Transparency, access to file and perspectives from the Nordics

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Anyone who might think that access to file from public authorities is boring is wrong. The right to access documents held by public authorities is anchored in the Norwegian Constitution (Section 100 (5)) and the clear general main in Norway is full disclosure (Section 3 of the Freedom of Information Act). This emphasizes the importance of this right for both individuals and companies regarding access to file. In public procurement procedures, access to file has an additional important function; transparency is a prerequisite for being able to review a contract award, so participants can settle with the award or initiate challenge.

In our experience, the practice of access to file in procurement procedures varies among the different contracting authorities. This will often lead to frustration for participating tenderers seeking to understand an award, especially when the reason provided is limited or very generic.

Some documents, such as evaluation documents/matrices, are usually produced. However, we frequently see that such documents are withheld in their entirety or that the scores assigned by the contracting authority to the qualitative evaluation are redacted in their entirety on the grounds that these scores constitute business secrets. The different practices seem to indicate a need for more detailed guidelines and guidance, and since there are different practices in Norway, we have asked our colleagues in Sweden, Denmark and Finland about their experiences with the practice of access.

The starting points in Norway

As known, there must be a relevant legal basis to justify an exemption from access to file in Norway. In the field of public procurement, the exemption for so-called "business secrets" in section 13 (1) no. 2 of the Public Administration Act and the exemption for internal documents in section 14 of the Freedom of Information Act are the most relevant.

In public procurement procedures, the requirement of transparency in Section 4 of the Public Procurement Act is fundamental, and without access to the relevant documents this requirement is challenged on an individual basis. In addition, the European Court of Justice has rather recently in case C-54/21 of 17 November 2022 stated that a contracting authority must provide access to essential parts of the documents in order to satisfy the requirement to an effective right of appeal as set out in the Remedies Directive. Furthermore, the preparatory works for the Public Procurement Act assume that the requirement of "good business practice" still applies, although it is no longer mentioned in the Act.

Requests for access must be assessed "*specifically and independently*" by the contracting authority. In addition, the request must be answered "*without undue delay*", cf. Section 29 of the Freedom of Information Act. If a request for information is not answered within 5 working days, it shall be deemed to have been refused, cf. Section 32 (2) of the Freedom of Information Act. In practice, this means that requests for access in procurement cases with an ongoing standstill period must be answered quickly, usually within 2-3 working days. This is rarely the case.

If access to file is denied, or if the access granted in fact is redacted in its entirety, the rule in the Freedom of Information Act is that the applicant may appeal and request for the decision to be reassessed and changed, or appeal to a higher authority, see Section 32 of the Freedom of Information Act. Lack of access to file may also justify a complaint in the procurement procedure based on the requirement to transparency.

The challenge which frequently arises is the fact that a discussion access to file/complaints over redacted documents received takes place while the standstill period runs (which is normally 10 days). While waiting for a complaint to be decided by a higher authority, the standstill period usually expires and the contract with the selected tenderer is signed, unless the tenderer takes legal and financial risk by initiating legal action to stop signing of the contract in accordance with the rules in Section 9 (2) of the Public Procurement Act, cf. Section 25-3 of the Procurement Regulation.

Perspectives from the Nordics

Perhaps not surprisingly, our colleagues in Denmark, Sweden and Finland report that their jurisdictions also have a general rule on of public access to information to and from public authorities and that exemptions apply, naturally for business secrets.

As in Norway, the problem is the very broad understanding of business secrets, and does not provide the trust, a tenderer, e.g. ranked as second best, needs to be able to rest assured that the award is in accordance with the public procurement rules. Access to file is difficult to obtain during the standstill period, although Denmark reports that its customary that the standstill period is extended based on requests for access to file.

None of the countries report any special provisions to protect tenderers in this situation, which easily leads to frustration when necessary information is not obtained in order to challenge a contract award without incurring high financial and legal risks.

Sweden reports that the courts have an obligation to obtain information from the contracting authority if it is necessary to ensure an effective verification, provided that the bidder has tried to obtain sufficient information. This obligation was established by the Supreme Administrative Court in case 2015 ref. 55. After receiving the information, the court decides to what extent the documents/information shall be made available. In Finland, the so-called Market Court (which decides on disputes relating to public procurement) shall also have full access to the documents and has to decide whether or not access to the documents should be granted or not.

The obligation that the courts in Sweden and Finland have under national law is very similar to the European Court of Justice case C-927-19, Klapeidos, which can be interpreted to impose an obligation for the courts to receive the selected tenderer's offer in an open version and to assess whether or not the information are business secrets and whether or not it shall be included in the case. However, this does not solve the problem of obtaining access to necessary information to assess own position at the right time, without high costs and risks.

Our thoughts

In our experience, contracting authority's practice the rules on access to file different. There is no doubt that business secrets shall not be disclosed, but the assessments of what information in fact constitutes business secrets vary widely and the threshold is generally set far too low. Typically, it is based on the tenderer's own suggestions, without the "concrete and independent" assessment required by the Freedom of information Act.

In our view, unnecessary "noise" can be avoided by taking access requests seriously and evaluating them carefully - the first time. At the same time, contracting authorities should recognize their own interest in ensuring a transparent process and remember that the person requesting access often has a desire to understand an award after having put a lot of work into submitting a bid. This is particularly important while the standstill period is running and there are limited opportunities to challenge a rejection before it expires, or if the documents received are redacted (and the normal appeal process takes too long time).

There is no doubt that a "*specific and independent*" assessment can be time-consuming, but taking requests for access to file seriously and handling them properly the first time is, in our view, the best way to achieve the goals of efficient use of society's resources and ensuring trust in procurement procedures. Leaving tenderers to "fight the battle" to achieve the necessary degree of transparency is an inefficient alternative - also for the contracting authorities who must deal with such complaints.

To read the article in Norwegian, published at anbud365.no, follow this link.

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