

K E N D E L S E

Ansaldo STS SpA
(advokat Lotte Hummelshøj, København)

mod

Banedanmark
(kammeradvokaten ved advokat Kristian Hartlev)

Ved udbudsbekendtgørelse nr. 2010/S 39-057711 af 23. februar 2010 udbød Banedanmark (indklagede) som udbud med forhandling efter direktiv 2004/17/EF (forsyningsvirksomhedsdirektivet) to »Design-Build-Maintain« delkontrakter om udskiftning af det nuværende signalsystem på fjernbanen med et såkaldt ERTMS level 2 system - én delkontrakt vedrørende den østlige del af fjernbanenettet (»East lot«) og én delkontrakt vedrørende den vestlige del af fjernbanenettet (»West lot«). Værdien af »East lot« anslås i bekendtgørelsen til 3 – 4 mia. kr. ekskl. moms., og værdien af »West lot« anslås til 4 – 5,5 mia. kr. ekskl. moms. Skillelinjen mellem de to delkontrakter var Lillebælt. De to kontrakter kunne ifølge udbudsbetingelserne ikke tildeles samme tilbudsgiver. Udbuddet indgik i en af Folketinget besluttet samlet udskiftning af signalanlæg på fjernbanen og S-banen til en samlet værdi af 18 mia. kr.

Klagenævnet har den 22. december 2011 modtaget en klage fra Ansaldo STS SpA (klageren) over udbuddet.

Klageren har anmodet om, at klagenævnet tillægger klagen opsættende virkning.

Indklagede har protesteret mod, at der tillægges klagen opsættende virkning.

Klagenævnet har truffet afgørelse vedrørende opsættende virkning på det foreløbige grundlag, der foreligger, nemlig klageskrift med bilag 1 – 14 og svarskrift med bilag A – M samt processkrift af 13. januar 2012 fra klageren med bilag 15-26l, jf. dog nedenfor om bilag 26a-26l, og processkrift af 16. januar 2012 fra indklagede med bilag N-S.

Forud for afgivelsen af de seneste processkrifter har klagenævnet som følge af en meddelelse fra klageren om at have til hensigt at afgive et yderligere processkrift ved e-mail af 12. januar 2012 meddelt parterne følgende:

»Henset til den korte frist for klagenævnets afgørelse, kompleksiteten af udbuddet og omfanget af de allerede modtagne processkrifter og bilag har klagenævnet ikke mulighed for ved sin stilling til begæringen om opsættende virkning at tage hensyn til et supplerende processkrift fra klageren, som indgives senere end fredag den 13. januar 2012, kl. 12. Det forudsættes endvidere, at et sådant klageskrift ikke indeholder nye påstande, væsentlige nye anbringender og/eller bilag af væsentlig ny og/eller mere omfangsrig karakter, samt at såvel processkrift som eventuelle bilag indgives i elektronisk form.«

Klageren er, uagtet det anførte om forudsætningerne vedrørende et yderligere processkrift fra klageren, i processkriftet af 13. januar, fremkommet med en ny påstand 1 og har ændret og udbygget flere af de hidtidige påstande. Herudover har klageren indgivet et bilag 26a-26l, som samlet er 450 sider tætskrevet engelsksproget tekst. Klageren har i processkriftet af 13. januar 2012 om disse bilag, som er fremlagt til støtte for den nye påstand 6, anført:

»Det er som nævnt klagerens grundlæggende opfattelse, at en række udsagn, som er anført i bilag 7 [evalueringsrapporten vedrørende klagerens tilbud], hvori klagerens tilbud bedømmes negativt, ikke er sagligt begrundet i tilbuddenes indhold.

Klager fremlægger endvidere som bilag 26a-26l med underbilag en redegørelse herfor. Denne redegørelse vil blive yderligere uddybet og forklaret i senere processkrifter og herunder den mundtlige forhandling i klagenævnet. Redegørelsen med bilag erstatter bilag 11-14, der herefter udgår, da der er overlap.«

Påstand 1 i processkriftet af 13. januar 2013 er ny. Påstanden synes imidlertid, jf. de i processkriftet anførte anbringender, alene at være udtryk for et anbringende, som fremgik allerede af klageskriftet, om, at indklagede - som følge af politisk indblanding - ændrede en første tilbudsbedømmelse og indstilling vedrørende de endelige tilbud, hvorefter klageren stod til at vinde én af de to delkontrakter, således, at resultatet i stedet blev, at de to delkontrakter blev tildelt to andre tilbudsgivere. De øvrige nye/ændrede påstande synes at være udtryk for en præcisering af de i klageskriftet fremsatte påstande. Efter omstændighederne accepterer klagenævnet derfor at tage de nye/ændrede påstande i betragtning ved sin stillingtagen til begæringen om opsættende virkning. Henset til omfanget og karakteren af bilag 26a-26l og den manglende nærmere redegørelse for bilagenes indhold fra klagerens side i processkriftet tages disse bilag ikke i betragtning i relation til spørgsmålet om opsættende virkning. Klagenævnet inddrager imidlertid de bilag, som bilag 26a-26l ifølge processkriftet erstatter, ved afgørelsen herom.

Klagens indhold:

Klagerens processkrift af 13. januar 2012 indeholder følgende påstande:

Påstand 1

Klagenævnet skal konstatere, at indklagede har handlet i strid med forsyningsvirksomhedsdirektivets artikel 10 om ligebehandling og gennemsigtighed ved tilbudsevalueringen og den heraf følgende beslutning om at tildele kontrakten på West Lot til Thales-BBR, idet indklagede har foretaget en åbenbart urigtig og mangelfuld tilbudsevaluering.

Påstand 2 (tidligere påstand 1)

Klagenævnet skal konstatere, at indklagede har handlet i strid med forsyningsvirksomhedsdirektivets artikel 10 om ligebehandling og gennemsigtighed ved efter tildeling af kontrakterne at indlede forhandlinger med de to valgte leverandører, der fører til væsentlige ændringer i udbudsbetingelserne og de afgivne tilbud.

Påstand 3 (tidligere påstand 2)

Klagenævnet skal konstatere, at indklagede har handlet i strid med forsyningsvirksomhedsdirektivets artikel 10 om ligebehandling og gennemsigtighed og artikel 55 i forsyningsvirksomhedsdirektivet ved under evaluerin-

gen af tilbuddene i henhold til underkriterierne Technical Solution og Project and Maintenance Execution at have anvendt en sproglig evalueringsmodel, som medførte en vilkårlig og uigennemsigtig karaktergivning, som ikke på tilstrækkelig vis afspejler forskellene imellem de enkelte tilbud.

Påstand 4 (tidligere påstand 3)

Klagenævnet skal konstatere, at indklagede har handlet i strid med forsyningsvirksomhedsdirektivets artikel 10 om ligebehandling og gennemsigtighed ved at have foretaget en samlet helhedsbedømmelse af de opstillede krav, som ikke afspejler, at det var fastsat i udbudsbetingelserne, at en række af delkriterierne skulle prioriteres (vægtes) højere eller lavere end andre ved evalueringen af tilbuddene i relation til enkelte delkriterier til underkriterierne Technical Solution og Project and Maintenance Execution.

Påstand 5 (præcisering af tidligere påstand 3 og 4)

Klagenævnet skal konstatere, at indklagede har handlet i strid med forsyningsvirksomhedsdirektivets artikel 10 om ligebehandling og gennemsigtighed ved ikke at anvende samme evalueringsmodel på alle underkriterierne, hvorved det samlede evalueringsresultat ikke afspejler den indbyrdes vægtning af underkriterierne, som var fastsat i udbudsbetingelserne.

Påstand 6 (præcisering af tidligere påstand 4)

Klagenævnet skal konstatere, at indklagede har handlet i strid med forsyningsvirksomhedsdirektivets artikel 10 om ligebehandling og gennemsigtighed ved uberettiget og på usagligt grundlag at have tildelt klagers tilbud en væsentligt ringere score på underkriteriet Technical Solution end de to vindende tilbudsgiveres score, da denne væsentlige forskel ikke sagligt kan begrundes i forskellene i tilbuddenes indhold.

Påstand 7 (tidligere påstand 5)

Klagenævnet for Udbud skal annullere indklagedes beslutning af 16. december 2011 om at tildele kontrakt vedrørende »West Lot« til Thales-Balfour Beatty Rail konsortiet (»Thales-BBR«) og kontrakt vedrørende »East Lot« til Alstom konsortiet (»Alstom«).

Andre oplysninger i sagen:

Udbuddets forløb

Følgende 6 virksomheder blev prækvalificeret i maj 2010:

- Klageren
- Bombardier Transportation Denmark A/S
- Invensys Rail
- Et konsortium bestående af Siemens A/S og Siemens AG
- Et konsortium bestående af 3 Alstom selskaber (»Alstom«)
- Et konsortium bestående af Thales og Balfour Beatty Rail (»Thales-BBR«)

De pågældende virksomheder modtog udbudsmaterialet »Tender Documents«, som ifølge den endelige version af »Tender Conditions« punkt 3 samlet består af (de rettelsesmarkeringer, som fremgår af den endelige version, og som viser ændringer i forhold til den første version, er ikke medtaget her):

»

- Tender Overview
- Tender Conditions
 - Attachments
 - [not relevant in BAFO]
 - [not relevant in BAFO]
 - [not relevant in BAFO]
 - 4 Template for Tenderer's Questions
 - 5 Explanation of Award Criteria
 - 1 Price Evaluation Sheet
 - [not relevant in BAFO]
 - 8 Complete list of ITTs
- Contract
- Appendix 1 Time Schedule
 - Attachments
 - 1 General Time Schedule
 - 2 Definition of Milestones
 - 3 Overall Time Schedule East
 - 4 Overall Time Schedule West
- Appendix 2 Customer's Environment
 - Attachments
 - 1 Site Information Harddisk

