

Ministry of Trade, Industry and Fisheries
Att: Carsten Eriksrud
PO Box 8090 Dep
Norway

Your ref.:
15/1316-2

Our ref.:
2015/199-7

Executive officer/dir. line:
Bjorn Nilsen, +47 75512908

Location/date:
Bodø, 25.3.2015

Dear Sirs,

Subject: Own-initiative case against Norway for breach of EEA rules on public procurement resulting from the direct award of a public contract on IT service.

On its own initiative, ESA has established an infringement case against Norway for non-compliance with the EEA public procurement rules for having awarded an IT contract without any tender procedure. ESA requests answers to the following six questions:

1. Confirmation that a public contract on IT services was in fact awarded to DIPS by Helse Nord without launching a tender procedure in 2003;
2. An explanation of the reasons for the award of the 2003 contract without launching a tender procedure;
3. Confirmation that following the launch of a tender procedure in 2011 concerning the provision of IT services relating to electronic patient records, a public contract was awarded to DIPS;
4. Please provide any factual information regarding the 2011 tender procedure (subject matter of the public contract, award criteria, number of candidates/tenderers, identity of the tenderer the contract was awarded to, number of applications for legal review, etc);
5. A copy of the contract concluded with DIPS in 2003, the contract concluded with DIPS in 2011 and other relevant documentation;
6. Information relating to the current contractual relationship between Helse Nord RHF and DIPS.

In the following Helse Nord RHF (Northern Norway Regional Health Authority) provides consecutive answers to ESA's questions.

1. Award of contract to DIPS in 2003

Helse Nord RHF confirms that it awarded a contract to DIPS ASA in 2003 without first launching a public tender procedure.

In 2004 Helse Nord RHF was criticised by the Office of the Auditor General of Norway for illegal direct procurement from DIPS ASA. In the criticism from the Office of the Auditor General in 2004 it is stated that:

«In the documentation from Helse Nord RHF it is stated that the regional enterprise did not intend to comply with the rules in deciding on a new IT patient system since, based on previous experience, it was seeking to enter into an agreement with DIPS ASA. In the view of the Office of the Auditor General it is both unfortunate and a matter of concern that Helse Nord RHF has so deliberately sought to avoid commercial disclosure and openness in the procurement procedure for extensive IT patient systems for all hospitals within the Helse Nord RHF group. The Office of the Auditor General notes that the Ministry of Health agrees that procurement should have taken place on the basis of open competition.»

Following the criticism from the Office of the Auditor General, Helse Nord RHF acknowledged that this was an error of judgement and that procurement should have been on the basis of a tender procedure.

The criticism from the Office of the Auditor General was considered by the parliamentary Standing Committee on Scrutiny and Constitutional Affairs (the Committee) on 8 March 2005.

The Committee made the following pronouncement:

«The Committee notes that at no time was it Helse Nord RHF's intention to comply with the procedures required by law for the procurement of uniform computer software for the management of patient-related information in the hospitals in the health region in the north of Norway. The Committee wishes to underline that this is a serious breach of the regulations. The Committee wishes to emphasise that such a course of action could mean that the procured items are more expensive than necessary and that there could be greater risk of fraud. Moreover, Helse Nord RHF could risk actions for damages being brought by alternative suppliers. The Committee expects that the practice described by the Office of the Auditor General as "both unfortunate and a matter of concern" has been terminated.

The Committee believes that if public bodies consider the procurement regulations to be too complicated, too ineffective and/or that the amounts covered by the regulations are too low, information to this effect must be given to the decision-making authorities so that, in the event, the regulations can be amended.»

In 2003 Helse Nord RHF asked for advice for consideration of the possibility of having the same IT system used by all of our hospitals. The subject of our questions to external lawyers

and consultants was whether the regulations provided any scope for direct procurement of a product for the entire enterprise group which 10 of our 11 hospitals already had. The advice from two legal firms and one consultancy was that the regional health enterprise should carry out a public procurement.

Since 2004 Helse Nord RHF has therefore never disputed that the award of a contract to DIPS ASA in 2003 was to be considered as a direct procurement that was not in compliance with the rules.

