

The Principle of Economic Efficiency in Procurement Procedures

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Key Questions

- What does economic efficiency **mean** in public procurement?
- Is economic efficiency a **principle of European procurement law**?
- What are the concrete **legal implications**?

Art. 67(1) PD

"Without prejudice to national laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services, contracting authorities shall base the **award of public contracts** on the **most economically advantageous tender**."

Defining Economic Efficiency

- beyond selecting the "most economically advantageous tender" (Art. 67 PD)
- **costs** of the **procurement as a whole**
vs. **benefit** of the underlying **public purpose**
- relevant **factors** include: type and design of the procurement procedure, organization and centralization, review procedure

Part 1.102-2(b)(1) of the U.S. Federal Acquisition Regulations System

“In order to ensure that maximum efficiency is obtained, rules, regulations, and policies should be promulgated only when their **benefits clearly exceed the costs** of their development, implementation, administration, and enforcement. This applies to internal administrative processes, including reviews, and to rules and procedures applied to the contractor community.”

Efficiency as a Method and Legal Principle

- efficiency as a specific **method**: requires comparing different options to **optimize cost-benefit-relation** (not: to minimize spending)
- efficiency as a **legal principle**: applied when procurement **rules** leave **discretion**; **procedural** duties (e.g. duty to document efficiency considerations)

Economic Efficiency as a Principle of European Procurement Law

- economic efficiency **not explicitly** listed as a procurement principle in **EU directives**
- **German law** explicitly mentions economic efficiency in **Section 97 ARC**
- EU directives show strong support for an **implicit efficiency principle**

Section 97(1) of the German ARC

“Public contracts and concessions shall be awarded in a competitive and transparent manner. The principles of **economic efficiency** and proportionality shall be respected.”

Recital no. 2 of the PD

“Public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled Europe 2020 (...), as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while **ensuring the most efficient use of public funds**. For that purpose, the public procurement rules (...) should be revised and modernised in order to **increase the efficiency of public spending**, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals.”

Recital no. 47 of the PD

“Buying innovative products, works and services plays a key role in **improving the efficiency and quality of public services** while addressing major societal challenges. It contributes to **achieving best value for public money** as well as wider economic, environmental and societal benefits in terms of generating new ideas, translating them into innovative products and services and thus promoting sustainable economic growth.”

Recital no. 121 of the PD

“The evaluation has shown that there is still considerable room for improvement in the application of the Union public procurement rules. With a view to a **more efficient and consistent application of the rules**, it is essential to get a good overview on possible structural problems and general patterns in national procurement policies, in order to address possible problems in a more targeted way. (...) Better guidance, information and support to contracting authorities and economic operators could also greatly contribute to **enhancing the efficiency of public procurement**, through better knowledge, increased legal certainty and professionalisation of procurement practices. Such guidance should be made available to contracting authorities and economic operators wherever it appears necessary to **improve correct application of the rules**.”

Economic Efficiency in Action

- **indirect relevance:** **embedded** in specific rules on contract award criteria, framework agreements, electronic procurement etc.
- **direct relevance:** where public procurement law contains **administrative discretion** – examples:
 - (un)written rules on **evidence**
 - **choice of procedure**

OLG Karlsruhe, 7.9.2022 – 15 Verg 8/22 (AWS)

The contractor AWS “assured that personal health data would only be transmitted to [AWS Luxembourg] and that it would not leave the EU for processing, but would only be processed in Germany. (...) The [CA] also understood the declarations of [AWS] in the tender documents as a **binding assurance**. The [CA] may rely on this **promise of contract performance**.”

Room for Modernization

- incorporation of an **explicit principle** of procurement efficiency in **Art. 18 PD**
- provisions on the **rectification** and **irrelevance** of certain **procedural irregularities** (for example: “A violation of procedural regulations cannot be asserted if it is obvious that the violation did not affect the decision on the merits.”)