- 2 File List of Site Information Harddisk
- 3 Overall Signalling and Interlocking Principles
- 4 Strækningsregister
- 5 Type Examples of Level Crossings
- 6 Site Information Stick
- 7 Files List of Site Information Stick
- Appendix 3.1 Delivery Description
 - Attachments
 - 2 Summary of Concepts
 - 3 Fjernbane Signalling System Tender Compliance Matrix
 - 4 Fjernbane System Scope and Boundary Diagram
 - 5 Candidate Architecture Diagram
 - 6 Fitment Scope of Level Crossings
 - 7 Sidings, Depots and Stabling Tracks East
 - 8 Sidings, Depots and Stabling Tracks West
 - 9 Level Crossings Cat.3 East
 - 10 Level Crossings Cat.3 West
 - 11 Online Key Management Concept
- Appendix 3.2 Functional Requirements
 - Attachments
 - 1 Fjernbane Operational Concept
 - 2 Business Process Diagrams
 - 3 TMS Concept
 - 4 Hand-held Terminal Concept
- Appendix 3.3 Non Functional Requirements
 - Attachments
 - 1 List of Public Standards and Codes
 - 2 List of BDK Standards and Codes
 - 4 Basic Engineering Rules
 - 5 Bascule Bridge Principles
 - 6 Environmental Requirements
- Appendix 3.4 Security Requirements
 - Attachments
 - 1 Retningslinier for adgangsstyring til Banedanmarks systemer informationer og netværk
 - 2 Retningslinier for reetablering af systemer og data
 - 3 Retningslinier for logning og overvågning
 - 4 Civil Works Risk Assessment 2010
 - 5 Retningslinier for medarbejdersikkerhed
- Appendix 3.5 Interface Requirements
 - Attachments
 - 1 Transition Zones to S-bane
 - 2 Fjernbane Transition Zones
 - 3 Interfaces to legacy Interlockings
 - 4 Interface Denmark – Sweden
 - 5 Interface DK - DE

- Appendix 3.7 Training Requirements
 - Attachment
 - 2 Training Matrix
- Appendix 3.8 Options
 - Attachment
 - 17 Conceptual Timetable for 2025 of the Fehmarn Belt Project
- Appendix 4 Documentation
 - Attachments
 - 1 Documentation Tables
- Appendix 5 Maintenance
 - Attachments
 - 7 Possessions Needed for Maintenance
- Appendix 6 Service Level Goals
 - Attachments
 - 1 Conceptual Timetable
 - 2 Rolling Stock Data
 - 3 Failure Mode Effects and Criticality Analysis Fjernbane
 - 7 Large nodes (East)
 - 8 Large nodes (West)
 - 9 Rolling Stock Information
- Appendix 9 Change Management
 - Attachments
 - 1 Change Order Template
- Appendix 10 Project Organisation / Execution
 - Attachments
 - 2 Templates
- Appendix 11 Customer's Participation
- Appendix 12 Payment and Pricing Schedules
 - Attachments
 - 1 Pricing Schedules for the Delivery (East)
 - 2 Pricing Schedules for the Delivery (West)
 - 3 Pricing Schedules for Maintenance (East)
 - 4 Pricing Schedules for Maintenance (West)
 - 5 Pricing Schedules for the Options (East)
 - 6 Pricing Schedules for the Options (West)
 - 7 Pricing Schedule for Unit Prices
 - 8 Change Agreement Overview
 - 9 Pricing of Customer's Participation
 - 10 Pricing Schedule for Spare Parts, Consumables and Special Tools
- Appendix 13 Incentives and Penalties
- Appendix 14.1 Installation
 - Attachments
 - 4 Change-over System Concept

- 5 Geographical Split of Migration Steps
- Appendix 14.2 Testing and Commissioning
 - Attachments
 - 4 Concept on the Joint Test Laboratory
- Appendix 14.3 Decommissioning
- Appendix 15 License Terms for Software and Escrow Agreement
 - Attachment
 - 2 Escrow Agreement
- Appendix 16 Processes
 - Attachments
 - 1 Customer's Requirements Management Plan
 - 2 OR – Packages Overview
 - 3 OR – Packages Analysis and Study
 - 4 Stage Gate Procedure
 - 5 Customer's Authorities Approval Process Plan
 - 6 Customer's Safety Plan Fjernbane
 - 7 Customer's Risk Management Plan
 - 8 Customer's Pre Tender Risk Register
 - 9 G-ISA Scope of Work
 - 10 The G-ISA's proposed G-ISA – S-ISA split of Responsibilities
 - 11 Customer's draft Hazard List
 - 12 SAP PM Overview
 - 27 Customer's Interoperability Certification Plan
 - 31 NSA Guide on Authority Approval
- Appendix 17 Glossary
 - Attachment
 - 1 Glossary List
- Appendix 18 Model Infrastructure Sub-contract
- Appendix 19 Conditions for Civil Works
- Appendix 20 Model Non-Disclosure Agreement
- Appendix 21 Questions and Answers
- Appendix 22 Arbitration Agreement governing Disputes relating to On Demand Guarantee
- Appendix 23 Model Parent Company Guarantee

Appendices 3.6, 7 and 8, Attachment 6 to Tender Conditions and Attachment 3 to Appendix 3.3, are **not used**.

All Functional and Non Functional Requirements in Appendices 3.2 and 3.3 are an extract from DOORS, which the Tenderers also have access to. In case of discrepancy between Requirements in Appendices 3.2 and 3.3 compared to DOORS it is Appendices 3.2 and 3.3 that are applicable.

In case of discrepancy between Requirements in Appendix 3.5 compared to DOORS it is Appendix 3.5 that is applicable.«

De prækvalificerede afgav herefter i overensstemmelse med Tender Conditions punkt 7 inden for fristen herfor den 14. december 2010 et forhandlingstilbud (»first negotiation tender« forkortet »FNT«).

Efter en i udbudsbetingelserne fastsat forhandlingsproces i 1. halvår af 2011 justerede indklagede udbudsbetingelserne i overensstemmelse med den i udbudsbetingelserne fastlagte procedure. De prækvalificerede afgav herefter inden for fristen herfor den 14. september 2011 på dette grundlag deres endelige og bindende tilbud (»Best And Final Offer« forkortet »BAFO« - i det følgende »BAFO-tilbud«). Efter det oplyste var tilbuddene omfangsmæssigt på ca. 2.000 sider hver.

Efter en yderligere proces med afklarende spørgsmål fra indklagedes side traf indklagede den 16. december 2011 beslutning om at tildele delkontrakten om »East Lot« til Alstom og »West Lot« til Thales-BBR. Indklagede underrettede de øvrige tilbudsgivere herom per e-mail den 16. december 2011. Med underretningen fulgte en individuel evalueringsrapport »BAFO Assesment Report« til hver tilbudsgiver.

Minimumskrav og tildelingskriterier i udbudsbetingelserne

Af punkt 4.5 i »Tender Conditions« i udbudsbetingelserne (seneste version her gengivet uden rettelsesmarkeringer af ændringer i forhold til forrige version) fremgår:

»A number of minimum requirements are defined in the tender documents, cf. section 4.6. If the Tenderer **in the BAFO** makes reservations to a minimum requirement in the tender material, the tender is non-compliant and will be rejected (disqualified) and the Tenderer will be disqualified from further participation in this procurement process regarding the relevant lot(s), unless the reservation is withdrawn according to section 7.3 3rd paragraph.

If the Tenderer has reservations to a (non-minimum) requirement, the Tenderer shall specifically describe the scope of the reservations in the compliance matrix [1] and there specify any proposed amendment to the (non-minimum) requirement.

Reservations to (non-minimum) requirements will be assessed during the evaluation under the relevant sub-criterion, cf. section 6. The compliance matrix lists for each element of sub-criterion 2 and 3, the relevant parts of the appendices referring to (non-minimum) requirement(s).«

Om tildelingskriteriet og tildelingen anføres det i »Tender Conditions« i udbudsbetingelserne (seneste version her gengivet uden rettelser-markeringer af ændringer i forhold til forrige version):

»6.1 The Most Economically Advantageous Tender

The contract shall be awarded to the “most economically advantageous tender” assessed on the following sub-criteria (the relative weighting of the sub-criteria is stated in the parenthesis after each sub-criterion):

- 1) The lowest price, cf. "Total amount only for evaluation" in Tender Conditions Att. 1 to Att. 5 Price Evaluation Sheet (weight 40 %)
- 2) Technical Solution (weight 30 %)
- 3) Project and Maintenance Execution (weight 30 %)

The Customer shall award the contract based on an evaluation of the prices and descriptions et cetera in the Tenderers' BAFO. The negotiation tenders will not be evaluated, when the contract is awarded.

The award criteria for the two lots (East and West) are the same even though the evaluation will be done separately.

One supplier cannot win the contracts for both lots, so if the same supplier is evaluated as the best (according to the sub-criteria in section 6.2-6.4) on both lots, the Customer will select the combination of tenders for the East and the West lots, which is the cheapest combination of tenders, i.e. only evaluating on the price (cf. section 6.2) in the combination of tenders placed in top two in East and West respectively.

[herefter gives eksempler på, hvorledes denne udvælgelse af den bedste kombination sker.]

6.2 Sub-criterion 1 – Price (40 %)

The evaluation of the price consists of an evaluation of "Total amount only for evaluation", cf. the Tables in Attachment 1 to Attachment 5.

The weighting of the different price elements is listed in the same Tables in Attachment 1 to Attachment 5.

Sub-criterion 2 – Technical Solution (30 %)

When assessing the Technical Solution offered by the Tenderers the Customer will base the assessment on the following elements:

- 2.1 Compliance with Delivery Requirements
- 2.2 Maturity
- 2.3 Environmental impact
- 2.4 Robustness to external events
- 2.5 Robustness to major failures
- 2.6 System Integration
- 2.7 System Expansion and Changes, Flexibility of Upgrades and Maintenance
- 2.8 System Performance
- 2.9 System Safety
- 2.10 NOT USED
- 2.11 Maintainability of equipment
- 2.12 NOT USED
- 2.13 Options 1, 2 and 5:
 - Option 1 - Passenger Information System (East and West Contract)
 - Option 2 - Administrative and Support IT Systems using data from the Signaling System (East and West Contract)
 - Option 5 - Completion of the lot not awarded (East and West Contract)
- 2.14 NOT USED
- 2.15 NOT USED
- 2.16 Options 10 and 11:
 - Option 10 - Key Management System (East and West Contract)
 - Option 11 - Online Scheduler integrating conflict detection and resolution and decision support functionality (East and West Contract)
- 2.17 NOT USED

Together the 12 elements constitute the sub-criterion Technical Solution. The elements are of equal importance to the Customer except element 2.7 (System Expansion and Changes, Flexibility of Upgrades and Maintenance) which is of higher importance. The elements are explained in attachment 5 to these Tender Conditions and the explanations are an integrated part of the sub-criterion.

