



Promoting Social Considerations into Public Procurement Procedures for Social Economy Enterprises

Matrix explaining how social considerations have been embedded in the Danish law transposing Directive 24/2014/EU

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Article 18(2) of the Directive ► Not transposed in The Public Procurement Act (abbreviated TPPA, in Danish: “Udbudsloven”)			
Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
Not transposed directly.	<p>The reason for not directly transposing Article 18(2) in The Public Procurement Act is given in the report of the Committee on Danish Procurement Law.¹</p> <p>It argues:</p> <ul style="list-style-type: none"> • Since it is up to the MS to decide what constitute “appropriate measures”, the article does not have to be transposed in TPPA. • It is the opinion of The Committee that the relevant competent authorities in Denmark, e.g. The Danish Working Environment Authority, through inspections and other appropriate measures ensure that economic agents operating in Denmark comply with the obligations stated in Article 18(2). • With regards to labour law provisions, it is deemed appropriate that the issue of labour clauses is not regulated in TPPA. <p>Firstly, because the TPPA primarily is meant to regulate the procurement process. Therefore, the procurer’s access to making specific contractual requirements should only be regulated at a superior level. In this way a procurer can apply minimum requirements, clauses etc. as long as they adhere to the principles of public procurement.</p> <p>Secondly, it will always be a practical assessment which clauses a procurer can apply, and it is not deemed possible to compile an exhaustive list. In the remarks to the proposal for TPPA it is therefore alone stated, that clauses may not go against national or EU law.</p>	<p>Article 56(1): The provision of Article 56(1) allowing a contracting authority not to award a contract to the most economically advantageous tender, if the tender does not comply with Article 18(2) is transposed through section 159 (7) of TPPA.</p> <p>The provision allows a contracting authority to decide to not award a contract to the tenderer submitting the most financially advantageous tender, if the contracting authority can prove that the tender is not in accordance with certain obligations under environmental, social or labour law.</p> <p>Article 57(4): Article 57(4) letter a is transposed through section 137 1) of TPPA. The provision states, that a contracting authority may exclude a tenderer, if it can prove that the candidate or tenderer has ignored obligations in force in the fields of environmental, social or labour law etc.</p> <p>However, the contracting authority is required to announce in the contract notice, if it has decided to make use of this option.</p> <p>Article 69(3): Article 69(3) is transposed through section 169(3) of TPPA. The provision obliges a contracting authority to reject a tender, where the tender is abnormally low because the tenderer (or sub-contractor) has disregarded obligations in force in the field of environmental, social or labour law etc.</p>	<p>Environmental law:</p> <ul style="list-style-type: none"> • Danish Environmental Protection Act • Danish Livestock Farming Environmental Approval Act. • Protection of Nature Act • Planning Act • etc. <p>Labour law and agreements:</p> <ul style="list-style-type: none"> • The Collective bargaining agreements • Employment Contracts Act • The Danish Working Environment Act • The Holiday Act • etc.
Open questions	NA		
Example of application from the national level (where applicable)	Clauses may not go against national or EU law.		

¹ December 2014, Report of the Committee on Danish Procurement Law, page 548. <https://www.kfst.dk/media/2278/rapport-fra-udvalg-om-dansk-udbudslovgivning-december-2014.pdf>

Article 20 of the Directive ► Section 54 in The Public Procurement Act (abbreviated TPPA, in Danish: “Udbudsloven”)			
Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Section 54 of TPPA: A contracting authority may require that only sheltered workshops or economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons can participate in the procurement procedure. However, cf. (2). (2) Subsection 1 shall only apply where minimum 30 percent of all employees of the economic operator are disabled or disadvantaged persons. (3) Reference shall be made to this provision in the contract notice where the procurement procedure is reserved for economic operators subject to (1).</p>	<p>The provision gives contracting authorities the possibility to reserve participation in a procurement procedure (for a contract or subcontract) for economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons. In the comments to the law, it is specifically stated that it is of no relevance how the economic operator is organised, as long as they meet the criteria. Sheltered employment programmes and social enterprises (as defined in the Act on Registered Social Enterprises) are given as concrete examples.</p>	<p>The provision allows a contracting authority to reserve participation in a procurement procedure for sheltered workshops or for economic operators whose “most important” aim is the social and professional integration of disabled or disadvantaged persons. Minimum 30 percent of all employees of the operator has to be disabled or disadvantaged persons.</p>	<ul style="list-style-type: none"> It is specifically stated in the comments to the law, that it is a general requirement in Danish Law that civil servants act objectively and with pertinence. Thus, a procurer’s intent to promote the integration of disabled or disadvantaged persons should be legitimised by law or other relevant source of law. For municipalities the intent should also fall within their municipal authority. Act on Registered Social Enterprises: Is mentioned in the comments to the law, but given no importance. <p>References are made to “sheltered workshops” and “sheltered employment”. These activities are regulated through the Danish Social Service Law. The TPPA, however, does not make direct reference to this law.</p>
Open questions	<p>How is the 30 percent calculated? The Danish Competition and Consumer Authority has in its official guiding manual stated, that it shall in the calculation not be given importance whether a person is employed full-time or part-time. Furthermore, the authority is also of the opinion that persons employed in publicly supported employment – specifically “løntilskud” and “fleksjob” – should also be included in the calculation.²</p> <p>What constitutes disabled or disadvantaged persons? According to the remarks to the law proposal:</p> <ul style="list-style-type: none"> “Disabled” should be understood as persons, who due to the nature or extent of their disability cannot maintain employment on ordinary terms. “Disadvantaged persons” can be unemployed or persons belong to disadvantaged minorities or groups, which are in other ways marginalised. 		
Example of application from the national level (where applicable)	<p>The provision does not allow any contracting authority to make this requirement at any time. The procurer’s intent to promote the integration of disabled or disadvantaged persons has to be legitimised by law or other relevant source of law (see interaction with other national laws). The provision does not allow a contracting authority to reserve a contract for a Registered Social Enterprise (according to the Danish law on registration) if less than 30 percent of the employees are disabled or disadvantaged persons. The provision does not allow the procurer to reserve a contract without making reference to this in the contract notice.</p>		

