



Diakonhjemmet

How can we promote sustainable and socially responsible public procurement -- building on experiences at local level

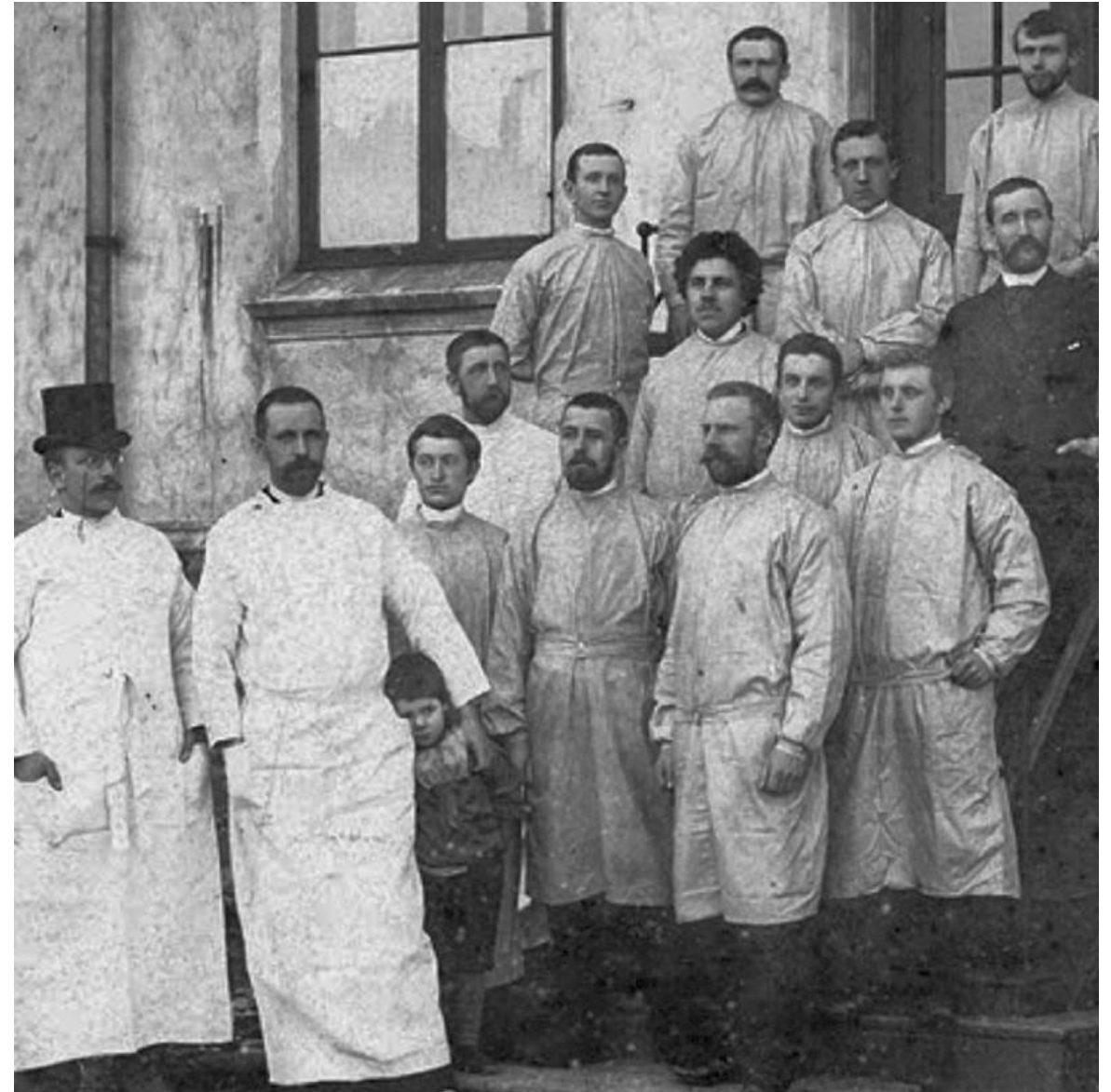
The implementation of reserved contracts in health & social services: The Oslo case E4-22

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Political and legal background

