

# Subsequent changes of a tenderer

## New nearshore wind tenders in Denmark

a general, non-exhaustive overview



# Possibilities for changes prior to contract award

It follows from the fundamental principles of equal treatment and transparency that a contract cannot be awarded to a tenderer who has not been prequalified.

Based on the existing limited case law from the Danish Complaints Board for Public Procurement<sup>1</sup> great emphasis is put on whether there is identity between the prequalified tenderer and the tenderer submitting the final bid.

Where the members of a prequalified consortium are changed during the tender procedure prior to contract award the identity between the prequalified entity and the entity submitting the final bid is considered lost.

Due to the rather limited access to undertake changes during the tender procedure all tenderers are strongly urged to carefully consider their constellation before applying for prequalification

<sup>1</sup>see inter alia ruling of 9 March 1998, *Fri vs. the Municipality of Ledøje-Smørum*, ruling of 10 May 2002, *Ementor Denmark A/S vs the County of Aarhus* and ruling of 2 September 2005 *Tipo Danmark A/S vs. the Municipality of Copenhagen*.

# Possibilities for changes prior to contract award

As mentioned the Danish Complaints Board for Public Procurement has so far put great emphasis on whether identity can be established between the prequalified entity and the entity submitting a tender.

In 2014 the Danish Complaints Board for Public Procurement published two decisions regarding changes within a prequalified entity prior to contract award.

In the first decision from 28 January 2014, *MT Højgaard A/s og Züblin A/S vs. Banedanmark*, which is a preliminary ruling on the question of suspensory effect, a member of a consortium consisting of two legal entities went bankrupt after prequalification and the final bid was then submitted by the remaining legal entity.

In its preliminary ruling the Complaints Board for Public Procurement found that the changes to the tenderer between prequalification and the award of contract **very likely is** a violation of the public procurement rules, as in the view of the complaints board the final offer was submitted by an entity that had not been prequalified.

The case has currently been postponed by the Danish Complaints Board upon referral to the European Court of Justice for a preliminary ruling.

# Possibilities for changes prior to contract award

The other decision from 21 March 2014 *Dansk Byggeri vs. the Municipality of Viborg* concerned a situation where the winning tenderer went bankrupt before the contract was entered into.

The owner of the winning tenderer established a new legal entity, which took over all work in progress and all orders from the bankruptcy estate. The bankruptcy estate had however not become a party to the contract.

The municipality then entered into the contract with the newly established entity.

Also in this case the Complaints Board for Public Procurement found that the changes to the tenderer between prequalification and the final award of the contract was a violation of the public procurement rules.

In its ruling the complaints board emphasized the fact that the contract was entered into with a legal entity which had not been prequalified – and in this case – had not submitted a tender.

# Permitted changes prior to contract award

Based on the limited existing case law the following changes are as a general rule considered permissible during the tender procedure prior to contract award:

- transfer of ownership shares in the prequalified entity, as the legal entity remains unchanged.
- merger of a prequalified entity with another entity as the principle of universal succession applies.
- internal restructuring of a prequalified company or a member of a prequalified consortium, provided the requirements for prequalification continues to be met after the internal restructuring.
- changes to the legal form of a prequalified consortium (e.g. establishment of a company) provided the requirements for prequalification continues to be met.

Depending on the specific circumstances the following change may also be permissible during the tender procedure:

- demerger of a prequalified entity, provided all relevant financial and technical capacities and competences which have had a decisive influence on the decision to prequalify the entity are transferred to the entity continuing in the tender procedure.

# Permitted changes prior to contract award

To sum up, based on the current case law, access to undertake changes in a prequalified consortium during the tender procedure prior to contract award is considered rather limited.

Changes can furthermore only be made with prior accept from the Danish Energy Agency.

Whether a change is permissible will always depend on a specific assessment on a case by case basis.

A more flexible approach, where a tenderer alone or together with one or more entities comply with the minimum requirements for prequalification, could be to assign subcontractors, as such can in general be changed freely, where they have had no impact on the assessment of the capabilities of an entity applying for prequalification.

# Changes after contract signing

The European Court of Justice stated in case C-454/06, *Presstext*, that replacement of the winning tenderer after contract signing in general is considered a material change to the contract, which will require a new award procedure. In the specific case the Court however found that a transfer of the contract to a 100% owned and controlled subsidiary as part of an internal restructuring was acceptable.

In case C-91/08, *Wall*, the European Court of Justice furthermore stated that also a change of subcontractor, may *in exceptional cases* constitute a material change to a contract where the use of one subcontractor rather than another was, in view of the particular characteristics of the services concerned, a decisive factor in concluding the contract.

In general tenderers cannot expect freely to be able to make changes in their constellation even after contract signing. Based on existing legal praxis a change can only be permitted where it does not impact decisive factors in concluding the contract.

# Changes after contract signing

Whether a change is permissible after contract signing will always depend on a specific assessment on a case by case basis.

In making that assessment case C-454/06, Pressetext provides some further guidance on the conditions which must be met for a change or replacement to be permissible.

Furthermore some guidance on permissible changes can be obtained from directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, which has however not yet been transposed into Danish law.