Sub-criterion 3 – Project and Maintenance Execution (30 %)

When assessing the Project and Maintenance Execution offered by the Tenderers the Customer will base the assessment on the following elements:

- 3.1 Time Schedule
- 3.2 Project Organisation and Execution
- 3.3 Maintenance Execution
- 3.4 Training
- 3.5 Migration and Installation, Test and Commissioning
- 3.6 Safety Management, Planning and Processes
- 3.7 Development of non standard functionality
- 3.8 Joint design
- 3.9 System Integration
- 3.10 Options 1, 2, 4B, 4C, 4D, 4E, 5, 10, and 11:
 - Option 1 - Passenger Information System (East and West Contract)
 - Option 2 - Administrative and Support IT Systems using data from the Signalling System (East and West Contract)
 - Options 4B, 4C, 4D and 4E:
 - Option 4B - Fehmarn Belt, Danish Land works (East Contract)
 - Option 4C - Fehmarn Belt Coast to Coast Connection (East Contract)
 - Option 4D - Vojens –Vamdrup (West Contract)
 - Option 4E - ERTMS for Regionstog's Network (East Contract)
 - Option 5 - Completion of the lot not awarded (East and West Contract)
 - Option 10 - Key Management System (East and West Contract)
 - Option 11 - Online Scheduler integrating conflict detection and resolution and decision support functionality (East and West Contract)
- 3.11 NOT USED
- 3.12 NOT USED
- 3.13 NOT USED
- 3.14 NOT USED
- 3.15 NOT USED
- 3.16 NOT USED
- 3.17 NOT USED
- 3.18 NOT USED
- 3.19 NOT USED

Together the 10 elements constitute the sub-criterion Project and Maintenance Execution. The elements are of equal importance to the Customer, except elements 3.1 (Time Schedule) and 3.5 (Migration and Installation, Test and Commissioning) which are of higher importance (and equal to one another), and except element 3.4 (Training) which is of lower importance. The elements are explained in attachment 5 to these Tender Conditions and the explanations are an integrated part of the sub-criterion.«

I et 20 sider langt dokument »Attachment 5 Explanation of Award Criteria« er underkriterierne til tildelingskriteriet nærmere forklaret, og det er uddybet, hvilke delkriterier indklagede ville lægge vægt på ved vurderingen af de kvalitative underkriterier. Det fremgår blandt andet:

»3.2 Sub-criterion 2: Technical Solution (30 %)

When assessing the **Technical Solution** offered by the Tenderers, the Customer will base the assessment on the elements listed in Table 3 below.

For each element in Table 1 there is an explanation of what is important to the Customer. The Tenderer should try to fulfill these wishes, since the evaluation of each element shall consist of an assessment of the Tenderer's fulfilment of the wishes stated in the table.

For each element, there is a reference to "Instructions for the Tenderer" (ITT) text(s). The purpose of the reference is to make it transparent for the Tenderer, under which element(s) a certain proposal - based on an "Instructions for the Tenderer" text - is assessed, and under which element the non or partial compliance of a Requirement is evaluated. Please see also section 4.5, 3rd paragraph, in the Tender Conditions.

It is noted that the **non or partial compliance of a minimum Requirement IS NOT evaluated**. Please refer to section 4.5, first paragraph, in the Tender Conditions.

Table 1 – Sub-criterion 2 - Technical Solution

AC no	Element	What is important to the Customer
TS.001	Compliance with Delivery Requirements	Fully compliant solution. The Customer will emphasize the extent of compliance with the requirements linked to this element. The purpose of this element is to evaluate the extent of compliance with the requirements that are NOT linked to the other elements (TS.002 – TS.016 or PME.001 – PME.010).

...

TS.011	Maintainability of equipment	The Customer will emphasize that the proposed equipment is easy to maintain. The Customer will at the same time emphasize the proposed equipment's ability to provide 1) condition monitoring, 2) remote diagnostics, 3) Maintenance tools, 4) easily accessible location of equipment, 5) minimized operation tasks (reboot, manual back-up and the like), 6) usable/informative logs, 7) relevant alarms, 8) and optimum MDBF/MTBF/MTTR. The aim with no. 1-8 is to minimise cost of Maintenance as much as possible and to make it easy for the Customer to have parts of the maintenance performed by himself or a third party. In addition, the Customer will – to the extent that the fulfilment of the requirements is not already covered by the above sentences – emphasise the extent of compliance with the requirements linked to this element in the Compliance Matrix.

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3.3 Sub-criterion 3: Project and Maintenance Execution (30 %)

When assessing the **Project and Maintenance Execution** offered by the Tenderers, the Customer will base the assessment on the Table 4 below.

For each element in Table 2, there is an explanation of what is important to the Customer. The Tenderer should try to fulfil these wishes, since the evaluation of each element shall consist of an assessment of the Tenderers' fulfilment of the wishes stated in the table.

For each element, there is a reference to "Instructions for the Tenderer" (ITT) text(s). The purpose of the reference is to make it transparent for the Tenderer, under which element(s) a certain proposal - based on an "Instructions for the Tenderer" text - is assessed, and under which element the non or partial compliance of a Requirement is evaluated. Please see also section 4.5, 3rd paragraph, in the Tender Conditions.

It is noted that the **non or partial compliance of a minimum Requirement IS NOT evaluated**. Please refer to section 4.5, first paragraph, in the Tender Conditions.

Table 2 – Sub-criterion 3 - Project and Maintenance Execution

AC no	Element	What is important to the Customer
PME.001	Time Schedule	A robust, efficient, and flexible Time Schedule that supports a timely delivery, and which leaves enough time for the Customer participation.

AC no	Element	What is important to the Customer
		The milestones should cover the whole project until Final Acceptance and enable the Customer to follow-up on a regular basis on the Supplier's progress. In addition, the Customer will – to the extent that the fulfilment of the requirements is not already covered by the above sentences – emphasise the extent of compliance with the requirements linked to this element in the Compliance Matrix.
PME.002	Project Organisation and Execution	The Customer will emphasize that: 1. The proposed project organisation is well-suited to perform a close collaboration with the Customer and the Stakeholders. 2. The proposed project organisation is able to make decisions quickly. 3. The proposed project organisation has diversity in qualifications and a robustness to handle the project until end of Project Closure phase. 4. The offered Key Resources are in possession of the right combination of qualifications and competences to make it probable that they can master the difficult task ahead. 5. The Key Resources are allocated full time or very close to full time to the project where it makes sense. In addition, the Customer will – to the extent that the fulfilment of the requirements is not already covered by the above sentences – emphasise the extent of compliance with the requirements linked to this element in the Compliance Matrix.
PME.003	Maintenance Execution	A proposal to maintain the Delivery in an efficient and suitable way and with a high degree of flexibility, taking into account the duration of the Maintenance period (and hence the need for adjustments). Proposal of a well-suited Maintenance organisation with the right amount and combination of key functions to secure a high quality in the deliverables, i.e. a robust organisation. The Customer emphasises that the Tenderer's proposal demonstrates that the proposed maintenance organisation is able to support the fulfilment of the RAM performance during the Maintenance period. The Customer emphasizes that the Tenderer states few limitations for the Customer to perform parts of the maintenance by himself or by a third party. In addition, the Customer will – to the extent that the fulfilment of the requirements is not already covered by the above sentences – emphasise the extent of compliance with the requirements linked to this element in the Compliance Matrix.

Bedømmelsen af tilbuddene

De tilbudsgivere, som ikke var tildelt kontrakt, modtog som nævnt hver en individuel evalueringsrapport »BAFO Assessment Report«. I rapporten til klageren, som er på i alt 74 sider, anføres det i afsnit 2.2 Contract Award Criteria, side 2, blandt andet:

»In the assessment Banedanmark has used the following terms to rate the tenders in relation to each of the elements under sub-criteria 2, Technical Solution, and sub-criteria 3, Project and Maintenance Execution:

- Excellent (the BAFO East fulfils all of Banedanmark's wishes and non-minimum requirements in the element)
- Very Satisfactory (the BAFO East fulfils almost all, or a very large majority, of Banedanmark's wishes and non-minimum requirements in the element)
- Satisfactory (the BAFO East fulfils most of Banedanmark's wishes and non-minimum requirements in the element)
- Less satisfactory (the BAFO East fulfils only a few of Banedanmark's wishes and non-minimum requirements in the element)
- Not satisfactory (the BAFO East does not fulfil any, or hardly any, of Banedanmark's wishes and non-minimum requirements in the element)

The assessment of Ansaldo's BAFO East is stated below in section 2.3 to 2.5 in this assessment report. Section 4 contains the award of the contract.«

I rapporten side 2-3 angives om bedømmelsen af underkriteriet Technical Solution:

»2.4 Assessment of the Technical Solution

Based on an assessment of the 12 elements it is Banedanmark's overall assessment that Ansaldo is Less Satisfactory regarding the sub-criterion Technical Solution.

When making this overall assessment Banedanmark has taken into account that the 12 elements are of equal importance, except for element TS.007 (in the Tender Conditions this element is referred to as element 2.7) which is of higher importance. This difference in importance has been taken into account during the overall assessment of the sub-criterion.

Ansaldo has received 1 Excellent, 2 Very Satisfactory, 8 Less Satisfactory and one Not Satisfactory ratings for the elements TS.001 – TS.016 (in the Tender Conditions referred to as element 2.1 -2.16) divided as follows:

Element TS.001 Compliance with Delivery requirements Excellent
 Element TS.002 Maturity Less Satisfactory
 Element TS.003 Environmental impact Less Satisfactory
 Element TS.004 Robustness to external events Very Satisfactory
 Element TS.005 Robustness to major failures Very Satisfactory
 Element TS.006 System Integration Less Satisfactory
 Element TS.007 System Expansion and Changes, Flexibility of Upgrades and Maintenance Less Satisfactory
 Element TS.008 System Performance Less Satisfactory
 Element TS.009 System Safety Not Satisfactory
 Element TS.011 Maintainability of equipment Less Satisfactory
 Element TS.013 Options 1, 2 and 5 Less Satisfactory
 Element TS.016 Options 10 and 11 Less Satisfactory

The assessment of the 12 elements is explained below.«

Side 15-16 fremgår det om bedømmelsen af underkriteriet Project and Maintenance Execution:

»2.5 Assessment of Project and Maintenance Execution

Based on an assessment of the 10 elements it is the Banedanmark's overall assessment that Ansaldo is Satisfactory regarding the sub-criterion Project and Maintenance Execution.