² The Danish Competition and Consumer Authority, *Udbudsloven - Vejledning om udbudsreglerne*, january 2016, page 266 <https://www.kfst.dk/media/47065/udbudsloven-vejledning-om-udbudsreglerne.pdf>

Article 40 of the Directive ► Section 39 in The Public Procurement Act (abbreviated TPPA, in Danish: “Udbudsloven”)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Section 39 of TPPA: <i>Preliminary market consultations, etc.</i> Before launching a procurement procedure, a contracting authority may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements. In that connection, the contracting authority may enter into dialogues with and receive guidance from economic operators. Such guidance may be applied in the planning and conduct of the procurement procedure provided that this does not result in a violation of the principles of section 2. (2) If an economic operator or an enterprise affiliated with an economic operator has provided guidance to a contracting authority in relation to a market consultation or otherwise provided guidance to or been involved in the preparation of the procurement procedure, the contracting authority shall take appropriate measures to ensure that competition is not distorted by the participation of the economic operator referred to in the procurement procedure. As a minimum, the contracting authority shall: 1) ensure to the greatest possible extent that relevant information exchanged in connection with the involvement of an economic operator in the procurement procedure is included in the contract documents, and 2) set the time limits for receipt of requests to participate and receipt of tenders to equalise the advantage in terms of time which an economic operator may have gained by its involvement in the preparation of the procurement procedure, including via dialogue with and guidance received from economic operators. (3) A contracting authority shall exclude the candidate or tenderer referred to in accordance with Section 136(2) if the contracting authority cannot guarantee that the principle of equal treatment is observed by less radical measures.</p>	<p>Section 39 in TPPA is very similar to the formulation of Article 40 in the Directive. In TPPA, however, it is specifically stated, how a contracting authority shall take appropriate measures to ensure that competition is not distorted. The opportunity for contracting authorities to conduct preliminary consultations relating to the <u>social aspects</u> of the procurement is not mentioned specifically.</p>	<p>Contracting authorities are allowed to seek or accept advice from independent experts or authorities or from market participants. The contracting authority shall take appropriate measures to ensure that competition is not distorted. Contracting authorities are not allowed to engage in pre-negotiation nor to give information which could have the effect of distorting competition or violating the principles of non-discrimination, equal treatment and transparency. The contracting authority is obliged to take appropriate measures to ensure that competition is not distorted. As a minimum, the contracting authority shall: 1) include relevant information exchanged in the contract documents, and 2) set appropriate time limits of the tender to equalise the advantage in terms of time which an economic operator may have gained.</p>	<p>Nor the law, the preparing documents or its remarks make reference to any significant interaction with other national laws. The Public Administration Act and General administrative law All public authorities are required to comply with the principles of general administrative law, which among other things demands equal treatment of citizens as well as sound financial administration, while disallowing any pursuing of special private interest.</p>
Open questions	The Danish Competition and Consumer Authority has published an official guidance manual to this article. ³		
Example of application from the national level (where applicable)			

³ The Danish Competition and Consumer Authority, *Dialog før og under udbudsprocessen*, february 2018. https://www.kfst.dk/media/49852/dialog-foer-og-under-udbudsprocessen_februar.pdf

Article 42(1) fourth and fifth subparagraph of the Directive ► Section 40 in The Public Procurement Act (abbreviated TPPA, in Danish: “Udbudsloven”)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Section 40 of TPPA: A contracting authority shall state the technical specifications according to the definitions in item 1 in Annex VII of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (the Official Journal of the European Union 2014, No. L 94, page 65) in the procurement documents.</p> <p>(2) A contracting authority shall stipulate the characteristics required by the works, services or supplies in the technical specifications. The contracting authority may impose requirements for the specific process or method of production or supply of the proposed works, supplies or services and requirements concerning intellectual property rights including transfer of intellectual property rights.</p> <p>(3) For all purchases intended for use by natural persons, the technical specifications shall be stipulated in view of disabled access or design for all users, save in exceptional cases duly justified. For access requirements which are compulsory pursuant to EU rules, the disabled access requirements or design for all users shall be established via reference to the relevant EU rules.</p> <p>(4) The technical specifications shall afford equal access for economic operators to the procurement procedure and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.</p>	<p>The fourth and fifth subparagraph of Art 42(1) is transposed directly into subparagraph 3 of Section 40 in TPPA (marked yellow).</p>	<p>The State must introduce a mandatory clause linked to technical specifications taking into account accessibility criteria for persons with disabilities or design for all users.</p> <p>If any legal act of the European Union provides for mandatory accessibility requirements relevant for accessibility criteria for persons with disabilities or design for all users, technical specifications must refer to them.</p>	<p>The Building Act (<i>Byggeloven</i>)</p> <p>The Building Regulations (<i>Bygningsreglementet - BR18</i>)</p> <p>The Planning Act (<i>Planloven</i>)</p>
Open questions	NA		
Example of application from the national level (where applicable)	The State may not preclude technical specifications taking into account accessibility criteria for persons with disabilities or design for all users, except in duly justified cases.		

