revenue within the terms of the agreement. Even if a framework agreement is valued on the basis of the turnover which the contracting authority expects from the framework agreement, there is no obligation for the framework agreement to be used. For example, this may be the case where the contracting authority has entered into parallel framework agreements with several economic operators for the supply of the same kinds of goods or services. Also, a contracting authority is not bound to use a framework agreement unless it contains a specific obligation to buy, so contracting authorities can choose to carry out competitive tendering rather than use a framework agreement.”

On this basis, a framework agreement can be characterized as a standing offer.”

Af þessu verður ráðið að tilskipanir ESB fela ekki í sér skyldu kaupanda samkvæmt rammasamningi til að kaupa alla þjónustu, vöru eða verk þess samnings af rammasamningshöfum, nema um slíkt sé sérstaklega samið í rammasamningi. Þó verður ráðið af orðum Sue Arrowsmith að aðildarríkin geti gengið lengra og kveðið á um bann við kaupum af öðrum en rammasamningshöfum. Af 34. gr. OIL verður ráðið að það hafi íslenski löggjafinn gert hvað varðar þau innkaup sem falla undir lög um opinber innkaup. Það hefur hins vegar ekki verið gert varðandi þau innkaup sem falla undir ákvæði veitutilskipunarinnar, enda hefur tilskipunin verið tekin óbreytt upp í íslensk lög með reglugerð nr. 755/2007. Af þessu leiðir að þó að það kunni að vera bannað að kaupa þjónustu, vöru eða verk sem falla undir rammasamning af öðrum en



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rammasamningshöfum samkvæmt lögum um opinber innkaup gildir engin slík regla um innkaup sem fara fram samkvæmt ákvæðum veitutilskipunarinnar. Hafi verið vilji til þess að kveða á um bann við kaupum af öðrum en rammasamningshöfum hefði veitutilskipunin ekki verið tekið óbreytt upp í íslenskan rétt.

Heimilt er að stöðva innkaupaferli um stundarsakir ef verulegar líkur verði leiddar að broti gegn lögum um opinber innkaup, sbr. 96. gr. laganna sbr. 15. gr. laga nr. 58/2013. Í því máli sem hér er til umfjöllunar verður ekki talið að kærendum hafi tekist að færa rök fyrir því. Vísað er til þess sem þegar hefur verið rakið og sérstaklega til þess að um framkvæmd samningskaupanna var fylgt reglum veitutilskipunar nr. 2004/17/EB frá 31. mars 2004 sem Ísland hefur tekið óbreytt upp í íslenskan rétt með reglugerð nr. 755/2007. Rammasamningar þeir sem kærundur hafa vert við Strætó bs falla því ekki undir lög um opinber innkaup nr. 84/2007.

Þá er rétt að ítreka að sú þjónusta sem varnaraðili hyggst kaupa af leigubílastöð er einungis tilraunaverkefni í 4 mánuði og því ekki af þeirri stærðargráðu að skylda beri að bjóða kaupun út, en áætluð heildarkaup eru 6,8 millj. kr.

Með vísan til alls framangreinds krefst varnaraðili þess að kröfu kæranda um að kærunefnd útboðsmála stöðvi um stundarsakir innkaupaferli varnaraðila verði hafnað.

Málskostnaður:

Varnaraðili telur að hafna eigi kröfum kæranda um málskostnað úr hendi hans.

Varnaraðili krefst hins vegar málskostnaðar úr hendi kæranda.

Áskilnaður:

Varnaraðili ítrekar gerðar kröfur og áskilur sér rétt til að leggja fram frekari gögn, ef tilefni þykir til eða óskað er eftir á síðari stigum.



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Greinargerð vegna efni kæru kærenda að öðru leyti verður skilað til kærunefndar útboðsmála fyrir 7. mars
n.k.

Virðingarfyllt,
f.h. Hafnarfjarðarkaupstaðar

Sigríður Kristinsdóttir hrl.
bæjarlögmaður

Meðfylgjandi: Ljósrit úr tilvitnuðum fræðiritum.

**The Law of Public and Utilities
Procurement: Regulation in the EU
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the benefit or detriment of SMEs depends very much on the particular factual circumstances and purchasing strategy that is adopted.