When making this overall assessment Banedanmark has taken into account that the elements are of equal importance, except elements PME.001 (Time Schedule) and PME.005 (Migration and Installation, Test and Commissioning) (in the Tender Conditions these elements are referred to as elements no. 3.1 and 3.5) which are of higher importance (and equal to one another), and except element PME.004 (Training) (in the Tender Conditions this element is referred to as element no 3.4) which is of lower importance compared to the other 7 elements. This difference in importance has been taken into account during the overall assessment of the sub-criterion.

Ansaldo has received 1 Very Satisfactory, 4 Satisfactory and 5 Less Satisfactory ratings for the elements PME.001 – PME.010 (in the Tender Conditions are referred to as elements no. 3.1 – 3.10) divided as follows:

Element PME.001 Time Schedule Less Satisfactory
 Element PME.002 Project Organisation and Execution Very Satisfactory
 Element PME.003 Maintenance Execution Less Satisfactory
 Element PME.004 Training Satisfactory
 Element PME.005 Migration and Installation, Test and Commissioning Less Satisfactory
 Element PME.006 Safety Management, Planning and Processes Satisfactory
 Element PME.007 Development of non standard functionality Satisfactory
 Element PME.008 Joint design Less Satisfactory
 Element PME.009 System Integration Satisfactory
 Element PME.010 Options Less Satisfactory

The assessment of the 10 elements is explained below.«

Side 62 nederst fremgår det, at klageren afgav det billigste tilbud på både kontrakten om »East Lot« og »West Lot« på henholdsvis [] mia. kr. og [] mia. kr.

Af afsnit 4.2, side 62-74, i rapporten fremgår:

»4.2 Explanation of the two awards

The names of the 4 non-winning Tenderers are in the following made anonymous by using the letters U [klageren], V, Y and Z instead.

4.2.1 East lot

The sub-criterion Price (weight 40 %):

Tenderer U has offered the lowest price ("Total amount only for evaluation" [] mDKK, cf. the Tender Conditions section 6.2). Alstom's price is the second lowest price (2.6 % higher than the low-est price). Thales-BBR's price, being the third lowest, is 17.4 % higher than the lowest price. The fourth lowest price, Tenderer Y's, is very close to the third lowest price, being 17.6 % higher than the lowest price. The two highest prices are Tenderer V (21 % higher than the lowest price) and Tenderer Z (24.9 % higher than the lowest price).

The sub-criterion Technical Solution (weight 30 %):

According to Banedanmark's overall assessment of the 12 elements, Alstom, Thales-BBR and Tenderer Z have the 3 best Technical Solu-

tions (all 3 assessed as Very Satisfactory). The Technical Solutions of these 3 Tenderers have different qualities, i.e. different strengths and weaknesses according to the 12 elements, but it is Banedanmark's overall assessment after having assessed all 12 elements, including element TS.007 which is of higher importance, that the Technical Solutions of the said 3 Tenderers have the same level of quality.

According to Banedanmark's overall assessment of the 12 elements the Technical Solution of Tenderer U (the Tenderer with the lowest price) is considered Less Satisfactory (the same assessment as one other Tenderer's Technical Solution). The difference between the Technical Solution of the 3 Tenderers mentioned in the above paragraph and Tenderer U's Technical Solution is very significant. The comparison is based on Banedanmark's overall assessment of the 12 elements, including element TS.007 which is of higher importance. Lastly, one Tenderer's Technical Solution is assessed as Satisfactory according to Banedanmark's overall assessment of the 12 elements.

The sub-criterion Project and Maintenance Execution (weight 30 %):

According to Banedanmark's overall assessment of the 10 elements Thales-BBR and Tenderer V have offered the 2 best Project and Maintenance Executions (both assessed as Very Satisfactory). The Project and Maintenance Executions of these 2 Tenderers have different qualities, i.e. different strengths and weaknesses according to the 10 elements, but it is Banedanmark's overall assessment after having assessed all 10 elements, including element PME.001 and PME.005 which is of higher importance and element PME.004 which is of lower importance, that the Project and Maintenance Executions of the said 2 Tenderers have the same level of quality.

The Project and Maintenance Execution of Tenderer U (the Tenderer with the lowest price) is considered Satisfactory according to Banedanmark's overall assessment of the 10 elements (the same assessment as the remaining 3 Tenderers' Project and Maintenance Executions). The difference between the Project and Maintenance Executions of the 2 Tenderers mentioned in the above paragraph and Tenderer U's Project and Maintenance Execution is significant. The comparison is based on Banedanmark's overall assessment of the 10 elements, including element PME.001 and PME.005 which is of higher importance and element PME.004 which is of lower importance.

The Project and Maintenance Executions of the 4 Tenderers who were assessed as Satisfactory on this sub-criterion have different qualities, i.e. different strengths and weaknesses according to the 10 elements, but it is Banedanmark's overall assessment after having assessed all 10 ele-

ments, including element PME.001 and PME.005 which is of higher importance and element PME.004 which is of lower importance, that the Project and Maintenance Executions of these 4 Tenderers have the same level of quality.

The two most economically advantageous tenders East

Based on the assessments described above, it is Banedanmark's overall assessment that Alstom has submitted the most economically advantageous tender on the East lot. When making this overall assessment Banedanmark has taken the relative weighting of the 3 sub-criteria into consideration. Alstom has submitted a price that is only 2.6 % higher than the lowest price (Tenderer U's). Tenderer U's small lead on Price (weight 40 %) is therefore lost due to Tenderer U's assessment on the sub-criterion Technical Solution (weight 30 %), where there are very significant differences in favour of Alstom (and Thales-BBR and Tenderer Z) according to Banedanmark's assessment. In other words, these very significant differences in favour of Alstom more than compensate for Tenderer U's lead on Price and the fact that Price has a weight of 40 % and Technical Solution has a weight of only 30 %. On the sub-criterion Project and Maintenance Execution (weight 30 %) Tenderer U and Alstom are both assessed Satisfactory. All in all, Alstom has offered a very competitive Price (second lowest) (weight 40 %) in combination with a very strong Technical Solution (weight 30 %) and a fairly strong Project and Maintenance Execution (weight 30 %). Based on the 3 sub-criteria with their relative weighting, it is Banedanmark's overall assessment that Alstom has submitted the most economically advantageous tender on the East lot.

According to Banedanmark's overall assessment - again based on the assessments of the 3 sub-criteria with their relative weighting - Thales-BBR has submitted the second most economically advantageous tender on the East lot. Thales-BBR's price, being the third lowest, is 17.4 % higher than the lowest price (Tenderer U's). Tenderer U's significant lead over Thales-BBR on Price (weight 40 %) is however lost (a) due to Tenderer U's assessment on the sub-criterion Technical Solution (weight 30 %), where there are very significant differences in favour of Thales-BBR (and Alstom and Tenderer Z), (b) in combination with Tenderer U's assessment on the sub-criterion Project and Maintenance Execution (weight 30 %), where there are significant differences in favour of Thales-BBR (and Tenderer V). In other words, these very significant differences in favour of Thales-BBR on Technical Solution and significant differences (again) in favour of Thales-BBR on Project and Maintenance Execution (with a total weight of 60 %) more than compensate for Tenderer U's significant lead on Price (weight 40 %). All in all, Thales-BBR has offered a fairly competitive Price (but only the

third lowest) (weight 40 %), however, in combination with a very strong Technical Solution (weight 30 %) and a very strong Project and Maintenance Execution (weight 30 %). Based on the 3 sub-criteria with their relative weight-ing, it is Banedanmark's overall assessment that Thales-BBR has submitted the second most economically advantageous tender on the East lot.

In order to further demonstrate that Banedanmark has considered the weighting of the sub-criteria (40 %, 30 % and 30 %) appropriately when identifying the most and second most economically advantageous tenders, Banedanmark has compared the result explained above with a score model, cf. attachment with supportive point model. It is stressed that the score model has only been used to compare the result of the assessment explained above, and that the score model in itself has neither been decisive nor a guideline for the result. The purpose of the score model is only to further demonstrate that the result of the verbal assessment explained above (in Danish: sproglig evalueringsmodel) is correct, i.e. that the most and second most economically advantageous tenders have been identified correctly according to the 3 sub-criteria with their relative weighting.

4.2.2 West lot

The sub-criterion Price (weight 40 %):

Tenderer U has offered the lowest price ("Total amount only for evaluation" [] mDKK, cf. the Tender Conditions section 6.2). Alstom's price is the second lowest price (4.4 % higher than the lowest price). Tenderer Y's price, being the third lowest, is 15.3 % higher than the lowest price. The fourth lowest price, Thales-BBR's, is very close to the third lowest price, being 15.8 % higher than the lowest price. The two highest prices are Tenderer V (18.7 % higher than the lowest price) and Tenderer Z (21.4 % higher than the lowest price).

The sub-criterion Technical Solution (weight 30 %):

All Tenderers have been given the same ratings for the East and the West lots regarding the Technical Solution. Reference is made to the evaluation of the East lot, cf. section 4.2.1.

The sub-criterion Project and Maintenance Execution (weight 30 %):

All Tenderers have been given the same ratings for the East and West lots (also) regarding the Project and Maintenance Execution. Reference is made to the evaluation of the East lot, cf. 4.2.1.

The two most economically advantageous tenders West

Based on the assessments described above, it is Banedanmark's overall assessment that Alstom has submitted the most economically advantageous tender on the West lot. When making this overall assessment Banedanmark has taken the relative weighting of the 3 sub-criteria into consideration. Alstom has submitted a price that is 4.4 % higher than the lowest price (Tenderer U's). Tenderer U's lead on Price (weight 40 %) is however lost due to Tenderer U's assessment on the sub-criterion Technical Solution (weight 30 %), where there are very significant differences in favour of Alstom (and Thales-BBR and Tenderer Z) according to Banedanmark's assessment. In other words, these very significant differences in favour of Alstom more than compensate for Tenderer U's lead on Price and the fact that Price has a weight of 40 % and Technical Solution has a weight of only 30 %. On the sub-criterion Project and Maintenance Execution (weight 30 %) Tenderer U and Alstom are both assessed Satisfactory. All in all, Alstom has offered a competitive Price (second lowest) (weight 40 %) in combination with a very strong Technical Solution (weight 30 %) and a fairly strong Project and Maintenance Execution (weight 30 %). Based on the 3 sub-criteria with their relative weighting, it is Banedanmark's overall assessment that Alstom has submitted the most economically advantageous tender on the West lot.