Article 43 of the Directive ► Section 46 in The Public Procurement Act (abbreviated TPPA, in Danish: “Udbudsloven”)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Section 46 of TPPA: <i>Labels</i> In the technical specifications, the award criteria or the terms of performance of the contract, a contracting authority may require that a purchase shall carry a particular label as documentation of specific qualities when:</p> <ol style="list-style-type: none"> 1) the label requirements are solely related to requirements in the subject-matter of the contract and are suitable for defining the qualities of the works, supplies or services which are the subject-matter of the contract, 2) the label requirements are based on objectively verifiable and non-discriminatory criteria, 3) the labels have been established in an open and transparent procedure in which all relevant stakeholders may participate, 4) the labels are available for all potential tenderers, and 5) the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence. <p>(2) When a contracting authority cannot require fulfilment of all label requirements, the contracting authority shall refer to the relevant label requirements in the procurement documents.</p> <p>(3) A contracting authority which requires a specific label shall be obliged to accept all labels which fulfil similar label requirements.</p> <p>(4) A contracting authority shall always accept other relevant documentation where</p> <ol style="list-style-type: none"> 1) a tenderer cannot obtain the required label or a similar label within the time limit stipulated for reasons which are not attributable to the that tenderer, or 2) a tenderer does not have the required label even if it was obtainable within the time limit stipulated, and the contracting authority is satisfied that the label requirements are fulfilled, and the resources spent by the contracting authority are found in a specific assessment not to exceed the resources which the contract authority would have been required to spend in order to verify that the tenderer were in possession of the required label to an inexpedient degree. 	<p>TPPA’s section 46 is very similar to the directive. Specifically, it only differs from Article 43 in one place: As can be read in Section 46 (4) 2) (marked yellow), TPPA requires that a contracting authority shall always accept other relevant documentation – also where the required label has been obtainable for the tenderer within the time limit stipulated.</p> <p>The contracting authority shall, however, only do so, « provided that the resources spent are found not to exceed the resources which the contract authority otherwise would have been required to spend to an inexpedient degree.</p>	<p>The provision allows a contracting authority to reject other relevant documentation if the required label has been obtainable for the tenderer within the time limit stipulated.</p> <p>BUT ONLY if the CA finds that the resources spent in the assessment to an inexpedient degree exceed the resources which the contract authority otherwise would have been required to spend.</p>	<p>Nor the law, the preparing documents or its remarks make reference to any significant interaction with other national laws.</p> <p>Provisions regarding requirements to labels are also found in other laws, for example: Law on foodstuff (<i>lov om fødevarer</i>) Law on Organic Agriculture (<i>økologiloven</i>).</p>
Open questions	NA		
Example of application from the national level (where applicable)	NA		

Article 46 of the Directive ► Section 49 in The Public Procurement Act (abbreviated TPPA, in Danish: “Udbudsloven”)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Section 49 of TPPA: <i>Division of contracts into lots</i> A contracting authority may decide to divide a contract into lots. (2) Where a contracting authority does not divide a contract into lots, the contracting authority shall state the grounds hereof in the procurement documents. (3) A contracting authority shall state the following in the contract notice: 1) whether the tenderer may submit a tender for one, several or all lots, 2) whether the tenderer can be awarded one, several or all lots and, if that is the case, how the lots or lot groups can be combined, and 3) the objective and non-discriminatory criteria or rules which determine the award of lots, including the award method for lots in cases when the criteria or rules would otherwise have the effect that a tenderer is awarded more lots than the maximum number which can be awarded to the tenderer.</p>	<p>Section 49 of TPPA transposes subparagraph 1-3 of Article 46 into Danish Law. Subparagraph 4 is not transposed. According to the provision, a contracting authority may decide to divide a contract into lots. In making this decision the CA may include economic and market related considerations. It is mentioned in the remarks to the section that a division into lot may be improve access for SMVs, and that this may benefit the competition for the tender. CSOs or Social Enterprises are not mentioned. When a contracting authority decides not to divide a contract into lots, they shall state the grounds hereof in the procurement documents.</p>	<p>Contract authorities are allowed to divide a contract into lots. They are also allowed not to do so, as long as they state the reason hereof in the procurement documents. There are no requirements as to the length nor content of the statement.</p>	<p>Nor the law, the preparing documents or its remarks make reference to any significant interaction with other national laws. Provisions aiming at fostering competition are also found in the Competition Law (<i>Konkurrenceloven</i>).</p>
Open questions	NA		
Example of application from the national level (where applicable)	It is not allowed for a contracting authority to decide not to divide a contract into lots without providing the reasons for its decision.		

Article 56 of the Directive ► Section 159 in The Public Procurement Act (abbreviated TPPA, in Danish: “Udbudsloven”)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Section 159 in TPPA: <i>A contracting authority shall award the contract in accordance with sections 161-165 on the criteria for award of the contract and, if relevant, sections 166-168 on the calculation of life cycle costs and section 169 on abnormally low tenders.</i></p> <p><i>(2) A contracting authority may only award the contract if the contracting authority has verified that the tender complies with the requirements fixed in the contract notice and the additional procurement documents. Further, the contracting authority shall obtain verification on the basis of the European Single Procurement Document, cf. sections 148-151, of documentation obtained under section 152(1) and eCertis, cf. section 52(3), that the tender was submitted by a tenderer,</i></p> <p><i>1) which is not excluded subject to sections 135-137,</i> <i>2) which fulfils the minimum requirements for suitability fixed by the contracting authority under sections 140-143, and</i> <i>3) which, if relevant, is selected to submit a tender via selection under section 145.</i></p> <p><i>(3) In case of doubt, the contracting authority shall carry out effective verification of the information and documentation of the request to participate or the tender.</i></p> <p><i>(4) If the contracting authority arranges an open procedure, the contracting authority may choose to evaluate the tenders before the contracting authority verifies that the conditions of (2)(1) and (2)(2) (1-3) are fulfilled.</i></p> <p><i>(5) While observing the principles of section 2, the contracting authority may request the candidate or tenderer to supplement, specify or complete the request for participation or tender by submitting relevant information or documentation within a suitable time limit, where the information or documents submitted by candidates or tenderers in relation to a request to participate or a tender are incomplete or incorrect, or where specific documents are missing. The request may not result in submission by the candidate or tenderer of a new request to participate or a new tender.</i></p> <p><i>(6) Irrespective of (5), the contracting authority shall reject a request or tender if it is stated expressly in the procurement documents that a specific error or omission will result in rejection of the request or tender, and the request or tender referred to includes such an error or omission.</i></p>	<p>Article 56 had been transposed directly into Danish Law through section 159 of TPPA – including the non-obligatory parts.</p> <p>The provision of Article 56(1) allowing a contracting authority <u>not to award a contract to the most economically advantageous tender</u>, if the tender does not comply with Article 18(2) is found in section 159(7) – marked yellow.</p>	<p>The provision allows a contracting authority to decide to not award a contract to the tenderer submitting the most financially advantageous tender, if the contracting authority can prove that the tender is not in accordance with certain obligations under environmental, social or labour law.</p> <p>The contracting authority is required to hear the tenderer before making the decision.</p> <p>In the remarks to the section it is stated, that this provision concerns whether certain obligations are not met (or can be expected not to be met) with regards to the work or contract in question.</p> <p>The possibility of exclusion as a consequence of previous misdemeanors is dealt with in section 137 (1).</p>	<p>Environmental law:</p> <ul style="list-style-type: none"> • Danish Environmental Protection Act • Danish Livestock Farming Environmental Approval Act. • Protection of Nature Act • Planning Act • etc. <p>Labour law and agreements:</p> <ul style="list-style-type: none"> • The Collective bargaining agreements • Employment Contracts Act • The Danish Working Environment Act • The Holiday Act • etc.