Immediately after the criticism from the Office of the Auditor Helse Nord RHF improved its procurement function. A common procurement system was established for the entire region. As part of this, new procurement procedures were established. In collaboration with the health enterprises, we also set up a project organisation with two employees whose task was to improve procurement work.

2. Reasons why a contract was awarded to DIPS without first launching a tender procedure

The decision that all of the hospitals should have the same computer systems was adopted by the board of directors of Helse Nord RHF on its consideration of Helse Nord RHF's ICT strategy in 2002. The ability of computer systems to communicate with each other is best for both patients and professionals. Accordingly, the Office of the Auditor General has recently criticised the fact that there is too little coordination of the ICT function in the Norwegian health sector. Helse Nord has been working on cooperation of this kind for more than 12 years.

In 2003 the University Hospital of North Norway in Tromsø was the only one of 11 hospitals in Helse Nord that did not have the same computer system for electronic patient records. Helse Nord RHF then did as mentioned previously, in order to have uniform computer systems, and effected a direct procurement from DIPS ASA in contravention of the rules.

A supplementary explanation is the fact that Helse Nord RHF was in very strained financial situation in 2003, with a deficit of several hundred million NOK, and with no prospect of improvement in the years immediately ahead. Any decision to replace the computer systems in all 11 of our hospitals would have been extremely expensive, and it would have delayed the process of establishing uniform computer systems in every area.

Please refer to: http://www.helse-nord.no/arsmelding2003/Design/Okonomi/Arsmelding_Okonomi_Styretsaarsberetning.htm

A third factor was the fact that because of our knowledge of the supplier market for patient medical record systems we believed there was little likelihood that there were others who could provide more future-oriented functionality than what we already had. Helse Øst RHF (Eastern Norway Regional Health Authority) had invited tenders in 2003 and had awarded a

contract to DIPS ASA in October, two months before we awarded our contract. We therefore knew that DIPS ASA had already won the tender in the biggest health region.

The explanations do not justify the omission to invite tenders, but they do show the possibilities that we believed existed at that time.

3. Implementation of tender procedure 2009–2011

The question of a tender procedure was relevant matter for us in the period 2004–2008 since we had a need to award a contract in the manner required by law, and also in order to have clinical ICT systems that would enable us to meet future requirements.

For Helse Nord RHF, the information we received about the supplier market was disquieting. The lack of competition, with the risk of very high costs, gave grounds for concern.

Two of Norway's five health regions, Helse Sør RHF and Helse Vest RHF, made procurements and allocated contracts to the Finnish company TietoEnator in 2004 and 2005. Subsequently, both regions cancelled the contracts as the supplier was unable to deliver. New procurements had to be made whereupon Helse Sør-Øst RHF (previously Helse Sør RHF and Helse Øst RHF) awarded a contract to DIPS ASA in January 2007 and Helse Vest RHF awarded a contract to DIPS ASA in October 2007.

In 2008 preparations were started for the new procurement of clinical ICT systems by Helse Nord. Electronic >health records (EHR) for patients were one of six systems which were to be put out to tender. A key element of this process was designing the basis of procurement to ensure that competition was achieved. Helse Nord RHF's market assessments and various strategies aimed at promoting competition are described in both the procurement project mandate and the procurement strategy to stimulate competition. In both of these documents Helse Nord RHF was transparent and it is accepted that the award of the contract to DIPS in 2003 can be criticised.

Special reference is made to page 9 of the procurement strategy document where the following is described:

«In order to prepare the way for the broadest possible competition, it has been decided that offers for one or more of the system areas covered by the procurement may be submitted. Potential niche supplier will therefore be able to participate and submit offers for parts of the delivery. This will send a useful signal to the market, also with reference to future tenders.

Historical events, such as the award of a contract to DIPS in 2003 as a illegal direct procurement, as has also been pointed out by the Office of the Auditor General, show that it is in Helse Nord's interest to encourage competition in so far as this is practically possible.