According to Banedanmark's overall assessment - again based on the assessments of the 3 sub-criteria with their relative weighting - Thales-BBR has submitted the second most economically advantageous tender on the West lot. Thales-BBR's price, being the fourth lowest, is 15.8 % (the third lowest, Tenderer Y's, is 15.3 %) higher than the lowest price (Tenderer U's). Tenderer U's significant lead over Thales-BBR on Price (weight 40 %) is however lost (a) due to Tenderer U's assessment on the sub-criterion Technical Solution (weight 30 %), where there are very significant differences in favour of Thales-BBR (and Alstom and Tenderer Z), (b) in combination with Tenderer U's assessment on the sub-criterion Project and Maintenance Execution (weight 30 %), where there are significant differences in favour of Thales-BBR (and Tenderer V). In other words, these very significant differences in favour of Thales-BBR on Technical Solution and significant differences (again) in favour of Thales-BBR on Project and Maintenance Execution (with a total weight of 60 %) more than compensate for Tenderer U's significant lead on Price (weight 40 %). All in all, Thales-BBR has offered a fairly competitive Price (but only the fourth lowest) (weight 40 %), however, in combination with a very strong Technical Solution (weight 30 %) and a very strong Project and Maintenance Execution (weight 30 %). Based on the 3 sub-criteria with their relative weighting, it is Bane-

danmark's overall assessment that Thales-BBR has submitted the second most economically advantageous tender on the West lot.

In order to further demonstrate that Banedanmark has considered the weighting of the sub-criteria (40 %, 30 % and 30 %) appropriately when identifying the most and second most economically advantageous tenders, Banedanmark has compared the result explained above with a score model, cf. (again) attachment with supportive score model. Again, it is stressed that the score model has only been used to compare the result of the assessment explained above, and that the score model in itself has neither been decisive nor a guideline for the result. The purpose of the score model is only to further demonstrate that the result of the verbal assessment explained above (in Danish: sproglig evalueringsmodel) is correct, i.e. that the most and second most economically advantageous tenders have been identified correctly according to the 3 sub-criteria with their relative weighting.

4.2.3 Price comparison of lot combinations

If the same Tenderer is evaluated as the best on both lots (according to the sub-criteria in section 6.2-6.4 of the Tender Conditions), Banedanmark will select the combination of tenders for the East and the West lots, which is the cheapest combination of tenders, i.e. only evaluating on the price (cf. section 6.2 of the Tender Conditions) in the combination of tenders placed in top two in East and West respectively.

The combination of Alstom for the East lot and Thales-BBR for the West lot results in a total price ("Total amount only for evaluation") of 5,790 m DKK, whereas the combination of Thales-BBR for the East lot and Alstom for the West lot results in a total price ("Total amount only for evaluation") of 5,830 m DKK. Therefore Alstom is awarded the East lot and Thales-BBR is awarded the West lot.«

Oplysninger og anbringender særligt ad påstand 1

Det fremgår af en e-mail af 15. november 2011 fra Programme Manager, Fjernbane Signalprogrammet, Gunnar Lohmann til Nicolas Hughes, som var leder af klagerens »bidding team«:

»We have realised that the process leading up to award of the two contracts for Fjernbane Infrastructure is more time consuming than originally anticipated. This means that the expected date of contract award is now by mid December and that the expected date of signing contracts with the selected suppliers is postponed to mid January 2012.«

Klageren har angivet at have modtaget mundtlige oplysninger om, at klagerens tilbud i starten af november blev indstillet til at få tildelt kontrakten, og at denne indstilling blev forkastet med besked om at reevaluere tilbuddene med henblik på at undgå tildeling af kontrakten til klageren. Klageren har endvidere anført at have hørt, at indstillingen blev forkastet som følge af politisk indblanding i beslutningsprocessen, idet man fra politisk hold ikke ønskede at indgå kontrakt med klageren, som er koncernforbundet med det selskab, Ansaldo Breda, der har stået for leverancen af IC4-tog til DSB. Indklagede angav endvidere i klageskriftet at mene, at en tidligere indstilling om at tildele klageren en af kontrakterne var blevet forelagt for Finansudvalget på et møde den 11. november 2011. I processkriftet af 13. januar 2012 har klageren i stedet anført, at den politiske indblanding må antages at have fundet sted på møder i Folketingets Transportudvalg og/eller ved kontakter til Transportministeriet.

Klageren har med processkriftet af 13. januar 2012 fremlagt følgende erklæring, som er underskrevet den 2. januar 2012 (erklæringen er i forhold til indklagede alene afgivet i en ikke-fortrolig version, hvor den pågældendes navn er slettet. Det er denne version, som gengives her):

»I ...(Independent Consultant) who was consulting during the Bane-danmark Signalling Programme Tender can confirm that I have been talking with [] on Friday December 16th after the Wayside award announcement.

I have been employed part time for Ansaldo during the Signalling Programme (SP) tendering in 2010-11 and still also employed by Bane-danmark (BDK) under contract.

[] is a [] within [] and he knows senior evaluation people within SP at BDK and senior management within the competition. [] worked for the SP previously when employed by Ramboll. [] has many good contacts in the SP at BDK.

Following the Wayside award decisions, [] told me what happened on the Wayside decisions. [] said that evaluation had been carried out to planned timescales and completed. [] said that in this evaluation, Ansaldo were a preferred bidder.

[] understands that

- there have been a 1st evaluation and award recommendation

- the Wayside Award topic must have been discussed at a separately meeting before Nov 10th.

These comments can't be 100% confirmed

[] understands that,

- the SP were told that they cant have this evaluation due to the IC4 situation with Ansaldo and they cant have an Ansaldo contract.
- the SP were sent back and told to do a new evaluation by the Transport Minister.

These comments are not 100% confirmed.

When the award decision was announced on Dec 16 it can't have been based upon a 1st evaluation.«

Med processkriftet er også fremlagt e-mails af 27. oktober 2011, 4. november 2011 og 11. november 2011 fra lederen af klagerens »bidding team« Nicolas Hughes til andre personer hos klageren, som var involveret i udbuddet om meddelelser fra indklagede og forlydender i markedet om forløbet af tilbudsbedømmelsen efter indgivelsen af BAFO-tilbuddene den 14. september 2011.

Af e-mailen af 27. oktober 2011 fremgår blandt andet:

»Gunnar Lohmann (PM) has confirmed that the evaluation process is due to complete at the end of wk44 (Nov 4th). BDK will then take 2 weeks to finalise internally with an announcement on both Preferred Bidders in mid November. Gunnar also confirmed that BDK will push hard to close both contracts before xmas. This is their aim with Project Commencement then straight after the xmas break. Gunnar said that we will receive final clarifications (shortly and that one matter needs to be clarified by Ansaldo.«

Af et vedhæftet dokument »Banedanmark update October 27th 2011« fremgår:

»1. Time Schedule

- Gunnar Lohmann (GL) said process has moved on in 6 weeks and is entering final phases.

- He added that there is still work to do but internal decision will be reached, by end wk44 (w/e Nov 4) and whole team are still on target.
- GL confirmed that its then 2 weeks for finalisation and approvals with an announcement on 2 Preferred Bidders – around mid Nov. NH Comment: Announcement looks to be after OB submission.
- GL said that the time schedule is unchanged.
- GL confirmed that there will be 1 more set of clarifications.
 - GL added that “there is a one matter to clarify with Ansaldo”.
 - He said twice “there is one matter to clarify with Ansaldo” – and it seemed to have some emphasis
 - When I then pushed GL would not go into any more details
 - GL said that clarification should be expected shortly.
- GL said that East & West contracts will be signed before Christmas
 - This is still the plan and GL said that they are pushing hard on this
- Morten Sondergaard (Program Director) came out with a media statement last week saying that he expects to finalise with the two winners before Christmas.

2.0 Supplier positions

- There is no feedback from GL and nobody in BDK will make an official comment on supplier positions.
- BDK Consultants are split into small teams, so nobody has an overall picture of the situation and there is no transfer of knowledge.
- Supply side not one bidder has any idea of position and all bidders are quite apprehensive. It was the same on S Bane.
- That said there is a lot of speculation – as per S Bane.
- It's said to be 3 horse race
 - BOM, ASTS & Alstom are the companies mentioned
 - Competition described as fierce.
- BOM ASTS & Alstom are all fairly equal on technical.
- BOM technical solution is the most detailed but it has weaknesses
 - mainly on power side
- ASTS solution seen as good and most flexible of all submitted.
 - We are also seen as most open minded company
 - But not confirmed as No1 technical choice
- Alstom technical solution described as equal to BOM & ASTS but it could be ‘more difficult’

- Installation partner (Bravida) not good for reputation
- Some question marks on Alstom maintenance (same as S Bane).
- Siemens “made a go” at Wayside East due to S Bane cost efficiencies on Installation, Maintenance
 - They are seen as possible but not that often mentioned.
 - Question marks on RBC and ICL.
- Invensys and Thales not really in the picture – and described as no chance.
 - Technical solution not as strong.
 - Too much equipment by comparison and not competitive
 - Installation approach seems to be a weakness in both.
- It is said (by most) that BOM and then either ASTS/Alstom are in pole
- But a minority say BOM will get OB – logical choice.
- These are not final, rather situation “as is” and process is still ongoing.
- I was also told that politics are involved
 - BOM has 250 people – if they don’t win, they close BOM Denmark Signalling.
 - Atkins report on IC4 cancellation is still pending.«

I e-mailen af 4. november 2011 anføres blandt andet:

»Latest on proces going forward and speculation in the market.

- Treasury Meeting is set for end of this week. This meeting confirms expenditure level and phasing of spend. Treasury are not interested in suppliers. Its purely to deal with monetary aspects and liabilities of the Danish state.
- Investment Paper inc 2 P Bidder Recommendations is being submitted to Transport Committee end of today. Protocol requires this to be in circulation 7 days before final meeting.
- This paper marks the end of the clarification and evaluation process and explains why our last answer was required, no later than 0830h on Friday morn.
- The Transport Select meeting is scheduled for Fri Nov 2011.
- This meeting is a rubber stamping exercise and not one that normally challenges decisions.
- ...
- On evaluation its said to be finished with P Bidders identified. Nobody knows who. Apparently within BDK they are not al-

lowed to talk about it – until middle of next week. Less than 10 BDK people know, but there is a lot of speculation in the market.