<p><i>(7) The contracting authority may omit awarding a contract to the tenderer submitting the most financially advantageous tender if, after hearing the tenderer, the contracting authority can prove that the tender is not in accordance with the obligations under environmental, social or labour law in accordance with EU law, national law or collective agreements or in accordance with the environmental, social or labour law obligations deriving from the conventions stated in Annex X to Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (the Official Journal of the European Union 2014, No. L 94, page 65).</i></p>			
<p>Open questions</p>			
<p>Example of application from the national level (where applicable)</p>	<p>A contracting authority cannot decide not award a contract to the tenderer submitting the most financially advantageous tender, if they cannot <u>prove</u> that the tender is not in accordance with the required obligations. i.e. the burden of proof is on the contracting authority.</p> <p>A contracting authority cannot decide not to award a contract to the tenderer submitting the most financially advantageous tender without hearing the tenderer.</p>		

Article 57 of the Directive ► Section 135 and 136 in The Public Procurement Act (abbreviated TPPA, in Danish: “Udbudsloven”)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Section 135 of TPPA transposes Article 57 (1-3). Section 135 in TPPA: <i>Compulsory grounds for exclusion</i> Section 135. A contracting authority shall exclude a candidate or a tenderer from participation in a procurement procedure, when the candidate or tenderer has been convicted or fined by final judgement for:</p> <ol style="list-style-type: none"> 1) actions committed as part of a criminal organisation as defined in Article 2 of Council Framework Decision 2008/841/JHA of 24 October 2008 (Official Journal of the European Union 2008, No. L300, page 42), 2) corruption as defined in Article 3 of convention on combating of corruption involving officials of the European Union and of the EU Member States and Article 2(1) of Council Framework Decision 2003/568/JHA of 22 July 2003 on combating of corruption in the private sector (Official Journal of the European Union 2003, No. L 192, page 54) and corruption as defined by national law in the Member State or home country of the candidate or tenderer or in the country in which the candidate or tenderer is established, 3) fraud within the meaning of Article 1 of the Convention relating to the protection of the financial interests of the European Communities, 4) acts of terror or criminal acts related to terrorist activities within the meaning of Article 1, 3 and 4, respectively, of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (Official Journal of the European Union 2002, No. L 164, page 3) and amending Council Framework Decision 2008/919/JHA of 28 November 2008 amending Council Framework Decision 2002/475/JHA on combating terrorism (Official Journal of the European Union 2008, No. L 330, page 21), 5) money laundering or financing of terrorism as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on prevention of the use of the financial system for the purpose of money laundering or financing of terrorism (Official Journal of the European Union 2005, No. L 309, page 15), or 6) breach of section 262 a of the Danish Penal Code or as regards a judgement issued in another country concerning child labour or other types of human trafficking as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and 	<p>Section 135 3) transposes Article 57 (2). The provision has been amended to align with existing national law. The provision states, that a contracting authority shall exclude a tenderer which has unpaid overdue debt of DKK 100 000 or more to public authorities in relation to tax, duties or social security contributions. The CA can and shall do this at any time throughout the procurement process. The contracting authority may, however, according to Section 135 (4) omit to exclude a tenderer if</p> <ol style="list-style-type: none"> 1) all candidates or tenderers are subject to (3), 2) the candidate or tenderer provides guarantee of payment of the part of the debt which constitutes DKK 100 000 or more, or 3) the candidate or tenderer has agreed on a repayment scheme. (see remarks under interactions with other laws). <p>If a tenderer has unpaid overdue debt of less than DKK 100 000 to public authorities section 137 (7) applies, meaning that the exclusion is voluntary, and that it has to be stated in the contract notice whether this is a exclusion ground. Section 137 1) transposes Article 57 (4) letter a.</p>	<p>A contracting authority is allowed to omit to exclude a tenderer which has unpaid overdue debt of DKK 100 000 or more if</p> <ol style="list-style-type: none"> 1) this is the case for all candidates or tenderers, 2) the tenderer provides guarantee of payment, or 3) the tenderer has agreed on a repayment scheme. <p>A contracting authority is allowed to exclude tenderers who have unpaid overdue debt of less than DKK 100 000...</p> <p>...as well as tenderers, where it can be proven that the tenderer has ignored obligations in force in the fields of environmental, social or labour law etc.</p> <p>... but only if the decision to do so is made prior to the tender and is announced in the contract notice.</p>	<p>Section 135 4) maintain the contents of “<i>Lov om begrænsning af skyldneres muligheder for at deltage i offentlige udbudsforretninger, jf. lovbekendtgørelse nr. 336 af 13. maj 1997</i>” (Law which limits debtors ability to bid for public tenders). This law was discontinued as a result of the implementation of TPPA.</p>

