

K E N D E L S E

Lattanzio Advisory S.p.A,
Fundación Educación Para el Empleo (EuropEFE),
EFE Egypt,
Jordan Career Education Foundation,
EFE Maroc,
EFE Tunisie,
EFE US,
Danish Forum for International Cooperation (FIC)
(alle advokat Erik Kjær-Hansen, København)

mod

Udenrigsministeriet
(advokat Vibeke Fabricius Nordlander, København)

Ved udbudsbekendtgørelse nr. 2016/S 193-347444 af 3. oktober 2016 udbød Udenrigsministeriet som begrænset udbud efter udbudsloven en kontrakt om tjenesteydelser i form af et partnerskab til et dansk-arabisk udviklingsprojekt, ”Youth Participation and Employment”.

Efter en prækvalifikationsrunde blev 5 konsortier udvalgt til at afgive tilbud, og ved tilbudsfristens udløb den 19. december 2016 havde følgende 4 virksomheder afgivet tilbud:

- International Alert,
- Lattanzio Advisory S.p.A m.fl. (et konsortium),
- Mellemfølgelig Samvirke og

– Oxfam IBIS

Udenrigsministeriet meddelte den 23. december 2016, at kontrakten ville blive tildelt Oxfam IBIS. Den 27. december 2016 tilbagekaldte ministeriet tildelingsbeslutningen, idet evalueringen af tilbuddene var behæftet med fejl.

Den 9. januar 2017 meddelte Udenrigsministeriet, at ministeriet efter en fornyet tilbudsevaluering af de 4 tilbud havde besluttet på ny at tildele kontrakten til Oxfam IBIS, som havde afgivet det økonomisk mest fordelagtige tilbud. Den 2. februar 2017 blev bekendtgørelse om resultatet af udbuddet offentliggjort.

Den 20. marts 2017 indgav Lattanzio Advisory S.p.A m.fl. (herefter Lattanzio) en klage til Klagenævnet for Udbud over Udenrigsministeriet. Klagen har været behandlet skriftligt.

Lattanzio har nedlagt følgende påstande:

Påstand 1

Klagenævnet skal konstatere, at Udenrigsministeriet har handlet i strid med principperne om ligebehandling og gennemsigtighed i udbudslovens § 2 ved i sin reevaluering af tilbuddene at benytte samme evalueringskomite som ved den oprindelige evaluering, uanset at evalueringen af de kvalitative elementer skulle ske uden kendskab til den tilbudte pris.

Påstand 2

Klagenævnet skal konstatere, at Udenrigsministeriet har handlet i strid med principperne om ligebehandling og gennemsigtighed i udbudslovens § 2 ved at lade to tilbudsgivere ændre prisen i deres tilbud, hvorved de reelt har fået mulighed for at afgive nye tilbud.

Påstand 3

Klagenævnet skal konstatere, at Udenrigsministeriet har handlet i strid med principperne om ligebehandling og gennemsigtighed i udbudslovens § 2 ved i forhold til det vindende tilbud at evaluere underkriteriet ”Monitoring and reporting” objektivt forkert, idet Udenrigsministeriet ikke har overholdt sin egen pointskala.

Påstand 4

Klagenævnet skal konstatere, at Udenrigsministeriet har handlet i strid med principperne om ligebehandling og gennemsigtighed i udbudslovens § 2 ved i evalueringen at lægge vægt på den vindende tilbudsgivers bilag til underkriteriet ”Result Framework” på trods af, at bilagene ikke overholdt kravene efter udbudsmaterialet.

Påstand 5

Klagenævnet skal konstatere, at Udenrigsministeriet har handlet i strid med udbudslovens § 2 om gennemsigtighedsprincippet, idet udbudsbetingelserne er behæftet med fejl, da vægtningen af kriterierne ikke er konsistente.

Påstand 6

Klagenævnet skal annullere Udenrigsministeriets beslutning om at tildele kontrakten til Oxfam IBIS og pålægge ministeriet at reevaluere de indkomne tilbud.

Påstand 7 (subsidiær i forhold til påstand 6)

Klagenævnet skal annullere udbuddet.

Lattanzio har taget forbehold for at nedlægge påstand om erstatning.

