



NP ADVOKATER

# FRAMEWORK AGREEMENTS AND DYNAMIC PURCHASING SYSTEMS – A BRIEF REVIEW.

*2. maj 2023*



# TODAY'S PROGRAM

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- Introduction to today's program
- Framework agreements
  - The use of Framework Agreements
  - Application rate
- Dynamic purchasing system
  - Application rate
  - Opening of applications





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# FRAMEWORK AGREEMENTS



*2. maj 2023*



## BRIEFLY ON THE USE OF FRAMEWORK AGREEMENTS

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- Denmark is one of the European countries that utilize Framework Agreements the most.
- More than 50 % of all Danish EU tenders are tendered as Framework Agreements - and the number is still increasing.
- Approximately 16 % of all European tenders are tendered as Framework Agreements.
- Framework Agreements are widely used in joint procurement i.e., KomUdbud, IN and the like. SKI and SI alone account for approximately 20 % of all tenders for Framework Agreements in Denmark.
- When individual contracting authorities use Framework Agreements, it is primarily to cover ongoing procurement needs in specific areas.

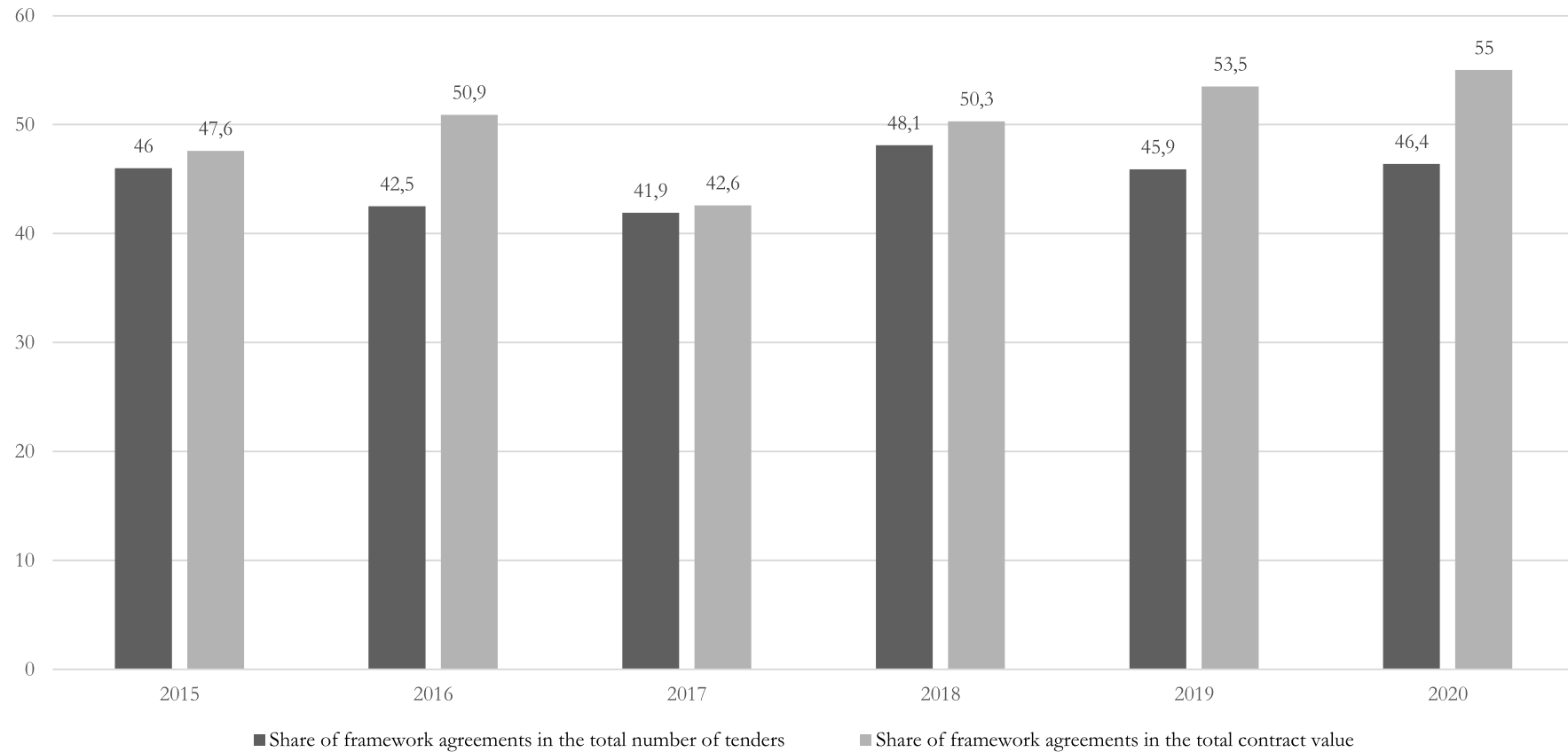




# APPLICATION RATE

- Framework Agreements

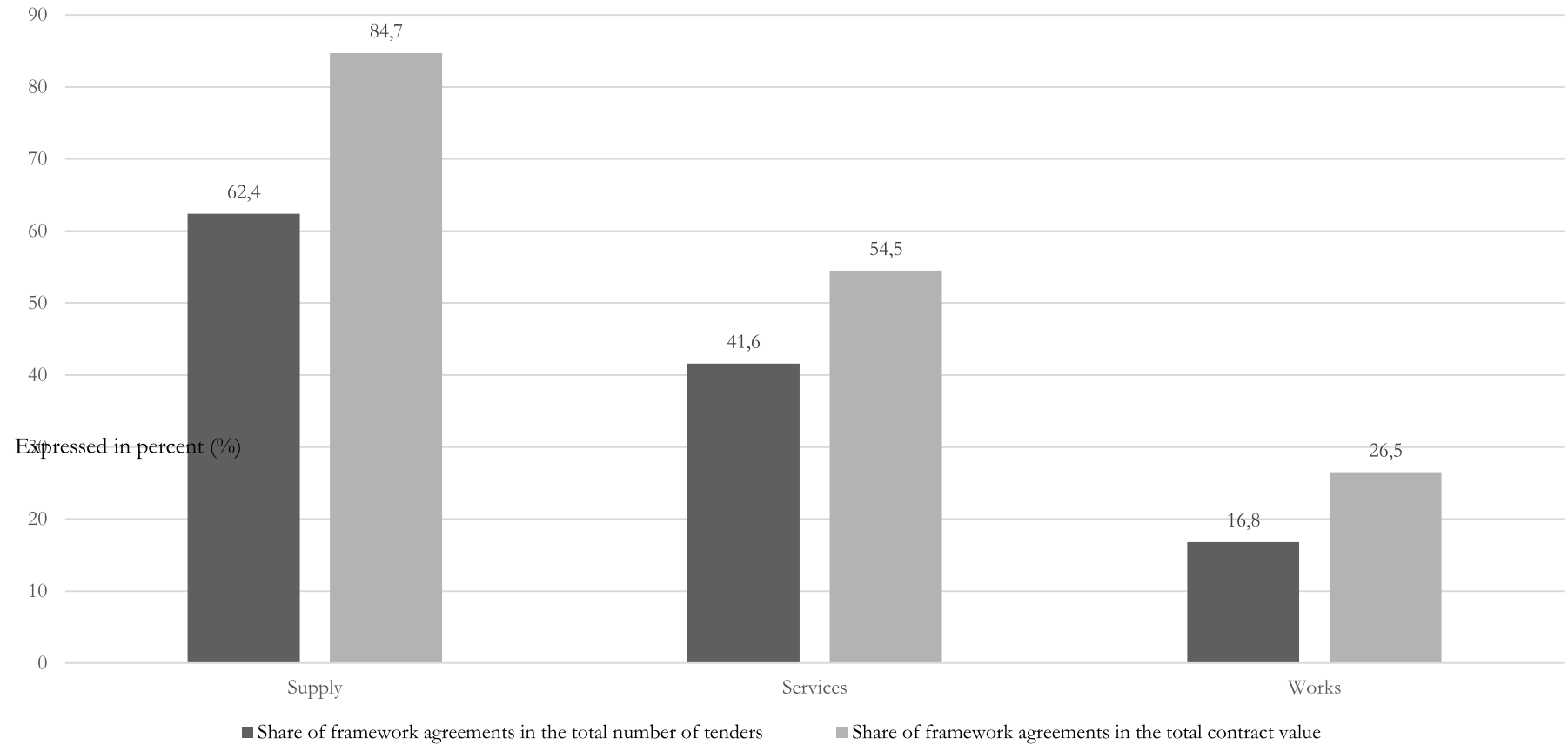
Development in Framework Agreement tenders in percent for the period 2015-2020