- Civil society and diaconal actors in welfare in Norway
- The implementation of the new Act on Public Procurement resulted in a strengthened consciousness of the role of nonprofit organisations in welfare
- Broad support for a policy aiming to facilitate/ increase future provision of welfare by non-profit organisations
- Since then, the objective has become embedded in documents and decisions, in part also with detailed targets of percentual growth in different welfare sectors



Oslo Municipality's strategy on the strengthening of non-profit providers engagement in welfare (2019)

- Use the opportunity space in the rules on public procurement to reserve competition for non-profits
- Request non-profits' distinctive features in open competitions
- Contract regulations ensure good services for users and good working conditions for employees
- Foster productive dialogue with non-profits

- Target: 25% of nursing home places are operated by non-profits (35% today)
- Recognized as a "Best Practice" by the European Commission



31 Oslo's strategy for the promotion of not-for-profit providers of health and social care services

Name of procuring authority, Country: Municipality of Oslo, Norway
Product or service sector: Healthcare



Introduction/procurement objective

Non-profit organisations have a long tradition in the provision of health and social services to people with care needs in Oslo. Acknowledging the societal value brought by not-for-profit operators, the Municipality of Oslo sought to reinforce access to public procurement markets by this type of provider and achieve the goal that at least 25% of the total number of places in nursing homes in Oslo are operated by not-for-profit providers by 2025.

As of June 2019, commercial operators run 1,188 places in nursing homes in Oslo, which represent 29% of the total. Not-for-profit operators currently run 746 places, or about 18% of the total. The remaining 53% of places are publicly-run.

Social policy objective and/or reference standard

The provision of health and social care services is a statutory obligation that the municipality of Oslo may choose to fulfil itself as a direct provider or, alternatively, may enter into contracts with operators that provide the service on its behalf. Such contracts should to the greatest possible extent be equal to the requirements observed by the municipality when it acts as a direct provider.

The contracts for health and social care services are usually high-value and last for several years (often up to 10 years). It is crucial that such services meet the needs identified by service users and service user groups. This means that price is not necessarily the most relevant element in the assessment of services, which may also need to adapt service provision according to users' changing needs.

EU Directive implemented in national legislation and regulation

- Act on Public Procurement (2016/2020) and Regulation on public procurement (2016/2020) reads:
- Article 30-2a, Regulation:
- Contracting Authorities **may reserve the right to participate in tendering procedures for health and social services (...) to non-profit organisations if the reservation contributes to the attainment of social objectives, the good of the community and budgetary efficiency.**
- **Non-profit organisations shall not have a return on equity as their main objective. They shall endeavour solely for a social objective for the good of community and reinvest any profits in activity that fulfils the organisation's social objectives.**
- A non-profit organisation may, to a limited extent, engage in commercial activity that supports the business's social objectives.
- A guideline for procurements in health and social services, which elaborates both the room for action and the methods available, was provided (2020)

The public procurement of longterm leasing and service agreements for up to 800 new long-term places in nursing homes in Oslo

- **1st round:** reserved procurement process for 400 new long-term places in nursing homes, leasing and service agreement, published in 2018, evaluated and assigned in July 2019, but withdrawn December 2019 due to process risk
- **2nd round:** new procedure with 2 separate, yet linked procurements/contracts for leasing of buildings and service contracts respectively, for up to 800 new long-term places in nursing homes, published November 2020.
- **The real estate part** of the procurement of long-term leasing agreements (30+10 years) was open
- **The services part** (8+1+1 years) of long-term places in somatic and psychiatric nursing homes was reserved for nonprofit organisations. Evaluated and assigned May 2023.
- **Legal dispute:** 2 commercial nursing home operators, Stendi and Norlandia, disputed the right to reserve procurement processes and contracts to nonprofit providers.



Legal dispute

- **City of Oslo rationale and argument:**
- **Contracts for tax-financed long-term places in nursing homes do not have as their object the provision of «services» within the meaning of the Directive, but are to be understood as non-economic activity in the general sense**
- **Activities that are sufficiently concerned with the exercise of official authority equally fall within the exception**
- **The Directive must be interpreted as not precluding a national legislation allowing public contracting authorities to reserve the right to participate in tendering procedures relating to nursing home services for non-profit organisations, provided that the regulation complies with the principles of equal treatment and transparency**
- The City Court of Oslo, Tingretten, asked the EFTA Court for an advisory opinion.