Udenrigsministeriet har nedlagt påstand om, at klagen ikke tages til følge.

Sagens nærmere omstændigheder

I udbudsbekendtgørelsen står blandt andet:

“II.1.5) Estimated total value
Value excluding VAT: 175 000 000.00 DKK

...

II.2.4) Description of the procurement:

This procurement procedure is one out of 5 procurement procedures with the purpose of entering into contract with a service provider with experience and competences matching the assignment. This particular contract entail development engagement of Youth Participation and Employment.

...

The development engagement for Youth Participation and Employment brings together four targeted intervention areas with potential synergy effects more specifically in the promotion of:

- Economic and employment opportunities for youth – men and women – identified and pursued by partnerships;
- Personal skills for youth – men and women – to engage in society and become change agents and entrepreneurs built by partnerships;
- Organisational capacity and geographical and socio-economic inclusiveness of organisations and communities for youth improved through partnerships;
- Legal reform (through advocacy work and dialogue between youth, public and private institutions and businesses, and local and national government) enhanced through partnerships.”

Af udbudsbetingelserne fremgår blandt andet:

”7. Tender Opening

7.1 Tenders and other submissions, which are in accordance with Clause 6 of these Instructions, will be opened by the Tender Committee Chairperson immediately after the expiry of the time limit for receipt of tenders. The Tenderers’ representatives will not be present at the opening.

The envelope with the price part (i.e. Appendix 3.1 Schedule of Prices of the Tender Document) shall not be opened until the evaluation of the technical parts have been completed.

...

8. Tender Evaluation

...

8.3 ...

The evaluation of the technical parts shall be completed before opening the envelopes with the price parts.

8.4 Price parts will first be checked by the Client for any arithmetic errors in computation and summation, and any errors will be corrected as follows:

- (i) If there is any discrepancy between amount in figures and in words, the amount in words will take precedence.
- (ii) If there is a discrepancy between the Total Price entered and the equivalent sum computed on the basis of the breakdowns, the Total

Price shall be adjusted to the sum computed on the basis of the breakdowns.

- (iii) If there is a discrepancy between a stated amount and the correct amount calculated by multiplying the stated unit rate by the quantity, the stated amount shall be adjusted to the correct amount and the Total Price adjusted correspondingly.

The Tenderer may be notified of these corrections and if the Tenderer does not accept these adjustments as notified, its tender may be rejected.

Tenders, where the Total Price, as quoted in the Schedule of Prices exceeds the maximum budget stated in the Letter of Invitation or contract notice, shall be rejected.

8.5 The Client will determine for each tender the evaluated price by making any correction for errors as described above.

8.6 To assist in the examination, evaluation and comparison of tenders, the Client may ask any Tenderer for clarification of breakdowns of unit rates and sums. The request for clarification and the response shall be in writing. No change in the price or substance of the tender shall be sought, offered or permitted except as required to confirm the correction of arithmetic errors discovered by the Client during the evaluation of the tenders, cf. Danish Public Procurement Act, §159, stk.5. The use of the word "shall" in the tender document does not prevent the Client from remedying or disregarding missing or ambiguous information in the tender.”

Tildelingskriterium m.v.

Tildelingskriteriet er i udbudsbetingelsernes afsnit “Criteria and method for evaluation” beskrevet således:

”...

Tenders shall be evaluated using the most economically advantageous tender criterion with a weight of 80% given to the technical part and a weight of 20% given to the price part (fees and project-related expenses, including options (if applicable) but excluding amounts fixed by the Client budget line B 4, and as defined in the Appendix 3 to the Agreement.)