<p>combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/HJA (Official Journal of the European Union 2011, No. L 101, page 1).</p> <p>(2) The contracting authority shall exclude a candidate or tenderer where a person who has been convicted by final judgement or who has been fined for the actions stated in (1) is a member of the board, management or supervisory committee of the economic operator. Further, the contracting authority shall exclude a candidate or tenderer if the convicted person is authorised to represent, monitor or make decisions in the board, management or supervisory committee of the candidate or tenderer.</p> <p>(3) The contracting authority shall exclude a candidate or tenderer which has unpaid overdue debt of DKK 100 000 or more to public authorities in relation to tax, duties or social security contributions under Danish law or under the law of the country in which the candidate or tenderer is established.</p> <p>(4) The contracting authority may omit to exclude a candidate or tenderer subject to (3) where</p> <ol style="list-style-type: none"> 1) all candidates or tenderers are subject to (3), 2) the candidate or tenderer provides guarantee of payment of the part of the debt which constitutes DKK 100 000 or more, or 3) the candidate or tenderer has agreed on a repayment scheme with the collection authority, and that scheme is observed. <p>(5) The contracting authority may omit to exclude a candidate or tenderer subject to (1-3) out of overriding reasons relating to the public interest.</p> <p>Section 137 of TPPA transposes Article 57 (4), letter a-d, g and i.</p> <p>Section 137 in TPPA:</p> <p><i>Voluntary grounds for exclusion</i></p> <p>A contracting authority shall state in the contract notice if a candidate or tenderer will be excluded from participation in a procurement procedure, where</p> <ol style="list-style-type: none"> 1) the contracting authority can prove that the candidate or tenderer has ignored obligations in force in the fields of environmental, social or labour law under EU law, national law, collective agreements or the obligations under environmental, social or labour law deriving from the conventions stated in Annex X to Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (the Official Journal of the European Union 2014, No. L 94, page 65) or subject to acts adopted by the European Commission under Article 	<p>The provision states that a contracting authority may exclude a tenderer, if it can prove that the candidate or tenderer has ignored obligations in force in the fields of environmental, social or labour law etc.</p> <p>However, the contracting authority is required to announce in the contract notice, if it has decided to make use of this option.</p>		
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<p>57(4), cf. Article 88, of the Directive,</p> <p>2) the candidate or tenderer has been declared bankrupt or is undergoing insolvency or winding-up proceedings, where the assets of the candidate or tenderer is being administered by a receiver or by court if the candidate or tenderer has entered an arrangement with creditors, where the commercial activities of the candidate or tenderer has been discontinued, or where the candidate or tenderer is in a similar situation under a similar procedure under national law in the jurisdiction in which the candidate or tenderer is registered,</p> <p>3) the contracting authority can prove that, in the exercise of its business, the candidate or tenderer has committed serious neglect which gives rise to doubt as to the integrity of the candidate or tenderer,</p> <p>4) the contracting authority has sufficient plausible indications to conclude that the candidate or tenderer has concluded agreements with other economic operators for the purpose of distorting competition,</p> <p>5) the contracting authority can prove that the candidate or tenderer has committed previous material breach of a public contract, a utility contract or a public works concession, and such breach has resulted in cancellation of the contract referred to or a similar sanction,</p> <p>6) the contracting authority can prove that the candidate or tenderer has attempted to interfere with the decision-making process of the contracting authority, where the candidate or tenderer has obtained confidential information which may have resulted in wrongful advantages in relation to the procurement procedure, or where the candidate or tenderer by gross negligence has provided misleading information which may have material influence on decisions on exclusion, assessment of the minimum requirements for suitability, selection or award of contract, or</p> <p>7) the candidate or tenderer has unpaid overdue debt of less than DKK 100 000 to public authorities in relation to tax, duties or social security contributions under Danish law or under the law of the country in which the candidate or tenderer is established.</p> <p>(2) Further, section 135(4) shall apply in the cases specified in (1)(7).</p>			
<p>Open questions</p>			
<p>Example of application from the national level (where applicable)</p>	<p>A contracting authority cannot announce in a contract notice that it will exclude candidates and tenderers according to the provisions in section 137 1-7, and then later on decide not to do so.</p> <p>If it chooses to include a voluntary exclusion ground in the contract notice, it is required to exclude candidates that fail to meet the requirements.</p>		

Article 67 of the Directive ► Section 161-165 in The Public Procurement Act (abbreviated TPPA, in Danish: “Udbudsloven”)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Section 161-165 of TPPA: <i>Contract award criteria</i> Section 161. A contracting authority shall award the contract to the tenderer which has submitted the most economically advantageous tender. Section 162. A contracting authority shall identify most economically advantageous tender based on one of the following award criteria: 1) Price, 2) costs or 3) best price-quality ratio. (2) When the award criterion cost is applied, all types of costs may be included, including prices and life cycle costs, cf. section 166. (3) When the award criteria best price-quality ratio is used, cf. (1) (3), the tender shall be based on sub-criteria such as qualitative, environmental and social aspects. The sub-criteria may include 1) quality, including technical value, aesthetic and functional characteristics, availability, design for all users, social, environmental and innovation characteristics and trade and conditions hereof, 2) the organisation of the staff which will perform the contract and their qualifications and experience, where the quality of the staff which will perform the contract may affect the level of performance of the contract to a significant extent, or 3) customer service, technical assistance and terms of delivery. (4) When the award criteria of (1)(3) is used, the contracting authority can set the price or costs to ensure that competition is carried out based on qualitative criteria only. Section 163. If a contracting authority uses sub-criteria, such sub-criteria shall be related to the subject matter of the contract. (2) Sub-criteria are related to the subject-matter of the contract when they are related to the works, supplies or services to be supplied under the contract as regards every aspect and every step of their life cycle, including factors which form part of 1) the specific process of production or supply of or trade in the works, supplies or services related to or</p>	<p>The options of using price, costs or best price-quality ratio (BPQR) are described in section 162. As in the Directive, it is also here stated that social characteristics can be included as sub-criteria when accessing quality. That sub-criteria shall be related to the subject matter of the contract and that the process of production is considered relevant to the contract is established in section 163. Neither the law text, the remarks nor the official guide to the law gives example of the kind of social criteria, which may be included. It is however stated in the remarks to the law, that the examples of sub-criteria given in the law text is not exclusive, and that a contracting authority may chose the sub-criteria that meet their requirements.</p>	<p>Contracting authorities are allowed to use social award criteria when accessing the quality of a bid. The contracting authority shall set award criteria which are transparent and state in the contract notice, how the stipulated sub-criteria will be weighted.</p>	<p>The Public Administration Act and General administrative law All public authorities are required to comply with the principles of general administrative law which among other things demands equal treatment of citizens as well as sound financial administration while disallowing any pursuing of special private interest.</p>