# Permissible changes after contract signing

Based on the current legal praxis and directive 2014/23/EU, it can be concluded, that changes after contract signing will only be possible if the winning tenderer as a whole continues to meet the financial and technical requirements, which was decisive factors during the tender procedure and provided no additional material amendments to the concession contract is made and provided such changes are not aimed at circumventing the procurement rules.

In general, it will be possible to accept changes resulting from universal or partial succession into the position of the initial concessionaire, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established.

# Permissible changes after contract signing

Transfer of the contract to a 100% owned and controlled subsidiary is considered to be permitted. Such transfer may require that the initial tenderer undertakes joint and several liability with the subsidiary for the fulfilment of the concession contract.

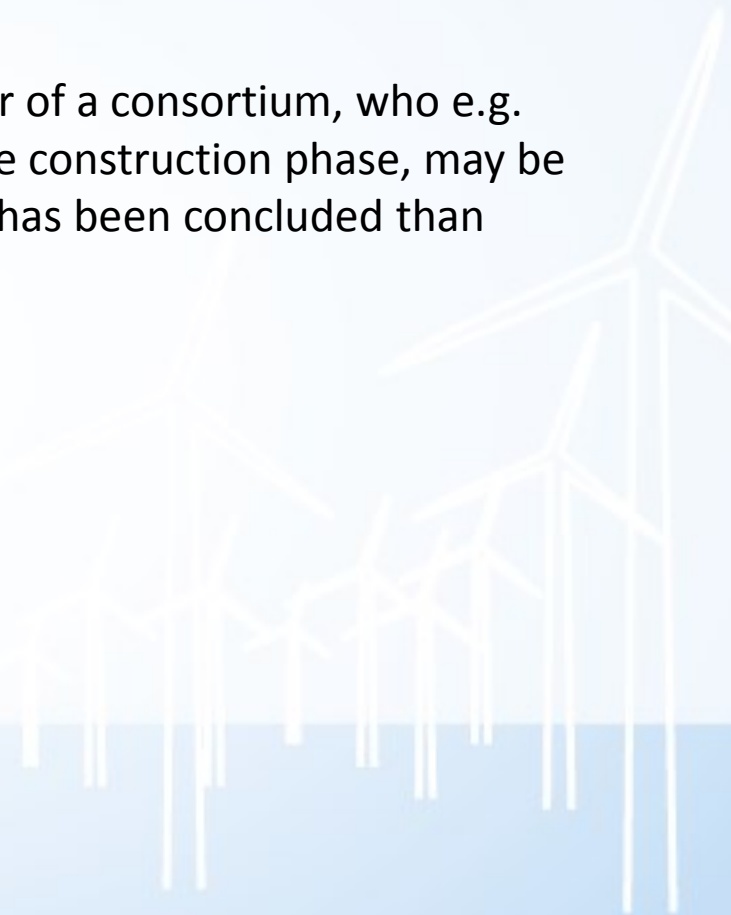
However, if the contract is transferred to a subsidiary, the subsequent sale or transfer of control in such subsidiary by the initial tenderer will in general not be permissible as this may likely be considered a material change.

The transfer of all assets and liabilities of a tenderer, including the contract, to a third party may – depending on the specific circumstances - be permissible, provided such third party meets the financial and technical requirements, which was decisive factors during the tender procedure.

# Permissible changes after contract signing

It may also bear weight at which point in time of a project a change is requested, as a subsequent change late in the project may less likely be considered an attempt to circumvent the procurement rules.

Furthermore, access to accept the exit of a member of a consortium, who e.g. contributed primarily with technical expertise in the construction phase, may be greater in the production phase once construction has been concluded than shortly after contract signing.



# Permissible changes after contract signing

Finally changes may be permissible in situations where a new concessionaire replaces the one that was initially awarded the concession on the basis of a clear, precise and unequivocal review clause provided for in the initial concession documents.

The Danish Energy Agency intends to include a review clause in the concession contract for the Nearshore Wind Farms.

As however even a review clause cannot provide for modifications or options that would alter the overall nature of the concession, it must be expected that the concessionaire after replacement or amendment must always meet the same technical and financial requirements as the initial tenderer awarded the concession and that material amendments of the terms of the concession contract cannot be accepted as a consequence of the changes to the concessionaire.

# Permissible changes after contract signing

A tenderer should expect that changes after contract signing pursuant to the review clause to be included in the concession contract for the Nearshore Wind Farms will be permitted in a limited number of specifically defined situations in line with the examples of permissible changes after contract signing set out in this presentation.

In general it can be expected that the review clause will allow for the transfer of the concession contract to a newly established subsidiary and the subsequent sale of a non-controlling interest in the subsidiary to the public in accordance with the Option-to-Purchase scheme, cf. paragraphs 13-17 of the Promotion of Renewable Energy Act (consolidated act no 122 of 6 February 2015). The initial tenderer should expect to be required to undertake joint and several liability with the subsidiary for the fulfilment of the concession contract.

# Permissible changes after contract signing

Furthermore, the review clause will allow for the addition of a financial partner after contract signing, as this will – in the opinion of the Danish Energy Agency - not impact whether the concessionaire continues to meet the financial and technical requirements, which was decisive factors during the tender procedure.

All changes to the concessionaire after contract signing will in all circumstances require the prior approval of the Danish Energy Agency.