The following criteria shall be used as a basis for evaluation of the technical part:

Technical Quality					70%
		1. Approach and methodology	20%		
		2. Partnership concept and strategic approach	20%		
		3. Objectives and theory of change (ToC)	15%		
		4. Results framework	15%		
		5. Management and organization	10%		
		6. Monitoring and reporting	10%		
		7. Risk management	15%		
Qualifications and competence of Key Personnel					30%
	Responsible for the programme		20%		
		General qualifications	25%		
		Adequacy for the assignment	55%		
		Experience in the region and language	20%		
	Senior professional				20%
		General qualifications	25%		
		Adequacy for the assignment	55%		
		Experience in the region and language	20%		
	Senior professional				20%
		General qualifications	25%		
		Adequacy for the assignment	55%		

		Experience in the region and language	20%		
	Senior professional				20%
		General qualifications	25%		
		Adequacy for the assignment	55%		
		Experience in the region and language	20%		
	Senior professional				20
		General qualifications	25%		
		Adequacy for the assignment	55%		
		Experience in the region and language	20%		
Total technical part				100%	
Weighted technical part					80%
Weighted price part				20%	
Total technical and price part					100%

The level of responsiveness for each qualitative (technical part) criterion and sub-criterion will be rated using the following scale from 0-8:

Fulfillment of criteria	Points
Best possible fulfillment of the criteria	8
Brilliant/excellent fulfillment of the criteria	7
Good/very satisfactory fulfillment of the criteria	6
Above average fulfillment of the criteria	5
Average/satisfactory fulfillment of the criteria	4
Below average fulfillment of the criteria	3
Less satisfactory fulfillment of the criteria	2
Insufficient fulfillment of the criteria	1
Poor fulfillment of the criteria (but compliant tender)	0

The rating of each criterion and sub-criterion shall then be weighted and added to give the total score.

The tendered price will be converted to points after a non-linear model, where the tender with the lowest evaluated price (cfr. clause 8.4, 8.5 and 8.6 in the Instructions to Tenderers) will be given a price score of 8 points and the other tenders' price will be scored using the following formula:

Score of the tender = $8 * \text{lowest price} / \text{tender price}$

The total score of the tender shall be obtained by weighting and adding the technical (20 %) and price (80 %) scores.

...

Description of evaluation method

Technical Quality:

The Tender Committee will in particular consider the following:

...

4. Results framework: The evaluation will assess whether the proposed result framework and its impact indicator(s) are realistic.

...

6. Monitoring and reporting: The evaluation will in particular assess whether the system for monitoring and reporting is appropriate and sufficient in regards to both the deliveries from the Implementing Partner as well as the local partner(s).

Also, the evaluation will assess whether the reporting systems ensure that MENA is kept up to date on the progress of the programme.

In addition, whether the tender proposes a clear system for ensuring satisfactory QA.

...”

Under prækvalifikationsfasen stillede tilbudsgiverne en række spørgsmål. Udenrigsministeriet besvarede blandt andet følgende spørgsmål vedrørende tildelingskriteriet:

”

No.	Question	Answer
P34	It is stated in the material that the price weigh 20%. Are you expected to weigh the pro-	The total price weighs 20% and the evaluation will be based on all of the cost includ-

	gramme or also administrative budget?	ed. Thus, both the administrative costs and the project related expenses will be part of the evaluation. Please refer to appendix 3, schedule 3.1. The evaluation of the total price consist of both Fees and Project Related Expenses, c.f. Schedule 3.1. The Ministry of Foreign Affairs requests that the tenderer break down the fees for year 1 and the Project related Expenses for year 1. In regards to year 2, 3, 4 and 5 the Ministry of Foreign Affairs refers to section 5 of the Tender Document. The Implementing Partner are required to "prepare annual work plans every year in cooperation with MENA, in order to ensure progress of the Assignment and that the activities are relevant in relation to the development in the region and the focus countries. The budget for each year is subject to approval by MENA in September each year".
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Af en PowerPoint præsentation fra et informationsmøde, der blev afholdt den 29. november 2016, fremgår blandt andet følgende om vægtningen af underkriterierne:

"The Assessment of the Tender

› The Economical Most Advantageous Tender

› Price, weight 20%

› Quality, weight 80%

› Technical Quality, 70%

› Qualification and Competences of Key Personnel, 30%"

Vederlag m.v.

Kontraktens vederlagsbilag, Appendix 3, indeholder følgende om kontraktens vederlagsstruktur:

” ...

Appendix 3 – Remuneration and payment

Appendix 3 comprises of the following schedules:

3.1 - Schedule of Prices (to be completed by the Tenderer)

3.2 - Terms of Remuneration

3.3 - Terms of Payment

...