<p>2) a specific process for another stage in their life cycle.</p> <p>(3) Subsection 2 applies even if such factors do not form part of the material content of the purchase.</p> <p>Section 164. A contracting authority shall fix award criteria which are transparent, and the criteria may not confer an unrestricted freedom of choice between tenders on the contracting authority. The criteria shall ensure effective competition for the contract.</p> <p>(2) In case of doubt, the contracting authority shall carry out effective verification of the information and documentation of the tender.</p> <p>Section 165. A contracting authority shall state its weighting of the stipulated sub-criteria. This does not apply when the assessment is based only on the award criteria price or costs, cf. section 162(1)(1 and 2).</p> <p>(2) The weighting may be stated by fixing a suitable interval.</p> <p>(3) If weighting according to (1) is not possible for objective reasons, the contracting authority shall state the criteria in the order of priority.</p>			
<p>Open questions</p>			
<p>Example of application from the national level (where applicable)</p>	<p>This provision does not allow contracting authorities to award criteria that are not linked to the subject matter of the public contract. Contracting authority cannot provide for award criteria that have the effect of conferring an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition (section 164).</p>		

Article 69 of the Directive ► Section 169 in The Public Procurement Act (abbreviated TPPA, in Danish: “Udbudsloven”)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Section 169 of TPPA: <i>Abnormally low tenders</i> If a tender appears to be abnormally low, the contract authority shall request the tenderer to account for the prices and costs stated in the tender within a suitable time limit, cf. (2). (2) A contracting authority may only reject a tender as abnormally low where the price or cost level tendered cannot be substantiated based on the account of the tenderer. The account may relate to 1) savings in connection with manufacturing methods for supplies or services or construction methods, 2) the technical solutions applied or an unusually favourable position of the tenderer regarding supply of the goods or services or performance of the work, 3) the originality of the work, supplies or services tendered by the tenderer, or 4) any state aid awarded to the tenderer, cf. (4). (3) The contracting authority shall reject a tender where the tender is abnormally low because the tenderer or the tenderer's sub-contractor has disregarded obligations in force in the field of environmental, social or labour law in accordance with EU law, national law or collective agreements or in accordance with the environmental, social or labour law obligations deriving from the conventions stated in Annex X to Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (the Official Journal of the European Union 2014, No. L 94, page 65). (4) A contracting authority may only reject a tender as abnormally on the grounds that the tenderer has received state aid where the tenderer has not proven within a reasonable time limit that the aid referred to is compatible with the internal market, cf. Article 107 of the Treaty on the Functioning of the European Union. (5) If the contracting authority rejects a tender owing to state aid, the contracting authority shall inform the Danish Competition and Consumer Authority hereof. The Authority will subsequently inform the European Commission.</p>	<p>This provision allows contracting authorities to reject abnormally low tenders where the tenderer is unable to give a sufficient explanation. This opportunity becomes an obligation where it has been established that the abnormally low price or costs proposed result from non-compliance with (international or national) social or labour law provisions.</p>	<p>If a tender appears to be abnormally low, the contract authority shall request the tenderer to account for the prices and costs stated in the tender. If the tender is abnormally low because the tenderer or the tenderer's sub-contractor has disregarded obligations in force in the field of environmental, social or labour law etc., the contracting authority is obliged to reject the tender.</p>	<p>Environmental law: <ul style="list-style-type: none"> • Danish Environmental Protection Act • Danish Livestock Farming Environmental Approval Act. • Protection of Nature Act • Planning Act • etc. Labour law and agreements: <ul style="list-style-type: none"> • The Collective bargaining agreements • Employment Contracts Act • The Danish Working Environment Act • The Holiday Act </p>
Open questions			
Example of application from the national level (where applicable)	<p>Contracting authorities are not allowed to reject a tender that appears to be abnormally low without having allowed the tenderer to give explanations. They are neither allowed to award a contract to a tender without having verified the relevant explanations as to the low level of the price or costs. In any case, contracting authorities are not allowed to accept a tender where it has been established that the abnormally low price or costs proposed result from non-compliance with (international or national) social or labour law provisions.</p>		