# APPLICATION RATE

Framework Agreement tenders in percent by type of contract, 2019-2020





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# DYNAMIC PURCHASING SYSTEMS



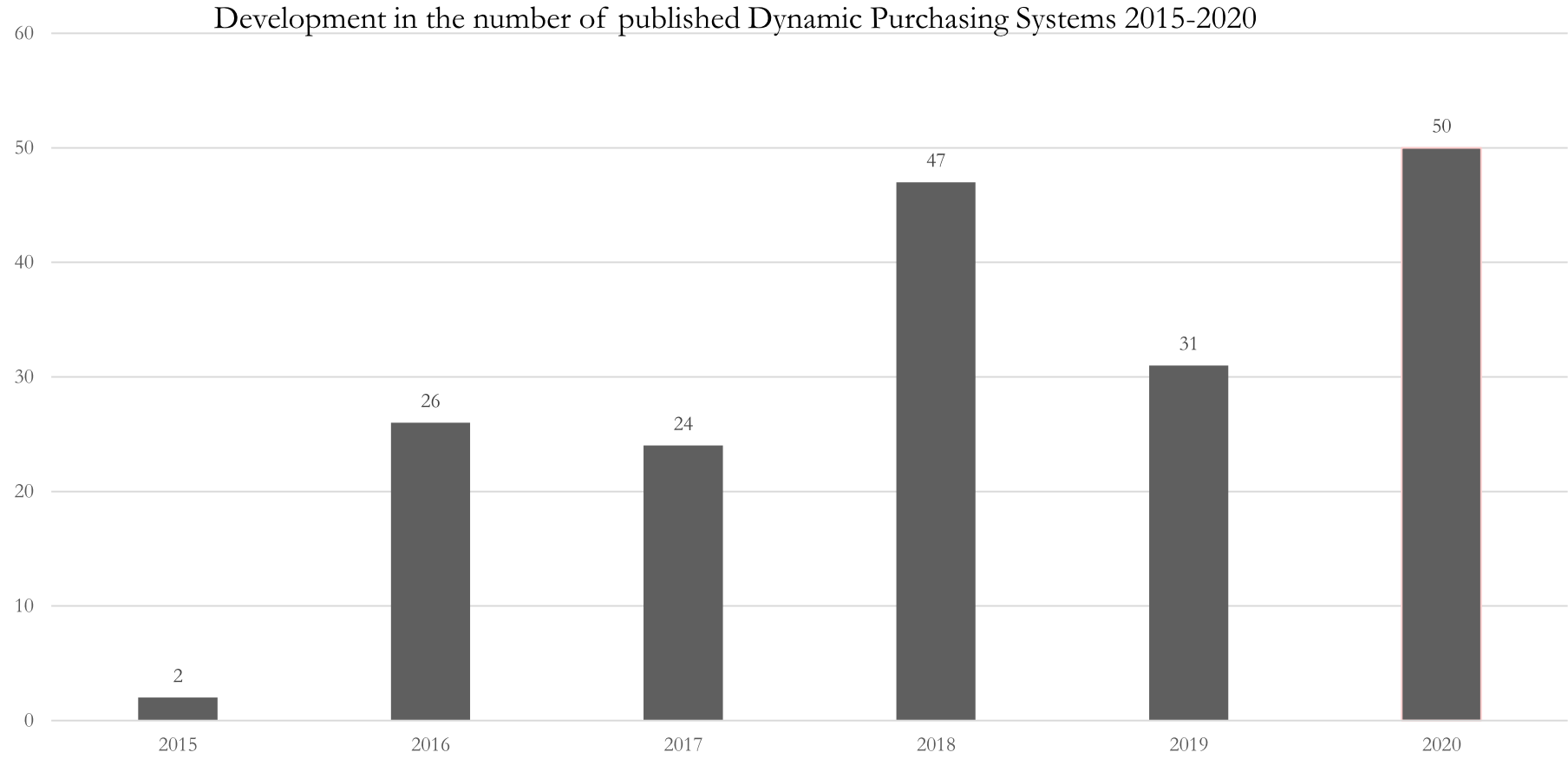
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# APPLICATION RATE