- 1 & 2 with most is ASTS and Alstom. Alstom are confident and priced using S Bane Parameters.
- Most say BOM had tender issues due to late additions of 20 Co-wi consultants. That was negative and affected their bid.
- ...
- Claus (our consultant and BDK employee) thinks that we were No1 on both West and East and that explains late price question with BDK trying to finalise No2 on East and West. Depending on our answer, a different 2nd P Bidder is selected and also which way around for East/West Lots. This is his view.

Pretty sure next week there will be more speculation ahead of formal announcement...«

Af e-mailen af 11. november 2011 fremgår blandt andet:

»I heard last night from within BDK the following

- Evaluation is complete at team level but nobody knows P Bidders.
- Apparently there is an agenda change for today's Transport Select Committee.
- It is said that process has moved into a Political level with top team (Morten Gunnar etc.) now spending time preparing answers for questions that haven't been asked yet. These answers could be asked of Transport Ministry and Politicians.
- Another Transport Select Committee is planned for Fri Nov 25.

I called Gunnar this morning to check out.

- GL said that decision is not made. They are still "in process".
- GL said they have to be thorough in final phase.
- When pushed, GL said decision and announcement is as soon as possible but he said I suppose it's still 2wks away and yes before end of Nov. (NH Comment: This is a 2wk delay at least and interestingly it allows BDK to consider OB bids before it announces Wayside)
- GL said they checked our points machine answer and they are satisfied with our explanation and they could see this in the BAFO also.

Other Intel

- ...

- Alstom say they have received few clarification questions from BDK. They say that the F Bane process is not as thorough as S Bane. It doesn't seem to bother them as they still remain confident.
- It was put to me that if Siemens win F Bane East and the F Bane West contractor goes into default, under the Contract Siemens then has to deliver F Bane West, as well as F Bane East and S Bane. It was also said that BDK would not put all this technical and execution risk into 1 contractor.
- ...
- IC4 has been in the news again this week.
- ...«

Klageren har herudover fremlagt en række presseklip fra perioden den 16. november – 15. december 2011 blandt andet ét som indeholder en udtalelse fra indklagede om, at udskydelsen af evalueringsprocessen skyldtes »formelle ting«, som skulle på plads i forbindelse med regeringsskiftet, samt om forskellige forlydender om begrundelsen for udsættelsen samt om problemer med IC4-tog leverancen. Der er også fremlagt en oversigt over møder i Transportudvalget i perioden den 27. oktober – 15. december 2011.

Udover ovennævnte har klageren henvist til de bilag, der er fremlagt vedrørende påstand 6, og anbringenderne angående denne påstand. Klageren har også henvist til en af klageren udarbejdet sammenligning mellem tilbuds-evalueringen af det ene vindende tilbud fra Thales-BBR og evalueringen af klagerens tilbud på underkriteriet Technical Solution, hvor klagerens tilbud blev bedømt som Less Satisfactory og Thales-BBR's tilbud blev bedømt som Very Satisfactory. Efter klagerens opfattelse viser sammenligningen en stor forskel på scoretildelingen, som ikke klart modsvares af den verbale begrundelse for bedømmelsen. Klageren har i sammenhæng hermed henvist til, at klageren har langt større erfaring end Thales-BBR med udførelse af signalanlæg, hvilket også gør det uforståeligt, at Thales-BBR på kriteriet »Technical Solution« har fået en langt bedre bedømmelse end klageren. Den lave pris, klageren har tilbudt, understøtter ifølge klageren, at klagerens tilbud bevidst og usagligt er blevet fejlbedømt på de kvalitative underkriterier med det formål at undgå at tildele kontrakt til klageren. Ifølge klageren er motivet hertil, at det som følge af den omfattende negative presseomtale af Ansaldo Breda, som er koncernforbundet med klageren, og som har leveret IC4 togene, ville være politisk uheldigt at tildele kontrakt til klageren.

Indklagede har bestridt, at der har været nogen form for politisk indblanding i evalueringsprocessen, og/eller at der har foreligget en oprindelig indstilling af klageren som vinder af en af kontrakterne, eller at en sådan indstilling efterfølgende er blevet ændret. Indklagede har tillige bestridt, at der i forbindelse med en sådan ændret indstilling eller i øvrigt er manipuleret med resultatet af tilbudsbedømmelsen med det formål at undgå, at klageren fik kontrakt tildelt.

Indklagede har oplyst, at »Programme Board« hos indklagede er det organ, som traf beslutningen om tildelingen, og herved tiltrådte den modtagne indstilling. Ifølge indklagede foreligger der kun den indstilling med blandt andet udkast til evalueringsrapporter, som blev drøftet på mødet den 16. december 2011 i Programme Board, hvor tildelingsbeslutningen blev truffet. De udkast til evalueringsrapporter, som Programme Board modtog, svarer ifølge indklagede til de 6 evalueringsrapporter, som hver af de 6 tilbudsgivere fik tilsendt i endelig udgave den 16. december 2011 som led i underretningen om tildelingsbeslutningen. Der foreligger ikke andre og tidligere indstillingsnotater med indstilling af klageren eller andre end de tilbudsgivere, som fik kontrakt tildelt. Dog findes der en række forudgående interne arbejdsudkast, som er gået forud for de endelige udkast til rapporter, som blev forelagt for Programme Board og godkendt. Disse udkast anser indklagede for undtaget fra aktindsigt i henhold til forvaltningslovens § 12, stk. 1, nr. 1, hvilket indklagede har oplyst at ville meddele klageren i en separat afgørelse. Klageren har ifølge indklagede på intet tidspunkt i evalueringsprocessen - ej heller i tidlige udkast til evalueringsrapporter - været indstillet som vinder.

Indklagede har endvidere oplyst, at spørgsmålet om kontrakttildeling ikke har været drøftet uden for Signalprogrammet. Tildelingsspørgsmålet har således ikke været forelagt for eller drøftet med Finansudvalget, som i øvrigt ikke holdt møde den 11. november 2011. Spørgsmålet har heller ikke været drøftet med Folketingets Transportudvalg (eller andre udvalg i Folketinget) eller med Finansministeriet eller Transportministeriet (eller andre ministerier).

Indklagede har fremlagt en erklæring af 11. januar 2012 fra programdirektør for Signalprogrammet Morten Søndergaard, hvoraf blandt andet fremgår:

»Politisk involvering

Vi har foretaget evalueringen af BAFO tilbuddene for fjernbane projektet sideløbende med, at vi på øverste ledelsesniveau har håndteret godkendelse af et rammeaktstykke for fjernbanen dækkende hele fjernbaneprojektet i perioden fra kontraktunderskrift til programmets færdiggørelse.

Rammeaktstykket betyder, at vi har fået bevillingen på basis af en økonomisk ramme fastsat på baggrund af forhandlingstilbuddene (FTN). Efter Finansudvalgets tiltrædelse af et sådan godkendt rammeaktstykke har Banedanmark selvstændigt mandat til at indgå kontrakt indenfor de i rammeaktstykkets givne rammer.

Rammeaktstykkeprocessen er en del af en sideløbende politisk proces, som startede helt tilbage ved Signalprogrammets start og det blev ved godkendelse af Signalprogrammet i februar 2009 aftalt, at forligspartierne løbende skulle holdes orienteret, samt at de skulle ratificere beslutningen før kontraktindgåelse. Rammeaktstykkeprocessen i starten af 2011 er en del af dette forløb, og er forløbet efter en plan aftalt med Transportministeriets departement. Efter planen har Banedanmark ved bestemte milepæle afgivet statusrapporter til ordførerne fra partierne bag Aftale om en grøn transportpolitik (januar 2009). Rammeaktstykkerne har fulgt den normale procedure med godkendelse i regeringens økonomiudvalg og finansudvalget, og Banedanmark har ikke deltaget i disse møder. Det færdiggjorte rammeaktstykke blev sendt til Transportministeriets departement den 4. november 2011 sammen med opdateret statusrapport. Ingen af disse dokumenter indeholdt noget specifikt om evalueringen.

I forbindelse med forberedelsen af rammeaktstykket har der været dialog med Transportministeriets og Finansministeriets departement, hvilket er naturligt for et aktstykke omhandlende så store beløb og så lang en tidshorisont. Banedanmark har ikke på noget tidspunkt drøftet det indholdsmæssige i evalueringen, bortset fra oplysninger om, at alle tilbud ved modtagelse opfyldte kravene til at blive evalueret (afleveret til tiden, på engelsk, i en elektronisk version og en hard copy version).

I forhold til departementerne eller politikerne, har der alene været drøftet status i forhold til tidsplan, overordnet økonomi, risici, modenheden af europæiske standarder mv.

Evalueringsprocessen

Evalueringsprocessen har været tilrettelagt således, at meget få personer, som deltog i evalueringen, har haft indsigt i priserne. Generelt har vi håndteret priserne adskilt fra den øvrige del af tilbuddene. Dette

har dels været for at sikre fortroligheden omkring dette emne, hvilket er vigtigt for såvel Banedanmark som for tilbudsgiverne, dels for at den enkelte assessors vurdering af et givet emne ikke skulle blive påvirket af tilbudsgivernes prissætning. Det har således ikke været almindelig kendt information i Signalprogrammet eller i fjernbaneteamet, hvordan tilbudsgiverne samlet set lå i forhold til hinanden.

Kontakt med tilbudsgiverne

Under evalueringsprocessen har der været retningslinjer for, hvem der kunne kommunikere med tilbudsgiverne. Det er projektlederen og undertegnede der har kontakt med tilbudsgiverne, bortset fra forhandlingsprocessen hvor der var møder mellem teknikere og økonomi og der har selvsagt været skriftlig dialog i forbindelse med mødeforberedelse og –referater.