The competition requirement is also observed in the criteria applied to select participants and in the evaluation of tenders. The suppliers will be subject to pre-qualification on the basis of their technical and professional qualifications related to the area where they have applied for qualification, and each area will be evaluated separately. Non-discriminatory allocation criteria will be established, even though all of the areas of application involved will be subject to overall evaluation.

For example, there will be no scope for tenderers to link economic terms in the form of discounts in order to be awarded several parts of a delivery».

Implementation of the tender procedure led to the entry of a new supplier in the market in competition with DIPS ASA in the area of EPJ/PAS (EHR). In this light, it must be said that the competition strategy established in connection with procurement was successful.

The procurement preparation process, including functionality specifications etc. involved many medical specialists, nurses and other personnel groups. Specification requirements were largely based on:

- National standards and public requirements.
- Functionality requirements stipulated by our own professionals.
- The use of requirements stipulated for procurements in other health regions.

Our procurement requirements were published and we experienced competition in all areas. The tenders were evaluated in groups by specialists from various areas. Common to all involved in the process was that their impartiality was thoroughly assessed in advance. Extensive rounds of negotiations were held (in total five in some areas) before the recommendations were submitted to the managing director. The recommendations were unanimous in all groups.

This resulted in the award of the following contracts on 9 March 2011:

1. Electronic patient medical records and patient administration (EPJ/PAS): DIPS ASA
2. Radiology information (Radiology Information Systems): Sectra
3. Laboratory information systems (Laboratory Systems): DIPS ASA
4. Electronic requisitioning of laboratory services (Electronic Requisitioning): DIPS ASA
5. Pathology: Tieto
6. PACS (Picture Archiving and Communication System): Sectra

4. Documentation of tender procedure implemented in period 2009–2011

There is a considerable number of documents relating to the procurements carried out in the period 2009–2011. In the first instance Helse Nord RHF is sending only those documents

which we believe are significant, at top level, in order to answer the questions that have been asked by ESA. If necessary, the total documentation will be sent, the quantity corresponding to the quantity shown in the enclosed procurement protocol.

The documents have been filed under the following subdirectories:

1. Procurement mandate
2. Procurement strategy
3. Publication of invitation to tender
4. Tendering conditions (EPJ/PAS – SYSTEM AREA 1)
5. Procurement protocol for all system areas
6. Contract copies:
 - a. Contracts awarded in 2003
 - b. Contracts awarded in 2011 – EPJ/PAS
 - c. Contracts awarded in 2011 – Laboratory Systems
 - d. Contracts awarded in 2011 – Electronic Requisitioning

The tendering conditions with appendices are located in the enclosed contracts, cf. question 5.

KOFA complaints

Following the award in 2011 two tenderers (in the field of Laboratory Systems (LAB) and Radiology Information Systems (RIS) sent complaints to KOFA (The Norwegian Complaints Board for Public Procurement). In the case of the LAB complains, KOFA concluded that Helse Nord RHF had complied with the regulations issued pursuant to the Public Procurement Act (KOFA case 2011/110). The RIS complaint was not considered by KOFA since it was obvious that it could not succeed (KOFA case 2011/127). KOFA's rulings can be accessed on the complain body's website at: www.kofa.no, or on Helse Nord's website at: www.helse-nord.no/aktuelt/helse-nord-rhf-brot-loven-om-a-ga-ut-pa-anbud-article126851-19948.html

5. Contract copies from 2003 and 2011

Contracts awarded to DIPS in 2003 and 2011

Helse Nord RHF's group contract with DIPS ASA dated 22 December 2003 and the contract in 2011 are enclosed, in copy form. Variation documentation related to the contract in 2011 is also enclosed.

Helse Nord RHF wishes to point out that both contracts and the variation documentation contain information that is subject to a statutory duty of confidentiality, cf. FOR-2006-04-07-402 Section 3-6 cf. Public Administration Act, Section 13, cf. also Directive 2004/18 EU art. 6.

DIPS ASA has agreed that ESA shall have access to all information in the contracts, provided that no information from the contracts is made public. A copy of the contracts where

confidential information is redacted can however be provided if ESA wishes to use specific information in the contracts for public purposes.