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- Dynamic Purchasing Systems

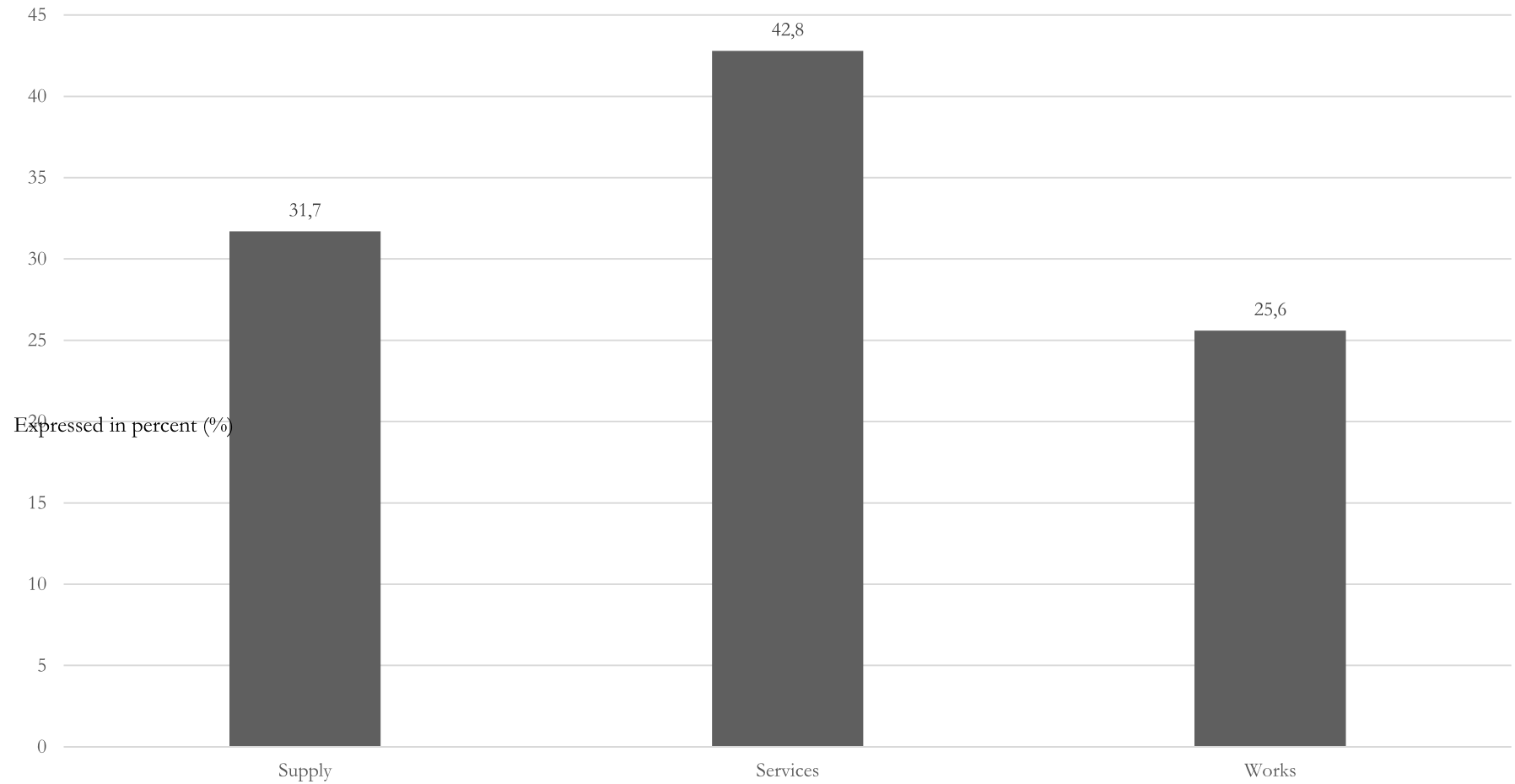






# APPLICATION RATE

Dynamic Purchasing Systems by type of contract 2015-2020





## DEVELOPMENT IN APPLICATION RATE

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- The use of Dynamic Purchasing System is increasing.
- Dynamic Purchasing Systems is used in all contract types, but mostly within the services area.
- The rules in the Danish Procurement Act for using Dynamic Purchasing Systems has been simplified, and it is very simple to establish a Dynamic Purchasing System
- But...do we have a discrepancy between the Danish Procurement Act and the Procurement Directive (2014/24/EU) on the provisions regarding Dynamic Purchasing Systems?