Article 70 of the Directive ► Section 176 in The Public Procurement Act (abbreviated TPPA, in Danish: “Udbudsloven”)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Section 176 of TPPA: <i>Conditions related to the performance of the contract</i> A contracting authority may fix special conditions of the performance of a contract. The conditions shall be related to the subject-matter of the contract, cf. section 163, and shall be stated in the contract notice or the additional procurement documents. Such conditions may include financial, innovation, environmental, social or employment considerations.</p>	<p>The provision allows contracting authorities to set additional conditions for performance of contracts. This may be done for any time in the life cycle of the product or service.</p>	<p>The provision allows contracting authorities to set additional conditions for performance of contracts. Which specific conditions contract authorities can/cannot choose to set are not regulated (although a wide range of examples are given in the remarks). It is, however, stressed that they have to be linked to the subject matter of the contract (and meet the criteria of equal treatment and transparency).</p>	<p>Since the agreement on the national budget in 2013, Danish contracting authorities have been required to consider the use of labour clauses (requiring contractors to create apprenticeships) for tenders of a certain size. If the CA chooses not to include an apprenticeship clause in these contracts, they are required to explain why. This is called the adhere or explain principle (<i>følg eller forklar-princippet</i>).</p> <p>It is a general requirement in Danish Law that civil servants act objectively and with pertinence. Thus a procurer's intent to, for example, promote the integration of disabled or disadvantaged persons should be legitimised by law or other relevant source of law. For municipalities the intent should also fall within their municipal authority.</p>
<p>Open questions</p>	<p>The Competition and Consumer Authority has published a guide on the use of social clauses as well as the “adhere or explain principle”: https://www.kfst.dk/media/53506/vejledning-om-sociale-klausuler-i-udbud.pdf</p>		
<p>Example of application from the national level (where applicable)</p>	<p>The provision does not allow the fixing of performance conditions which are not linked to the subject matter of the contract</p>		

Article 71 of the Directive ► Section 177 in The Public Procurement Act (abbreviated TPPA, in Danish: “Udbudsloven”)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Section 177 of TPPA: <i>Sub-contractors</i></p> <p>A contracting authority may require in the procurement documents that a tenderer states in its tender which elements of the contract the tenderer intends to sub-contract to third parties and which sub-contractors the tenderer suggests.</p> <p>(2) A contracting authority shall include a contract clause in connection with conclusion of works contracts and services contract which obligates the supplier to state name, contact information and legal representation for the sub-contractors used in connection with the performance of the contract. The information shall be provided at the time of commencement of performance, at the latest, provided they are known at the time.</p> <p>(3) A contracting authority may require in connection with supply contracts that the supplier states the name and contact information and legal representation of the sub-contractors used in connection with the performance of the contract.</p> <p>(4) A contracting authority may require the information under (2)(3) for sub-contractors further down the chain of sub-contractors.</p> <p>(5) A contracting authority may require that tenderers and candidates declare in their requests to participate or tender that sub-contractors are not subject to one of the situations which result in exclusion under sections 135-137. If a sub-contractor is subject to one or more of the grounds for exclusion under sections §§ 135-137, the contracting authority shall require replacement of the sub-contractor.</p>	<p>Article 71(1) is not transposed. The reason given by the implementation committee is, that it is directed at the Member States, and that it does not include stipulations, which are not already a part of the responsibilities of relevant authorities. See also the matrix for Article 18(2).</p> <p>Section 177(5) states that a contracting authority <u>may require</u> that tenderers declare that sub-contractors are not subject to one of the situations which result in exclusion under sections 135-137 (Article 57).</p> <p>Should this be the case, then the contracting authority shall require replacement of the sub-contractor.</p>	<p>The provision allows a contracting authority to require that tenderers declare that their sub-contractors are not subject to exclusion under sections 135-137 (Article 57).</p> <p>Should this be the case, the contracting authority is not only allowed, but required, to require replacement of the sub-contractor.</p>	<p>Laws and agreements also regulation contracts and cooperation between contractors:</p> <p>The Sale of Goods Act (<i>Købeloven</i>)</p> <p>Danish Contracts Act (<i>Aftaleloven</i>)</p> <p>Law on Public Licitations (<i>Licitationsloven</i>)</p> <p>Act on Competition (<i>Konkurrenceloven</i>)</p> <p>AB18: General Conditions for the provision of works and supplies within building and engineering (<i>Standardvilkår for byggebranchen</i>)</p>
Open questions			
Example of application from the national level (where applicable)			

Article 74 of the Directive ► Section 7 and 186 in The Public Procurement Act (abbreviated TPPA, in Danish: “Udbudsloven”)			
Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Title III of TPPA: Procurement of social and other specific services above the threshold</p> <p>Section 186: A contracting authority shall determine a procedure in accordance with section 2, including specification of award criteria for purchasing of social and other specific services, cf. section 7.</p> <p>Section 7: Title III shall apply to the formation of public contracts involving social and other specific services stated in Annex XIV of Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (the Official Journal of the European Union 2014, No. L 94, page 65) when the value of the contract equals minimum DKK 5,583,000 net of VAT.</p> <p>Section 2 (general principles): In public procurement procedures, a contracting authority shall observe the principles of equal treatment, transparency and proportionality pursuant to Title II-IV.</p> <p>(2) A public procurement procedure may not be designed for the purpose of exclusion from the scope of the present Act or limit competition in an artificial manner.</p>	<p>The special regime for social services is described in Title III (section 186 – 190) of TPPA. This is initially stated in section 7 of the act.</p> <p>Section 186 concisely states that a contracting authority purchasing these services, is required to determine a procedure in accordance with the general principles of equal treatment, transparency and proportionality.</p> <p>In the remarks it is stated, that a contracting authority is always allowed to apply the general rules for procurement above the threshold (described in Title II of TPPA), but not obliged to do so.</p>	<p>The provision allows a contracting authority to use the more lenient rules of the special regime for social services (in Danish named “Light-regimet”) for specific services stated in Annex XIV of the Directive.</p> <p>The contracting authority is allowed to choose to apply the more elaborate general rules for procurement, but not obliged to do so.</p>	<p>The Danish tender Act</p>
Open questions			
Example of application from the national level (where applicable)	The contracting authority is not allowed to determine a procurement procedure, which do not observe the principles of equal treatment, transparency and proportionality.		