Legal dispute:

- **Norwegian Government opinion:**
- **The contract for the provision of long-term places in nursing homes** should not be regarded as having as its object the provision of services... but is **fulfilling its obligation towards its own population based on the principle of solidarity**... As such, **the contract does not constitute a public service contract**
- The provision of long-term places in nursing homes is **directly and specifically connected with the exercise of coercive health care in respect of residents in such homes**
- ... **do not preclude national legislation pursuant to which contracting authorities may reserve the right to participate** in a tender procedure for contracts for the provision of health and social services to non-profit organisations.... **As such, an EEA state may, in the exercise of the power it retains to organise its social welfare system, reserve the right to participate in a tender procedure ... with a view to obtaining its social objectives, to non-profit organisations.**

Norwegian Government elaborated and clarified, in relation with a more recent introduction of section 30-2a of the Public Procurement Regulation:

Nonprofit operators provide an added value in society and confer advantages on society beyond the provision of the relevant health and social services.....



EFTA Court advisory opinion March 28, 2023

- The Court found that a public contract for pecuniary interest providing for the provision of long-term places in nursing homes, in circumstances such as those of the main proceedings, **constitutes a contract for the provision of services** within the meaning of point (9) of Article 2(1) of the Directive.
- The Court held that the activity of operating nursing homes, in circumstances such as those of the main proceedings, **cannot be regarded as being directly and specifically connected with the exercise of official authority**, even where coercive health care may be provided
- The Court found that Articles 74 to 77 of the Directive must be interpreted as **not precluding national legislation which reserves for “ideelle organisasjoner” the right to participate in a procedure, involving a competitive bidding process**, for the award of public contracts for the provision of social or other specific services listed in Annex XIV to the Directive, **provided that two conditions are fulfilled**. First, the legal and contractual framework within which the activity of those organisations is carried out must actually be **grounded in the principles of universality and solidarity**, which are inherent to a social welfare system, as well as in reasons of **economic efficiency and suitability**, and **contribute effectively to the social purpose and objectives of solidarity and budgetary efficiency** on which that system is based. Second, that the principle of **transparency**, ... is respected.

European Court of Justice Ruling March 31, 2023

- ECJ issued an interpretative opinion on March 31, 2023, in Case C-676/20- ASADE II
- The CJEU states that the **Public Procurement Directive does not preclude national legislation which allows for contracts to be reserved for non-profit organisations under certain conditions.**
- The CJEU provides **further clarification** of what is meant by the reservation condition «**budgetary efficiency**», and states that the exclusion of commercial suppliers from a reserved procurement **is not contrary to EU law for the sole reason that an open procurement procedure could possibly have enabled the contracting authority to purchase the same personalised service at a lower cost**

Challenges

- Pushbacks from commercial providers – process risk
- Unclear legal situation
- Lack of procurement competence in public admin/ in municipalities
- Lack of guidelines and best practices
- Price/quality ratio -> price pressure, favour price over quality
- Detail /micro management -> lack of development and innovation, isomorphism
- Social impact, innovation and sustainability are not requested
- Lack of nonprofit competition
- Lack of investment capital



Possibilities

- Commission to investigate how to regulate the role of commercial providers in tax-funded welfare, establish a formal definition of nonprofit providers in welfare and propose a register arrangement for nonprofit organisations
- Take advantage of the opportunity space in public procurement legislation: request /document social impact and added values including sustainability, innovation, change, voluntarism, inclusion, participation, employment...
- Foster and make use of the room for dialogue and involvement in development and planning of health and social care (market consultation, collaboration, partnership)
- Reserved procurement processes and contracts represent one, but not the only tool to promote non-profit, civil society engagement in welfare



How to promote sustainable and socially responsible procurement?

- Clarify and communicate existing rule
- Ensure correct implementation – guidelines, best practices
- Promote innovative, sustainable and socially responsible procurement
- Focus on requesting, documenting and communicating distinctive features, added value and social impact of non-profit and civil society based welfare
- Highlight different motivation for innovation: oriented towards meeting user needs and coproduction with users
- Hold on to sustainability targets – sustainability in the widest sense
- Explore alternative, diversified models of financing social services



Thank you!

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