3. LEGAL RULES GOVERNING THE USE OF DIFFERENT TYPES OF FRAMEWORK AGREEMENTS

1. General

As we will see later, the 2004 Public Sector Directive permits and regulates both single-provider and multi-provider framework agreements, when Member States choose to use these agreements.

The directive does not, on the other hand, generally regulate the discretion of Member States to decide whether and when to use framework agreements at all in their national systems: it is concerned merely with ensuring that when states do choose to use frameworks this is done in a transparent manner and in such a way as to avoid other obstacles to competition. In this respect, Art.32(1) states that "Member States may provide that contracting authorities may conclude framework agreements".²³ Recital 16 of the directive also specifically clarifies that it is for Member States to decide whether their contracting authorities should be permitted to use framework agreements at all, stating that:

"In order to take account of the different circumstances obtaining in Member States, Member States should be allowed to choose whether contracting authorities may use framework agreements ... as defined and regulated by this Directive."²⁴

The directive also contains no constraints on which of the various types of framework agreements described above a Member State may use: thus it is for Member States to decide which of these types are available to their own contracting authorities and in what circumstances those authorities may use them. Thus states could, for example, make framework agreements available only for specific types of goods or services, or make them available only under defined conditions. It can be noted that recital 60 to the 2014 Public Procurement Directive states that:

"Contracting authorities should not be obliged pursuant to this Directive to procure works, supplies or services that are covered by a framework agreement, under that framework agreement."

This seems intended to affirm the generally understood position that the directive itself does not require contracting authorities using frameworks to undertake legal commitments to purchase—that is, that framework agreements of types 3 and 5 are permitted.

²³ Recital 16 also makes it very clear that it is for Member States to decide whether or not to allow use of frameworks.

Under the 2004 Public Sector Directive it is also open to Member States to require the use of framework agreements should they wish to do so.

In UK domestic law, in accordance with the traditional approach to public procurement, there are in general no legal obligations to govern the choice of contracting authorities of whether to use framework agreements or in what circumstances.

However, there is a notable exception to this in the form of recent legislation concerning purchases for use by the police. In order to take better advantage of aggregation of spend, reduce transaction costs in procurement and also improve standardisation in the IT field,²⁵ the Police Act 1996 (Equipment) Regulations 2011,²⁶ made under the Police Act 1996 ss.53, requires all purchases for police use of certain equipment to be made through certain existing framework agreements,²⁷ as listed in the schedule to the regulations. The regulations provide both that the design and performance specifications used must conform to the specifications in the relevant frameworks²⁸ (which, given the objectives of the regulations seems to preclude use of a higher specification on any features) and that purchases must be made using the framework in question.²⁹ The framework agreements subject to the regulations as listed in the schedule currently cover vehicles, body armour and standardised IT hardware and software. There is an exception for purchases made through binding contractual commitments existing at the date of entry into force of the relevant regulations³⁰ until those commitments expire or are terminated in accordance with their terms (although, surprisingly, there appears to be no obligation to terminate them where there is a choice).³¹ The possibility for extending legal obligations of this kind to other areas of police procurement is still under discussion.³²

We have also noted that public bodies in the UK are sometimes—and increasingly—required by administrative arrangements to use centrally provided framework agreements for certain types of common purchases.³³

2. Impact of the 2014 Public Procurement Directive

It is not clear how the position above is affected by the 2014 Public Procurement Directive. This merely states, in Art.33, that "Contracting authorities may conclude framework agreements, provided that they apply the procedures provided for in this Directive". In contrast with the rules in the 2014 directive

²⁵ See Home Office, *Obtaining Better Value for Money from Police Procurement: the Police Act 1996 (Equipment) Regulations 2010 and the Police Act 1996 (Services) Regulations 2010*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/118270/police-procurement.pdf (Accessed May 12, 2014).

²⁶ (SI 2011/3000).

²⁷ Police Act 1996 (Equipment) Regulations 2011 reg.2.

²⁸ Reg.2(a).

²⁹ Reg.2(b).

³⁰ Police Act 1996 (Equipment) Regulations 2011 reg.2 and reg.3.

³¹ Some framework agreements may not, of course, contain any contractual commitments to purchase and in these cases can no longer be used.