Conclusions

- Economic efficiency is an (implicit) **legal principle** of EU public procurement law.
- The principle can have **direct legal impact** when **administrative discretion** is involved (e.g. with regard to rules on evidence, choice of procedure).
- There is **room for modernization** (e.g. introducing rules on rectification and irrelevance of certain procedural irregularities).

The background image shows a modern library interior. It features a multi-level design with circular bookshelves and a balcony. The bookshelves are white with a curved top and are filled with books. The balcony has a wooden floor and a metal railing. A black armchair is positioned on the balcony. Large windows on the right side of the image provide natural light and a view of the city.

The possibilities after *BibMedia* - Negotiations in open and restricted procedures?

Andreas Riis Madsen, Kromann Reumert

24 April 2025

KROMANN
REUMERT

” *Knowledge is knowing that a tomato is a fruit.*

Wisdom is knowing not to put it in a fruit salad.

- Brian O'Driscoll, Irish rugby player

Content

1. The tender specifications (East/West Model)

2. Decision of the Danish Complaints Board for Public Procurement

3. Judgement of the CJEU - Case C-737/22 *BibMedia*

4. **Unpacking the CJEU's Judgment: Key Criticisms and Concerns**

5. Applying the East/West Model



The tender specifications (East/West Model)

Framework agreement relating to the provision of library materials and preparatory services

- SKI is a central purchasing body owned by the Danish State and Kommunernes Landsforening (Association of Danish Municipalities).
- In 2020, SKI launched an open procedure with a view to concluding a framework agreement relating to the provision of library materials and preparatory services.
- The award criterion was the lowest price.
- The framework agreement was divided into eight lots out of which two related to Danish books and sheet music.
- The contracts relating to Danish books and sheet music (lots 1-2) were subject to a so-called “**East/West Model**”.
- **The East/West Model aimed at securing;**
 - more than one supplier in Denmark, thus maintaining competition in future tenders and
 - uniform prices throughout Denmark.



Key elements of the East/West Model

- **Geographical Division:** The contract on Danish books and sheet music is split into two lots:

Lot 1) Danish books and sheet music (East) (est. DKK 253 mio. (EUR 34 mio.))
Lot 2) Danish books and sheet music (West) (est. DKK 475 mio. (EUR 63 mio.))

- **Interdependent Lots:** Bids for one lot is automatically considered for both.
- **Single Supplier per Lot:** Each lot is awarded to a single supplier, though the same supplier can win both lots.
- **Award Criteria:** The most economically advantageous tender (price) wins the Western lot, while the second-best tender wins the Eastern lot, provided they accept the same pricing terms as the Western lot.

Tender specifications

3.1 Division of lots [...]

Lots 1 and 2 are interdependent (see paragraph 3.1.1) and, if a tenderer submits a tender for one of those lots, that tender will automatically be deemed to have been submitted for both lots.

[...]

3.1.1 Danish books and sheet music – Lot 1 (East) og Lot 2 (West)

The contracts relating to Danish books and sheet music are being put out to tender according to an “East/West model”, which means that the intention is to designate 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 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, that tenderer must accept that the award of the contract as the supplier in Eastern Denmark shall require the tenderer to supply the products and services covered by the framework agreement to customers in Eastern Denmark at exactly the same prices as those that have been offered and will be applied in Western Denmark by the tenderer with the most economically advantageous tender....

Overview of Parties and Case



March 2020: SKI awards contracts to tenderers

SKI receives bids from Audio Visionary Music ('AVM') and from BibMedia. SKI awards Lot 2 (West) to BibMedia and proposes to award Lot 1 (East) to AVM, on the condition that AVM accepts to deliver at the price offered by BibMedia according to the East/West Model.



April 2020: AVM accepts the offer, but files a complaint regarding the East/West model

AVM accepts the offer but files a complaint regarding the East/West Model with the Complaints Board for Public Procurement in Denmark.



January 2021: Decision of the Complaints Board for Public Procurement

The Complaints Board finds that SKI have infringed public procurement law by applying the East/West model (upholding its interim decision from May 2020).