Efter modtagelse af BAFO er der ingen, der i Signalprogrammets fjernbane-regi har haft drøftelser med tilbudsgiverne udover projektleder Gunnar Lohmann og jeg selv. Den kontakt, der har været efter modtagelse af BAFO, har været relateret til processen omkring afklarende (clarification) spørgsmål samt meldinger om forhold af relevans for *tidshorisonten* for tildeling af kontrakten. Eksempelvis da der blev udskrevet valg i efteråret 2011, synes vi, det var vigtigt, at vores tilbudsgivere forstod, at det ikke bragte den politiske opbakning i fare. På intet tidspunkt har selve tildelingen af kontrakten været drøftet med nogen af tilbudsgiverne.

Beslutningsprocessen

I forbindelse med beslutningen om tildeling af delkontrakterne har der været afholdt forberedende interne møder op til beslutningsmødet i Signalprogrammets »Programme Board« den 16. december 2011. Der har ikke på noget tidspunkt været fremlagt andre indstillingsnotater/evalueringsrapporter, end dem som lå til grund for mødet den 16. december 2011.

Sammenfattende erklærer jeg:

- At det på intet tidspunkt er drøftet med politikere eller embedsmænd udenfor Banedanmark hvem der skulle have tildelt delkontrakterne
- at ingen har i Signalprogrammets regi meddelt klager, at de var indstillet til at få tildelt delkontrakt på fjernbanen
- at der ikke har foreligget andre indstillinger end den som blev forelagt Signalprogrammets Programme Board til mødet den 16. december 2011«

Oplysninger og anbringender særligt ad påstand 2

Af Tender Conditions punkt 7.3, sidste afsnit fremgår følgende:

»In the period between the Customer has selected the winning Tenderers (as a result of the BAFO evaluation) and the signing of the Contract, it is possible for the Customer and the winning Tenderers to agree on changes in the tender material and in the winning Tenderers' BAFO, provided this does not risk distorting competition or causing discrimination towards the non-winning tenderers.«

Indklagede udsendte den 16. december 2011 en pressemeddelelse om tildelingen, hvoraf blandt andet fremgår:

»Efter en hård konkurrence mellem seks prækvalificerede bydere har Banedanmark valgt at gå i slutforhandlinger med Thales-BBR (et konsortium bestående af Thales Group og Balfour Beatty Rail) og Alstom om at levere fremtidens signaler til fjernbanen - i alt næsten 3000 km. spor. En opgave, der er budgetteret til samlet set godt 15 mia. kr. De to tilbud ligger inden for budgettet med en pæn margin. De endelige priser kendes, når kontrakterne er færdigforhandlet og underskrevet.«

Indklagede har oplyst, at indklagede har valgt at udnytte den i punkt 7. 3 i Tender Conditions angivne mulighed for afsluttende forhandling som følge af projektets betydelige kompleksitet, herunder behovet for koordinering mellem leverandørerne af henholdsvis den østlige og vestlige løsning og med andre projekter i den samlede signalsystemudskiftning, samt henset til tilbuddenes betydelige omfang. Indklagede har endvidere oplyst, at der alene agtes aftalt præciseringer og mindre justeringer i udbudsbetingelserne, som falder indenfor rammerne af punkt 7.3, og de to BAFO-tilbud.

Indklagede har fremlagt de dagsordener mv., som indklagede har udsendt vedrørende slutforhandlingsmøder i perioden fra slutningen af december 2011 og i januar 2012. Indklagede har endvidere meddelt at være indstillet på at fremlægge en oversigt over aftalte justeringer og præciseringer, når slutforhandlingerne er afsluttet, hvilket forventes at være tilfældet om et par uger.

Særligt ad påstand 6

Af udbudsbetingelsernes punkt 7.3 fremgår blandt andet følgende:

»With respect to the principles of equal treatment and transparency the Customer may also request the Tenderers to clarify, define, adjust and/or fine-tune their BAFO.«

Indklagede har oplyst, at denne adgang til afklaring har været håndteret ens over for alle tilbudsgivere. Indklagede har generelt stillet »clarification« spørgsmål – så vidt muligt i form af lukkede spørgsmål – begrænset til de tilfælde, hvor indklagede vurderede, at tilbudsgiveren kunne svare ved at henvise til bestemte dele af sit BAFO-tilbud eller kunne bekræfte en udlægning af tilbuddet (f.eks. at et minimumskrav var opfyldt). Derimod er der ikke stillet afklarende spørgsmål, hvis det efter indklagedes skøn forudsatte, at tilbudsgiveren leverede nye oplysninger. Indklagede har fremlagt »clarification questions & answers« vedrørende de to tilbudsgivere, som indklagede besluttede at tildele kontrakt, Alstom (et dokument på 30 sider) og Thales-BBR (et dokument på 10 sider).

Klagerens tilbud blev anset for konditionsmæssigt for så vidt angår både »East Lot« og »West Lot«.

Tilbuddet blev for så vidt angår bedømmelsen af de kvalitative underkriterier og hertil knyttede delkriterier på en række områder i rapporten bedømt som Less Satisfactory og opnåede dermed set i forhold til de to vindende tilbud en relativt lav score på de to kvalitative underkriterier.

Klageren har gjort gældende, at denne bedømmelse er uberettiget og har udover nedennævnte i klageskriftet anførte konkrete eksempler på, hvad der efter klagerens opfattelse er uberettiget negative bedømmelser af enkelte delkriterier, tillige henvist til, at klagerens tilbud opfyldte alle minimumskrav. Klageren har endvidere gjort gældende, at en række af begrundelserne for en negativ bedømmelse i evalueringsrapporten drejer sig om uklarheder, som indklagede kunne have afklaret i perioden fra indgivelsen af BAFO-tilbud og frem til tildelingsbeslutningen, og at det – navnlig som følge af den attraktive pris klageren tilbød, udbuddets omfang og kompleksitet og det hermed forbundne ressourceforbrug – er påfaldende, at indklagede ikke benyttede adgangen under udbud med forhandling til at stille afklarende

spørgsmål. Dette gælder, uanset at indklagede har ret, men ikke pligt til at stille sådanne spørgsmål. I den forbindelse har klageren fremlagt de »clarification & answers«, der blev stillet og besvaret vedrørende klagerens BAFO-tilbud (et dokument på 15 sider). Klageren har endvidere med proceskriftet af 13. januar 2012 fremlagt en oversigt over de punkter i bedømmelsen af klagerens tilbud, hvor klageren for så vidt angår underkriteriet Technical Solution fik en lav score, og hvor indklagede efter klagerens opfattelse kunne have fået afklaret de forhold, som gav anledning til den negative bedømmelse ved at rette henvendelse til klageren.

For så vidt angår de konkrete eksempler, klageren i klageskriftet har fremhævet som eksempler på en uberettiget lav score, fremgår følgende af rapporten henholdsvis de dele af klagerens tilbud, som klageren har påberåbt sig til støtte for, at bedømmelsen i rapporten af det pågældende delkriterium eller delelement under delkriteriet er fejlagtig:

Om bedømmelsen af klagerens tilbud i relation til underkriteriet TS011 Maintainability of Equipment til underkriteriet »Technical Solution« fremgår af rapporten 3. afsnit på side 14 blandt andet:

»The Tenderer's Technical Solution describes a SCADA system for condition monitoring, remote diagnostics, logs and alarms which is positive. However, the description of the SCADA system does not make it clear exactly which equipment in the Delivery is covered for some of the bigger subsystems, like RBC or Interlocking, or how the solution works with regard to condition monitoring, remote diagnostics, logs and alarms. This lack of information is assessed negatively.«

Klageren har fremlagt et uddrag af sit BAFO-tilbud: Appendix 3–1, Attachment 1, section IIb »TMS Functional Description East-West«, hvori et SCADA-system er beskrevet, og der er i afsnit 6.2 givet en beskrivelse i form af overordnede bulletpoints af hvilke »Control Centre functions«, der kan klassificeres samt en beskrivelse af systemet, herunder i afsnit 6.3.4 visse »Specific Functions«.

Om delkriterium PME001 Time Schedule til underkriteriet »Project and Maintenance Execution« er det i rapporten næstnederste afsnit på side 16-17 anført:

»2.5.1 Element PME.001 Time Schedule

A robust, efficient, and flexible Time Schedule that supports a timely delivery, and which leaves enough time for the Customer participation.

The milestones should cover the whole project until Final Acceptance and enable the Customer to follow-up on a regular basis on the Supplier's progress.

In addition, the Customer will – to the extent that the fulfilment of the requirements is not already covered by the above sentences – emphasise the extent of compliance with the requirements linked to this element in the Compliance Matrix.

According to the Customer's assessment the Tenderer's Master Project Schedule is not robust, efficient and flexible. It does not support a timely delivery and does not leave enough time for Customer participation. For example several national holidays in the spring of 2012 are missing, resulting in a schedule that won't hold without major changes even for the first half year of the project's life. Other examples are that the standard processing periods for customer approval indicated by the Customer are not followed; key drivers are not justified or commented. Together this is considered as negative.«

Klageren har fremlagt Master Project Schedule til sit BAFO-tilbud. Det pågældende bilag er et 2 siders diagram som illustrer de forskellige faser i projektet, og herunder markerer visse så vidt ses kortere perioder/enkelte dage til »Approval«. Der er ved symbolmarkering angivet blandt andet »Milestones«, og herunder »Critical Milestones«.

Om delkriteriet PME001 Time Schedule, er det endvidere side 16-17, angivet:

»The Tenderer has delivered milestones that cover the whole project, but the milestones do not fully enable Customer follow-up as several milestones include no definition of deliverables. Therefore the supplied milestones would need some adjustments before the Customer can use them to follow up on a regular basis. This is considered negative.

A Schedule Management Plan was provided with an extensive coding structure. The internal consistency however remains unclear and references, which could not be located, are weighed in negatively. No reference to a critical path could be located, nor to a Schedule Revision Procedure.

The Tenderer complies with all the non-minimums requirements (R1.201, R1.202, R1.203 and R1.204 of this element, which is considered positive.

It is the overall assessment that Andaldo's BAFO East for the element PME.001 Time schedule is Less Satisfactory.«

Klageren har angivet, at det i klagerens BAFO-tilbud er angivet:

»3.7 Critical Path

The most critical path goes through the design, development, testing and safety acceptance of the switch device (to enable to switch between the legacy system and ERTMS-system during the early deployment phase). See Annex 3.«

Klageren har så vidt ses ikke fremlagt den del af tilbuddet, hvoraf dette fremgår. Klagenævnet har under alle omstændigheder ikke været i stand til i det fremlagte omfattende materiale at identificere, hvorfra det pågældende citat hidrører.