³² See most recently National Audit Office *Review of the*

Sune Troels Poulsen, Peter Stig Jakobsen
& Simon Evers Kalsmose-Hjelmborg

EU Public Procurement Law
The Public Sector Directive
The Utilities Directive

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Contracting authorities must publish notice of the award of a contract.²⁹²

5. Special forms of contracts

A public contract covers an economic operator's substantive supply (of goods, services or works), and the consideration will normally be payment of an amount of money for that supply.

Contracting authorities can enter into contracts where the supply is first delivered at a later date and where the precise scope of the agreement is not fixed; such contracts are referred to as 'framework agreements'. Entering into a framework agreement follows the procedures of the directives through all phases up to entry into the agreement. However, as framework agreements concern the award of future contracts, the procurement directives lay down special rules for them; see section 5.1 below.²⁹³

Contracting authorities can also award contracts where the consideration does not solely take the form of payment of money, but consists in whole or in part of the right to the financial exploitation of the supply. Such a contract is referred to as a concession contract. The award of concession contracts for works is subject to special rules in the directives; see section 5.2 below.²⁹⁴

Contracting authorities can be interested in entering into closer cooperation with an economic operator. Such close cooperation can be characterised as a partnership; see section 5.3 below.

5.1. Framework agreements²⁹⁵

The procurement directives contain special rules on framework agreements.²⁹⁶ A framework agreement differs from a normal contract in that a framework agreement lays down conditions for contracts which the parties

292. Article 43 of the Utilities Directive.

293. Articles 1(5) and 32, and recital 11 of the Public Sector Directive.

294. Title III, Chapter I, Articles 56-65, of the Public Sector Directive. Pursuant to Article 17 of the Public Sector Directive, service concessions fall outside the scope of the Directive.

295. Contracting authorities covered by the Public Sector Directive can use framework agreements; see section 4(1) of Danish Executive Order No 712 of 15 June 2011. In 2005 the Commission issued an 'Explanatory Note - Framework Agreements Classic Directive'.

296. Article 32 of the Public Sector Directive; and Article 14 of the Utilities Directive. In 2011 Udbudsrådet (the Danish Procurement Council) published *Analyse af bedste praksis for brug af rammef aftaler*.

will enter into at a later date. Also, a normal contract sets out all the terms for the deliveries to be made while, depending on its content, a framework agreement can subsequently be supplemented on one or more of its points. With a framework agreement the economic operator does not always have a justified expectation of minimum revenue within the terms of the agreement. Even if a framework agreement is valued on the basis of the turnover which the contracting authority expects from the framework agreement, there is no obligation for the framework agreement to be used. For example, this may be the case where the contracting authority has entered into parallel framework agreements with several economic operators for the supply of the same kinds of goods or services. Also, a contracting authority is not bound to use a framework agreement unless it contains an explicit obligation to buy, so contracting authorities can choose to carry out competitive tendering rather than use a framework agreement.

On this basis, a framework agreement can be characterised as a standing offer.²⁹⁷ In the Public Sector Directive a framework agreement is defined as follows:

'A "framework agreement" is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.'²⁹⁸

Framework agreements are used for purchasing many different kinds of goods, services and works; they can include purchases of furniture or electricity, property maintenance, consulting and so on.²⁹⁹ The use of framework agreements gives considerable flexibility when awarding public contracts, and their use can save both time and resources.³⁰⁰

297. On the calculation of thresholds for framework agreements, see Chapter 4.5.3 above.

298. Article 1(5) of the Public Sector Directive. Article 1(4) of the Utilities Directive has a corresponding definition.

299. See e.g. Case C-448/01 *EVT*, on a framework agreement for electricity; Case T-4/01 *Renco v Council*, on renovation and maintenance of the Council's buildings; Decision of the Complaints Board for Public Procurement of 14 October 2004, *SK Toltke Service v Københavns Amt*, on a framework agreement for interpreting services; and Decision of the Complaints Board for Public Procurement of 2 July 1998, *Føremingen af Rådgrønde Ingeniører v Københavns Lufthavne*, on a framework agreement for technical advice and support.

300. A central purchasing bodies such as SKI (the central purchasing body for the Danish State and local government authorities) uses a large number of framework agree-