7. Present contractual relationship between DIPS and Helse Nord RHF

Helse Nord RHF is in the process of implementing the system procurement that was carried out in 2011. Implementation has been organised as a separate programme which will run until the end of 2016.

Further information about implementation of the region's common clinical ICT systems introduction can be accessed at: www.helse-nord.no/fiks/category31090.html

The introduction of systems of this kind in the hospitals represents one of most important strategic choices that Helse Nord RHF has implemented on the ICT side. The long-term nature of the choices that have been made has been similarly communicated to the market and among the areas where this is reflected is in the use of pricing as an evaluation criterion whereby suppliers are evaluated in an 8-year perspective. Where ICT systems relate to the core activities of hospitals, competitive tendering with greater frequency is inappropriate.

It seems that practice in Europe corresponds approximately to Helse Nord RHF's experience, where the lifetime of contracts related to systems of this kind is up to 15 years¹.

"This vastness of the scope of eHealth procurement and its cross-value chain impact explain the intimidation that is faced when engaging in procuring them. The daunting nature of eHealth services' scope is not lightened by the durability expected from eHealth services. An eHealth solution, such as an EHR, could be in place for as long as 15 years. Therefore, avoiding error in procuring is even more crucial than usual. This is before the size of the investment required for large-scale or main-streamed services is taken into consideration or the accompanying attention attracted by such sums of what is often public money".

Without seeking to excuse the evaluations that were made in 2003, Helse Nord RHF hopes that the process initiated in 2009, and which will continue until at least the end of 2016, shows how demanding procurements, system changes and the introduction of clinical systems at hospital are.

Concluding remarks

In 2012 Helse Nord RHF was contacted by the company Empirica which was carrying out a survey to identify good practice in the area of ICT procurement, under an assignment for the

¹ Study on enhancing procurement of ICT solutions for healthcare; European Commission, DG Communications Networks, Content and Technology Contract Number - 30-CE-0387926/00-81, Belfast/Bonn, 30th August 2012

EU Commission. The aim was draw up specific guidelines as an aid to the enhancement of procurement processes in this area.

The aim of the ProHealth study is to enhance the procurement of ICT solutions for health-care by providing guidelines to decision makers and procurers within public healthcare authorities and care delivery organisations. The guidelines are to help them to conduct consistent and systematic planning processes when strategic considerations point to adopting eHealth solutions and how to transfer the planning to the procurement specification and process.

The report "Study on enhancing procurement of ICT solutions for healthcare" chose 10 examples of the procurement of EHR systems which represent good practice.

Helse Nord RHF was one of those chosen.

The EU Commission's approach is based on the experience of others and can be instrumental in increasing the level of enhanced public procurement related to EHR solutions for the health sector in the EU. Helse Nord RHF is pleased to participate in studies of this type and to share available experience and documentation, not only with other regions in Norway but also with other countries. The most recent instances include Helse Nord RHF's tender documents which were sent to Landspítali, Island at <http://www.landspitali.is/um-landspitala/languages/english/>

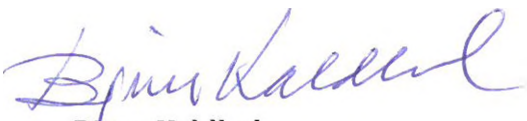
The results of the ProHealth study referred to above have been published and can be accessed at: <http://www.pro-ehealth.eu/index.php#page=news/news>

Conclusion

Helse Nord RHF hopes that the documents provided are sufficient to answer ESA's questions.

Should there be any further questions, the Ministry of Trade, Industry and Fisheries is requested to contact Helse Nord RHF.

Yours faithfully,



Bjørn Kaldhol
Chairman of the Board
Helse Nord RHF



Lars H. Vorland
CEO
Helse Nord RHF

Enclosure(s)

1. Procurement mandate
2. Procurement strategy
3. Publication of invitation to tender
4. Tendering conditions (EPJ/PAS - SYSTEM AREA 1)
5. Procurement protocol for all system areas
6. Contract copies:
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