July 2021: SKI brings an action before the Danish Courts which submits a preliminary question to the EU Court of Justice

SKI brings an action before the District Court of Glostrup, Denmark against the decision of January 2021. The action was remitted to the High Court of Eastern Denmark, which decided to stay the proceedings and to refer a question to the CJEU for a preliminary ruling.



July 2022: BibMedia acquires AVM, thereby entering the pending litigation



June 2024: Judgement of the CJEU

The CJEU issued its preliminary ruling overturning the previous decision of the Complaints Board of Public Procurement in Denmark, that found that the East/West Model violates public procurement law.

A background image of a balance scale, symbolizing justice or law. The scale is partially visible on the right side of the frame, with its pans and beams. The image is slightly blurred, focusing attention on the text overlay.

Decision of the Danish Complaints Board for Public Procurement

Decision of the Complaints Board

- A unanimous and extended Complaints Board found that SKI had infringed Paragraph 2(1) of the Law on Public Procurement by applying the East/West model.
- The Complaints Board justified that decision by stating that the second-best tenderer had had the opportunity to amend an essential term of its offer, namely the price, in a way which was favorable to the contracting authority and gives the tenderer the opportunity to improve its tender in order to be awarded one of the lots of the contract.
- Such an approach is contrary to the ban on negotiations, which derives from the principles of equal treatment and transparency.
- The fact that the East/West Model was mentioned in the tender specifications and was previously communicated to the economic operators involved in the market dialogue before the tender did not alter the outcome.

"A contracting authority must, in accordance with sections II-IV, comply with the principles of equal treatment, transparency, and proportionality in public procurement."

§2

Preliminary ruling of the CJEU - Case C- 737/22



Preliminary ruling by the CJEU

No oral hearing and no advocate general opinion!

Findings of the Court: The East/West model is legal

- The CJEU recalled that the principles of equal treatment and transparency outlined in Article 18 of the Directive on Public Procurement preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure.
- The ban on negotiations means that once a tender has been submitted it cannot be amended, whether at the request of the contracting authority or the request of the tenderer (para. 32)
- However, the CJEU found that the East/West model did not involve any elements of negotiation, although it allowed the second-best tenderer to lower their offered price to be awarded Lot 1 (East) (para. 33)

Reasoning of the Court: Both ranking and price were established and fixed before the submission deadline

- No tenderer had the possibility of changing, by amending its tender or by any negotiation, its position in the ranking or the price at which the contract will be concluded (para. 38)
- The ranking of tenderers was determined solely by the prices offered before the submission deadline, and no changes could be made to the tenders or prices after that (paras. 35-36)
- In that ranking, the tenderer who offered the lowest price took the first place and that tenderer's price was that at which the entirety of the contract was concluded.

"Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner"

Art. 18

Unpacking the CJEU's Judgment: Key Criticisms and Concerns



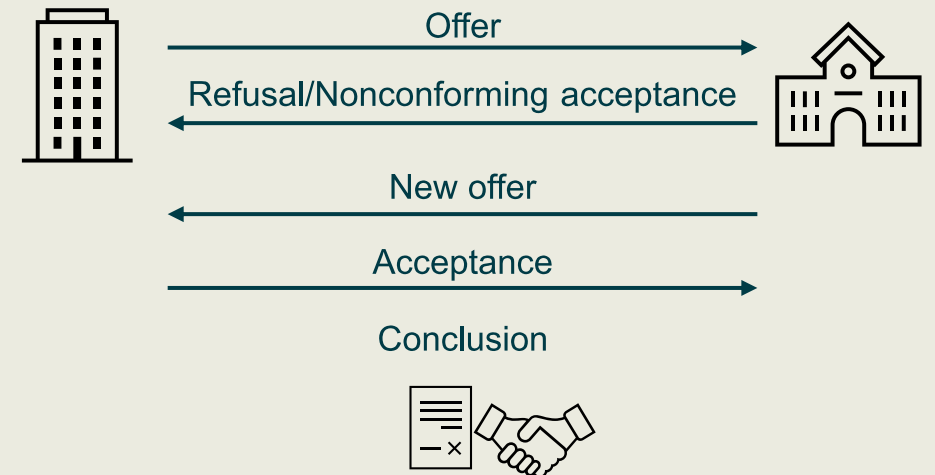
Negotiation between the contracting authority and a tenderer

It is a matter of negotiation – at least in the sense of contractual law.