# THE OPENING OF APPLICATIONS

- After 30 days, 10 days, or immediately?
- Problem
  - Is there a discrepancy between the Public Procurement Act § 104 and the Procurement Directive 2014/24/EU, article 34.
  - Opening of requests for participation within or after the initial 30 days?
  - Handling of Applications within 10 days – does this also apply to applications received in connection with the establishment of the Dynamic Purchasing System?





# THE OPENING OF APPLICATIONS

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- **The Danish Public Procurement Law, § 104, paragraph 1 and 4:**

*“In connection with the establishment of a dynamic purchasing system, the minimum time limit for the contracting entity's receipt of requests to participate shall be 30 days from the day after the dispatch of the contract notice.”*

[...]

Paragraph 4:

*“Without prejudice to paragraphs 5 and 6, the examination of an application received before the deadline set out in paragraph 1 shall be finalised within 10 working days of receipt of the application.”*





## THE OPENING OF APPLICATIONS

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- The Danish Procurement Act says, that even before the Dynamic Purchasing System is established, the applications should be considered within 10 days.
- However, preamble 64 to the Procurement Directive (2014/24 EU) says:

*”The examination of those requests to participate should normally be carried out within a maximum of 10 working days, as the assessment of the selection criteria will take place on the basis of the simplified documentation requirements set out in this Directive. However, once a dynamic purchasing system has been set up, contracting authorities may, in response to the first publication of a contract notice or an invitation to confirm interest, be faced with so many requests to participate that they will need more time to analyse the requests. This should be possible provided that no specific procurement procedure is launched before all applications have been analysed. Contracting authorities should be free to organise the way in which they examine requests to participate, for example by deciding to carry out such examinations only once a week, provided that the time limits for the examination of each request to participate are respected.”*

- Thus, the time limits must be after the Dynamic Purchasing System is established – meaning after finishing the tender procedure.



# DIRECTIVE 2014/24/EU ON PUBLIC PROCUREMENT

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- **Article 34 (1) :**

*“For commonly used purchases the characteristics of which, as generally available on the market, meet the requirements of the contracting authorities, contracting authorities may use a dynamic purchasing system. The dynamic purchasing system shall be operated as a completely electronic process, and shall be open throughout the period of validity of the purchasing system to any economic operator that satisfies the selection criteria. It may be divided into categories of products, works or services that are objectively defined on the basis of characteristics of the procurement to be undertaken under the category concerned. Such characteristics may include reference to the maximum allowable size of the subsequent specific contracts or to a specific geographic area in which subsequent specific contracts will be performed. ;”*



# DIRECTIVE 2014/24/EU ON PUBLIC PROCUREMENT

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- **Article 34 (2) a:**

*[Art. 32 (2) Notwithstanding Article 28, the following time limits shall apply:]*

*“the minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice or, where a prior information notice is used as a means of calling for competition, the invitation to confirm interest is sent. No further time limits for receipt of requests to participate shall apply once the invitation to tender for the first specific procurement under the dynamic purchasing system has been sent;”*



# DIRECTIVE 2014/24/EU ON PUBLIC PROCUREMENT

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- **Article 34 (2) b:**

*“the minimum time limit for receipt of tenders shall be at least 10 days from the date on which the invitation to tender is sent.”*





# DIRECTIVE 2014/24/EU ON PUBLIC PROCUREMENT

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- **Article 34 (5):**

*“Contracting authorities shall give any economic operator, throughout the entire period of validity of the dynamic purchasing system, the possibility of requesting to participate in the system under the conditions referred to in paragraph 2. Contracting authorities shall finalise their assessment of such requests in accordance with the selection criteria within 10 working days following their receipt. That deadline may be prolonged to 15 working days in individual cases where justified, in particular because of the need to examine additional documentation or to otherwise verify whether the selection criteria are met.”*

- Meaning, **after the establishment of the Dynamic Purchasing System**, the Contracting authorities should finalize their assessment within 10 working days, but not in the process of establishing the system...?