Vedrørende delkriteriet PME003 Maintenance Execution til underkriteriet »Project and Maintenance Execution« er det side 19-20 i rapporten blandt andet angivet:

»The Tenderer intends to develop the scope of services for administration and planning of Maintenance during the Maintenance Preparation Subproject instead of providing it in the tender. The Tenderer has described the service desk and the help desk, but it is not clear how technical issues are communicated to Danish speaking maintenance/failure staff. All this is assessed negatively.

...

The Tenderer has named a call center in Milano as point of contact in Danish language. However, the long term provision of Danish language at a call center (service desk in Milano) is not explained which is negative.«

I klagerens BAFO-tilbud, Appendix 5, attachment 1, Preliminary Maintenance Service Specification, angives i § 5.1.1, om call centrets funktionsmåde blandt andet:

»The Call Center is the only point of contact in Danish language where the Customer can notify or report all the potential failures of the ASTS Delivery.

This centre guarantees better service efficiency, increased promptness in replying and a better coordination of activities inside and outside the ASTS Service, including those carried out by any external suppliers regarding the hardware / software repair and service they supply.

The Call Center can be reached by dialing a **dedicated phone number**, and the operators are available 24 hours a year, 365 days a year. A contemporaneous number of operators such as to ensure no waiting time is also envisaged.

According to Appendix 5 § 7.3 requirements, Service Desk will be able to answer within 60 seconds for all the Customer's calls.

The main functions of the Call Center are the following:

...«

Vedrørende delkriteriet PME003 Maintenance Execution til underkriteriet »Project and Maintenance Execution« fremgår det side 20 i rapporten:

»The Tenderer's draft Maintenance preparation Plan does not or only partly address important issues. In particular, a time schedule and an activity plan are missing. The objectives of the Maintenance Preparation Subproject are not stated.«

Ifølge klageren er formålet med Maintenance Preparation Plan beskrevet i et attachment til appendix 5, til klagerens BAFO-tilbud, hvortil der skulle være vedhæftet en tidsplan og en aktivitetsplan, der beskriver, hvilken organisation, der tilbydes, og hvilke personer, der er involveret, herunder med angivelse af de pågældende personers roller og aktiviteter. I klageskriftet er det angivet, at det pågældende attachment er attachment 4 (som ikke er fremlagt). På klagenævnets forespørgsel har klageren oplyst, at det rettelig er attachment 1, der henvises til. Klagenævnet har ikke kunnet identificere de pågældende oplysninger i det 88 sider lange attachment 1 dokument. Det er i øvrigt også en række oplysninger i klagerens appendix 5, attachment 4 og klagerens BAFO Master Project Schedule i Appendix 1, Attachment 6, som indklagedes projektleder for fjernbane projektet, civilingeniør Gunnar Lohmann, har forholdt sig til i nedennævnte erklæring vedrørende klagerens eksempler.

Indklagede har bestridt, at der er foretaget en fejlagtig bedømmelse af klagerens BAFO-tilbud og har henvist til den vide skønsmargin, indklagede efter fast rets- og klagenævnspraksis har som ordregiver ved bedømmelsen af kvalitative kriterier, som de foreliggende. For så vidt angår indklagedes udøvelse af adgangen til at stille afklarende spørgsmål har indklagede oplyst som anført ovenfor om sin udøvelse af adgangen hertil. Indklagede har endvidere gjort gældende at have administreret adgangen til at stille afklarende spørgsmål korrekt, og har herved bestridt, at indklagede kunne eller skulle have afklaret de af klageren oplyste forhold ved at stille yderligere spørgsmål til klagerens BAFO-tilbud. Indklagede har desuden henvist til forskellige eksempler på, at de to vindende tilbudsgivere også har fået negativ kritik som følge af manglende eller overfladiske oplysninger.

Der er af indklagede fremlagt en erklæring af 13. januar 2012 fra projektleder for fjernbane projektet, civilingeniør Gunnar Lohmann, hvori ovennævnte konkrete indsigelser fra klageren gennemgås og indklagede med nærmere tekniske begrundelser afviser klagerens indsigelser om en fejlagtig bedømmelse fra klageren på de ovennævnte punkter.

Klagenævnet bemærker, at flere af de af klageren i klageskriftet anførte og ovenfor gengivne eksempler på en fejlagtig bedømmelse af klagerens tilbud vedrører underkriteriet »Project and Maintenance Execution«, der, som påstand 6 (tidligere påstand 4) er formuleret i processkriftet af 13. januar 2012, ikke længere er omfattet af påstanden. Da klagenævnet ikke er klar over, om dette er udtryk for, at klageren nu ikke længere gør disse eksempler gældende i relation til påstand 1, er de, uanset den ændrede formulering, taget i betragtning af klagenævnet.

Klagenævnet udtaler:

Klagenævnet træffer afgørelsen om opsættende virkning efter § 12, stk. 2, i lov om håndhævelse af udbudsreglerne m.v., der lyder:

»Stk. 2. Indgives en klage til Klagenævnet for Udbud i standstill-perioden, jf. § 3, stk. 1, har klagen opsættende virkning, indtil Klagenævnet for Udbud har truffet afgørelse om, hvorvidt klagen skal tillægges opsættende virkning, indtil den endelige afgørelse foreligger. Klagenævnet for Udbud kan kun tillægge klagen opsættende virkning, hvor særlige grunde taler herfor.«

Betingelserne for at tillægge en klage opsættende virkning er efter klagenævnets praksis:

1. En umiddelbar vurdering af klagen skal føre til, at klagen har noget på sig (*»fumus boni juris«*). Hvis klagen umiddelbart synes håbløs, er betingelsen ikke opfyldt.
2. Der skal foreligge *uopsættelighed*. Det vil sige, at opsættende virkning skal være nødvendig for at afværge et alvorligt og uopretteligt tab for klageren.
3. En *interesseafvejning* skal tale for opsættende virkning. Klagerens interesse i, at klagenævnet tillægger klagen opsættende virkning, skal veje tungere end indklagedes interesse i det modsatte.

Hvis blot én af de tre betingelser ikke er opfyldt, tillægger klagenævnet ikke klagen opsættende virkning.

På denne baggrund vurderer klagenævnet klagen sådan:

Vedrørende betingelse nr. 1 (*»fumus boni juris«*) bemærker klagenævnet:

Ad påstand 2

På det foreliggende grundlag er der ingen faktiske omstændigheder, der understøtter, at indklagede ved de igangværende slutforhandlinger med Alstom og Thales-BBR agter at overskride de rammer for præciseringer og justeringer af de pågældende afsluttende tilbud, som følger af forsyningsvirksomhedsdirektivets artikel 10 og udbudsbetingelsernes punkt 7.3. Det bemærkes herved, at klagenævnet alene kan konstatere overtrædelser, som allerede er begået, og at klagenævnet alene over for sådanne overtrædelser kan gribe ind med sanktioner.

Ad de øvrige påstande

Klagenævnet bemærker om påstand 1 foreløbigt, at det fremgår af erklæringen fra programdirektør Morten Søndergaard og de e-mailunderretninger, Nicolas Hughes har sendt til andre involverede i

klagerens organisation, at kun en meget begrænset personkreds hos indklagede var involveret i processen med indstilling af vinderne af udbuddet, og at oplysningerne herom blev holdt strengt fortroligt. Derudover fremgår det, at der var en række rygter og formodninger i markedet om bedømmelsen.

Anbringendet om politisk indblanding hviler så vidt ses alene på erklæringen fra en enkelt person, som samtidig med, at den pågældende var ansat hos indklagede, fungerede som konsulent for klageren i udbudsfasen. Den pågældende har efter det oplyste ikke selv været involveret i evalueringsprocessen og indstillingen af, hvilke tilbudsgivere som skulle have kontrakt tildelt. Ifølge erklæringen er oplysningerne om en oprindelig indstilling af klageren som vinder og om politisk indblanding baseret på andenhånds oplysninger fra en person ansat hos []. Denne person var ifølge erklæringen heller ikke involveret i evalueringsprocessen og indstillingen af, hvilke tilbudsgivere der skulle have kontrakt tildelt. I erklæringen angives, at oplysningerne »are not 100% confirmed«.

Klagenævnet finder på dette grundlag og efter de i øvrigt foreliggende oplysninger foreløbigt, at der ikke er grundlag for klagerens anbringender om ændring af en oprindelig indstilling af klageren som vinder og om, at dette skulle være resultatet af en politisk indblanding.

For så vidt angår klagerens øvrige anbringender til støtte for påstand 1 bemærkes foreløbigt blot, at disse anbringender så vidt ses dækker over samme forhold som påstandene 3-6, herunder særligt påstand 6.

For så vidt angår de øvrige påstande samt de øvrige anbringender til støtte for påstand 1 foreligger der efter klagenævnets foreløbige vurdering ikke forhold, der kan give anledning til at slække på kravene til opfyldelse af betingelse nr. 2 om uopsættelighed. Det bemærkes herved, at påstandene 3-6 og de yderligere anbringender vedrørende påstand 1 vedrører resultatet af bedømmelsen af 6 teknisk meget komplicerede og omfattende tilbud.

For så vidt angår betingelsen om *uopsættelighed* finder klagenævnet, at det forhold, at det som følge af kontrakternes store værdi, kompleksitet og lange varighed kan være kompliceret at opgøre det nøjagtige tab ved ikke at få kontrakt tildelt, ikke indebærer, at muligheden for erstatning, hvis betingelserne herfor måtte være opfyldt, ikke udgør et tilstrækkeligt værn

mod det retstab, klageren ville lide, såfremt der ikke gives opsættende virkning, og klagenævnet efterfølgende, når kontrakter er indgået, måtte statuere, at der er begået overtrædelser som påstået af klageren. Det yderligere af klageren anførte om renommétab og brug af betydelige ressourcer på tilbudsgivningen kan heller ikke føre til, at erstatning ikke kan antages at udgøre et tilstrækkeligt værn af klagerens interesser.

Da betingelse nr. 2 om *uopsættelighed* herefter ikke opfyldt, tillægges klagen ikke opsættende virkning.

Herefter bestemmes:

Klagen tillægges ikke opsættende virkning.

Michael Ellehauge / Katja Høegh

Genpartens rigtighed bekræftes.

Camilla Christina Nielsen
kontorfuldmægtig