- It is only when the contracting authority makes a counteroffer to the tenderers (in ranked order) to deliver at tenderer No. 1's price and the tenderers accept this offer that a binding agreement has been concluded.
- Tenderer No. 2 thus changes the price in its original offer.
 - *"This means that Audio Visionary Music A/S must agree to deliver the products and services of lot 1 at the prices offered by the bidder with the economically most advantageous offer for lots 1-2. These prices are attached as an Excel appendix to this letter, and the prices will be included in appendix C to the framework agreement, which will be entered into with Audio Visionary Music A/S. On this basis, SKI requests Audio Visionary Music A/S's written acceptance to become the supplier for lot 1."*
- SKI also acknowledged in the complaint procedure that its letter to AVM is "an offer that AVM could chose to accept on the given conditions".



East/West Model

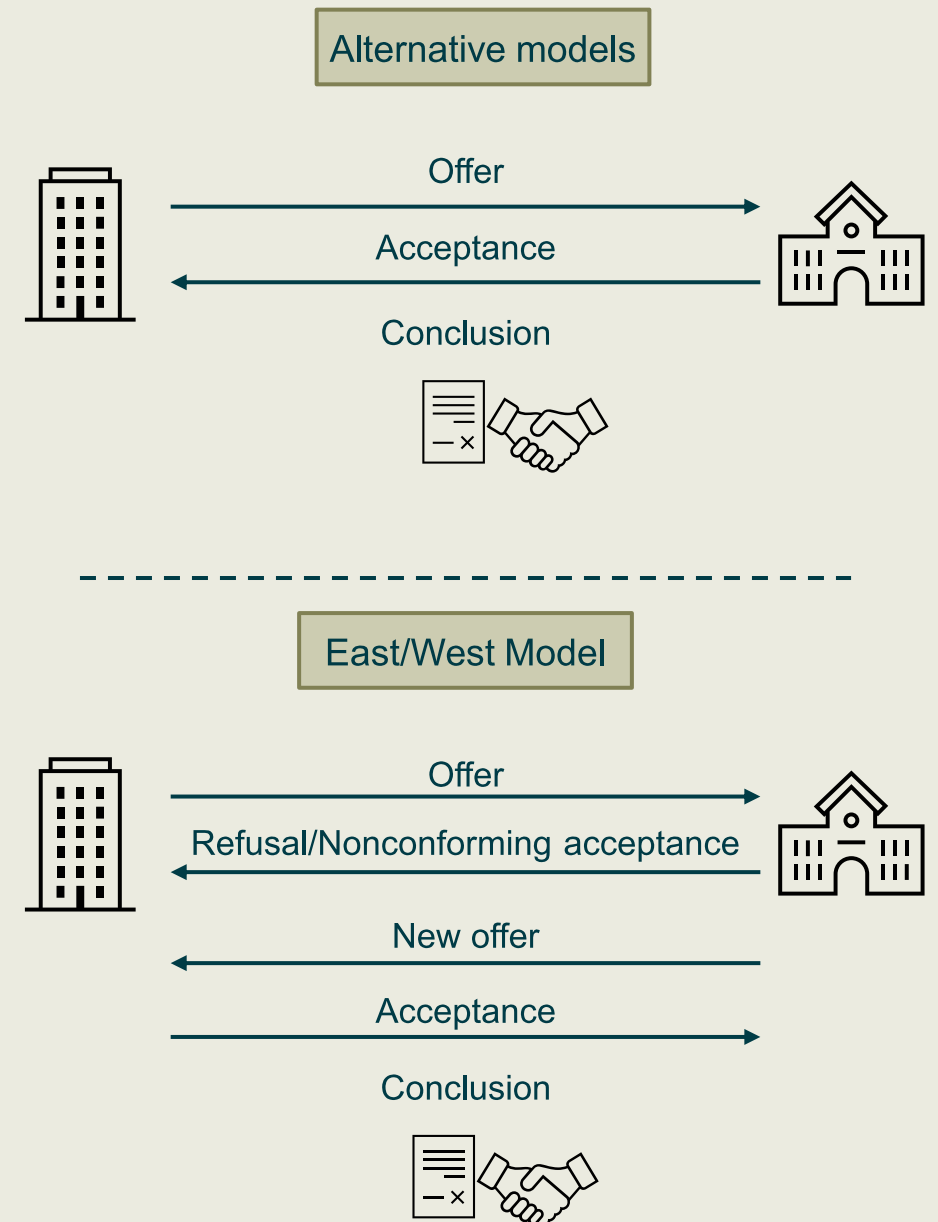


Alternatives that would not entail a quasi-negotiation

- a) **Tenderer No. 1's price plus X %**, provided that the resulting price is lower than the tenderer's originally offered price.
- b) **Own price as originally offered, minus Y%**, provided that the resulting price is lower than tenderer No. 1's price.
- c) **Tenderer no. 1 will win both lots if the price difference is above Z%** - ensures competition among bidders and ensures only a price difference up till Z%.

→ These models do not involve quasi-negotiation and can be evaluated and awarded without contact with tenderer No. 2, who has submitted a bid, incl. a)-c), when submitting its original bid.

→ However; the point is not whether the East/West-model violates procurement law - it does not according to the CJEU.



Is the East/West Model commercially viable?

- The award of Lot 1 (East) requires the tenderer to deliver at No.1's prices applied in Lot 2 (West).
- However, the estimated value of Lot 2 (West) significantly surpasses that of Lot 2 (East).
- Due to the lower value of Lot 1 (East) fixed costs will be relatively higher and Lot 1 is thus less profitable.
- SKI indicated this in the tender specifications:
"The tenderer who is awarded Eastern Denmark must therefore also be aware that the tenderer must ensure that the tenderer at the dictated prices will be able to achieve a profitable operation in relation to its own costs, even though the turnover in Eastern Denmark is expected to be lower than in Western Denmark." (our translation)
- Furthermore, BibMedia had offered a price of 0,01 DKK for five services and SKI used the procedure under article 69 on abnormally low tenders.



Does the East/West Model encourage coordination of prices and information sharing?

The East/West model was partly justified due to high market concentration.

- SKI justified the East/West Model due to the limited numbers of market participants.
- Thus, the model aimed at ensuring more than one supplier in Denmark, thus maintaining competition in future tenders.

Ironical consequences

- A concentrated market heightens the risk of coordination.
- Risk of encouraging price coordination further
 - Within the East/West Model, the most economically favorable bid determines the terms of all contracts, posing an increased incentive, and thus risk, of price coordination.
- Information sharing in events of cancellation and new procurement procedures
 - Consider the implications of cancellation and re-tendering when there is knowledge about the pricing of the closest competitor.



Applying the East/West Model

Points of attention when applying the East/West model

- The East/West Model must be clearly described in the tender notice.
 - The Complaints Board noted that it was inadequate for SKI to only mention the East/West Model in the tender specifications as it was required that the tender notice outlines the objectives and the non-discriminatory criteria that govern the awarding of lots.
 - Barrier to effective competition?
 - It must be considered whether, depending on the specific circumstances, the East/West Model is likely to have a negative effect on competition.
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Wisdom is knowing not to put it in a fruit salad.*

- Brian O'Driscoll, Irish rugby player

” *Knowledge is knowing that BibMedia is the law.
Wisdom is knowing not to use its opportunities.*

- Andreas Riis Madsen, Kromann Reumert



Questions?



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