- Validity equals after establishment:

*“Art. 34 (7): Contracting authorities may, at any time during the period of validity of the dynamic purchasing system, require admitted participants to submit a renewed and updated self-declaration as provided for in Article 59(1), within five working days from the date on which that request is transmitted.”*



# DIRECTIVE 2014/24/EU ON PUBLIC PROCUREMENT

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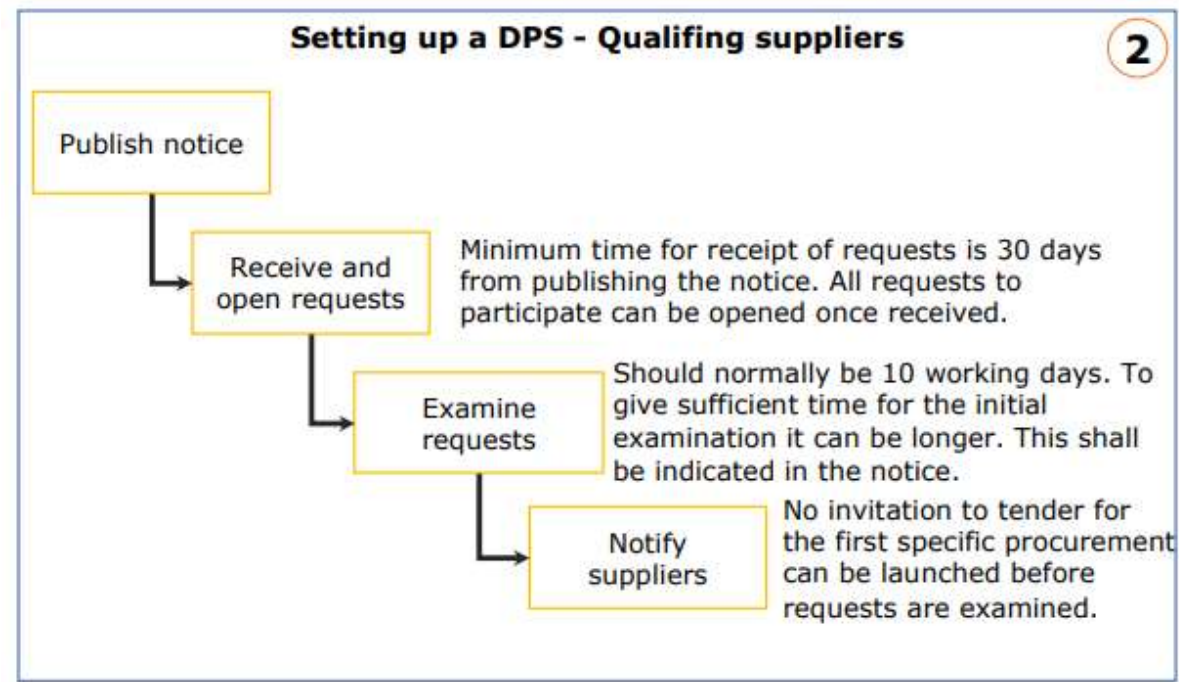
- **Article 34 (5):**

*Notwithstanding the first subparagraph, as long as the invitation to tender for the first specific procurement under the dynamic purchasing system has not been sent, contracting authorities may extend the evaluation period provided that no invitation to tender is issued during the extended evaluation period.*

*Contracting authorities shall indicate in the procurement documents the length of the extended period that they intend to apply. Contracting authorities shall inform the economic operator concerned at the earliest possible opportunity of whether or not it has been admitted to the dynamic purchasing system.”*

# CONCLUSION?

- Conclusion
- Answer according to Danish Competition and Consumer Authority
  - Act accordingly to the practice of the EU Commission:
    - *“Minimum time for receipt of requests is 30 days from publishing the notice. All request to participate can be opened once received”*



**Figure 3:** Qualification process during the set-up of a DPS



## CONCLUSION?

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- The answer “to follow the practice of the EU Commission” is not sufficient to answer the problem in question.
- At the moment the electronic procurement systems gives the public authorities access to the applications from day one of the tender process.
- Is it a real problem? What are the consequences, if it is not in line with the Public Procurement Directive to open applications as they are received?
- It all comes down to the question of what “the validity of the system” means...





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THANK YOU FOR YOUR ATTENTION

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