Article 75 of the Directive ► Section 187 and 189 in The Public Procurement Act (abbreviated TPPA, in Danish: “Udbudsloven”)			
Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Section 187 of TPPA: In procurement of social and other specific services, a contracting authority shall publish a contract notice or a prior information notice. (2) Contract notices shall include the information described in Annex V, Part H, of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (the Official Journal of the European Union 2014, No. L 94, page 65) in accordance with the standard forms of the European Commission and the information on the procedure stipulated by the contracting authority in accordance with section 186. (3) Prior information notices shall include the information stated in Annex V, Part I of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (the Official Journal of the European Union 2014, No. L 94, page 65). The notice shall state that contracts will be awarded without further publication, and it shall invite interested economic operators to communicate their interest in writing. (4) The contract notice or the prior information notice shall be published either by electronic transmission to the Publications Office of the European Union or in the buyer profile of the contracting authority. (5) Subsection 1 may be deviated from in cases similar to those subject to sections 80-83.</p> <p>Section 189 of TPPA: No later than 30 days from the end of each quarter, the contracting authority shall submit notices concerning contacts concluded on the basis of section 186. (2) Contract award notices shall include the information stated in Annex V, Part J of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 public procurement and repealing Directive 2004/18/EC (the Official Journal of the European Union 2014, No. L 94, page 65). The notice shall be prepared on the standard form of the European Commission. (3) After the conclusion of the procedure subject to section 186, a contracting authority shall prepare a written report in accordance with section 174.</p>		<p>Section 187 states the rules applicable to publication of notices for public contracts under the special regime for social services. The provision requires the contracting authority to publish either a contract notice or a prior information notice. The content requirements to the contract notice is stated in section 187 (2). The content requirements to the prior information notice is stated in section 187 (3). Section 189 obliges a contracting authority to make known the results of the procurement procedure by means of a contract award notice. They are allowed to group such notices on a quarterly basis.</p>	
Open questions			
Example of application from the national level (where applicable)			

Article 76 of the Directive ► Section 188 in The Public Procurement Act (abbreviated TPPA, in Danish: “Udbudsloven”)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Section 188 of TPPA: A contracting authority shall award contracts in accordance with the procedure stipulated by the contracting authority, cf. section 186. (2) Communication to candidates and tenderers shall take place in accordance with section 171. (3) A contracting authority may not conclude a contract until after the expiry of the standstill period under section 3(1) or (2) of the Act on the Danish Complaints Board for Public Procurement, at the earliest.</p>		<p>The TPPA includes very few requirements to the procedure for awarding contracts under the special regime for social services. According to the remarks to section 188, the contracting authority is free to decide on a procedure as long as it enables interested tenderers to submit a bid, determine the award criteria and adhere to the requirements of communication set out in section 171. The contracting authority is free to decide on the award criteria as long as they adhere to the principles of equal treatment and transparency set out in section 2. This may include considerations with regards to “quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation” (the remarks include a 1:1 translation of this formulation)</p>	
Open questions			
Example of application from the national level (where applicable)			

Article 77 of the Directive ► Section 190 in The Public Procurement Act (abbreviated TPPA, in Danish: “Udbudsloven”)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Section 190 of TPPA: <i>Reserved contracts for organisations for certain services</i> The contracting authority may reserve the right to participate in the procurement procedure for organisations solely engaged in the health, social and cultural services described in section 186. (2) An organisation in accordance with the description in (1) shall fulfil the following conditions: 1) The objective of the organisation is the pursuit of a public service work linked to the delivery of the services described in (1). 2) The profit is reinvested with a view to achieving the organisation’s objectives. Where profits are distributed or redistributed, this shall be based on participatory considerations. 3) The structures of management or ownership of the organisation performing the contract are based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders. 4) The organisation has not been awarded a contract for the services concerned by the contracting authority concerned pursuant to this provision within the past three years. (3) The term of the contract may not exceed 3 years. (4) The contract notice or prior information notice shall include reference to this provision.</p>	<p>A contracting authority can reserve the right to participate in the procurement procedure for organisations, which fulfill certain requirements in terms of objective, profits and management / ownership.</p>	<p>Section 190 gives contracting authorities the possibility to reserve the right to participate in the procurement procedure for organisations, which fulfill certain requirements in terms of objective, profits and management/ownership. The specific requirements are stated in section 190(2). The fourth requirement states, that an organisation cannot be awarded the contract if it has previously been awarded a contract for the same service, by the same contracting authority using this provision. The contract notice must make reference to section 190. The provision can only be used for specifically listed service stated in the remarks to the Act. CPV: 75121000-0, 75122000-7, 75123000-4, 79622000-0, 79624000-4, 79625000-1, 80110000-8, 80300000-7, 80420000-4, 80430000-7, 80511000-9, 80520000-5, 80590000-6, from 85000000-9 to 85323000-9, 92500000-6, 92600000-7, 98133000-4, 98133110-8.</p>	<ul style="list-style-type: none"> Act on Registered Social Enterprises: It is specifically mentioned in the comments to the law that organisations registered according to this act can bid for these contracts. However, only if they adhere to listed criteria. The criteria of the Act on Registered Social Enterprises are very similar to criteria 1-3 of section 190. They are, however, not identical, and this is a source for confusion. Ideally these criteria would be compatible, so that a registered social enterprise would automatically adhere to criteria 1-3.
<p>Open questions</p>	<p><u>Scope of prohibition of consecutive contracts:</u> In the formulation of TPPA, it seems quite clear that a total of three circumstances are required to disqualifying an organisation from being awarded a contract using this provision: The organisation has been awarded a contract:</p> <ul style="list-style-type: none"> - For the same service - By the same contracting authority - Using this provision. <p>The official guide by the Danish Competition and Consumer Authority supports this interpretation</p>		

Example of application from the national level (where applicable)

The provision cannot be used to award a contract to economic operators that have been already in charge of the same services within the past three years – if the contract was given using this provision.
Duration of the awarded contract may not exceed three years.
The provision cannot be used for other services than the ones specifically listed.