3.2 - TERMS OF REMUNERATION

1. Total Price, Ceiling Amounts and Sub-ceiling Amounts

1.1 ... The ceiling amounts are sub-divided into sub-ceiling amounts as follows:

All amounts shall be in DKK.

A Fees	Ceiling Amount
A.1 Long term Key Personnel	Sub-ceiling Amount
A.2. Short term Key Personnel	Sub-ceiling Amount
B Project-related Expense	Ceiling Amount
B.1 International travel	Sub-Ceiling Amount
B.2 Local travel	Sub-ceiling Amount
B.3 Subsistence allowance	Sub-ceiling Amount
B.4 Other project related expenses	Sub-ceiling Amount

...

2. Fees

2.1 ...

All fee rates must cover:

- The remuneration actually paid per month to Key Personnel on long-term assignments, and per working day to Key Personnel on short-term assignments.
- Administrative costs of employing the Key Personnel, such as relocation and repatriation expenses (excluding flights to and from the beneficiary country upon mobilization and demobilization), expatriation allowances, leave, medical insurance and other benefits accorded to the Key Personnel.

- Accommodation for Key Personnel on long term assignments (accommodation for Key Personnel on short term assignments is covered by the Subsistence allowance / per diem); see also 3.4.
- The margin covering the Consultant's overheads, profit and backstopping facilities such as (i) general administration and administration related to the Services (management, Key personnel, secretarial services, book keeping and auditing, advance payment security, IT administration, engineering backup, other support, etc.), (ii) internal quality management and assurance, (iii) marketing (promotion, tendering, negotiations etc.), (iv) HRD and business development.

...

3. Project-related Expenses

3.1 The Client shall, subject to the conditions and principles set out in these terms, reimburse the Consultant's expenses as specified in the Schedule of Prices and actually and reasonable incurred by the Consultant in the execution of the Services.

Reimbursement of expenses shall only take place against documentation from a third party.

Only expenses listed by the types and amount in the Schedule of Prices, and defined as follows shall be reimbursed.

3.2 International Travel

Outward travel on commencement of assignment between the permanent residence and the base of operation and return travel on completion of the assignment shall be reimbursed for all Key Personnel. Journeys from the airport or public transport station closest to the place of permanent residence of the Key Personnel to the final place of assignment are regarded as international travel. The sections of the journey before and after the international journey, and between the town of arrival and its airport are covered by the per diem.

All travels to be reimbursed shall be made by the most appropriate means of transport and the most direct, practicable route, and shall be on what corresponds to economy class using existing discount schemes.

3.3 Local travel

Travel costs for missions to be undertaken by Key Personnel as part of the assignment away from the base of operation in the beneficiary country. Such travel expenses may comprise:

- Travels by air/ground by the most appropriate means of transport and the most direct, practicable route, and shall be on what corresponds to economy class using existing discount schemes.

3.4 Subsistence allowance

Subsistence allowance paid on a per diem basis to Key Personnel on long-term assignments on missions requiring an overnight stay away from the base of operations in the beneficiary country, and to Key Personnel on short-term assignments away from their permanent place of residence.

Per diems cover accommodation, meals, local travel within the place of mission (intra-city travel) and sundry expenses not exceeding the per diem rate published on the EC web site.

3.5 Other project related expenses

Expenses for insurances referred to in Particular Conditions B. Additional Clauses 7.1. and 7.2. Other expenses only as specified in Appendix 1, Scope of Services.”

Udenrigsministeriet modtog under prækvalifikationsfasen følgende spørgsmål om vederlag:

” ...

No.	Question	Answer
... P59	... 4. Tender document page 56: “A more detailed budget for 2017 should be attached (Appendix 3). To the extent possible, expenses should be budgeted in relation to outcomes and activities.” Appendix 3 provides a template for breakdown of fees (page 64-65) as well as a template for breakdown of project related expenses (page 66-68). Q1: Is it expected to include the 5 key personnel (with attached CVs) in a separate schedule for breakdown of fees and subsequently include	... Q1: The breakdown of fees should include all needed personnel (including the 5 offered key personnel, any additional personnel needed as well as any sub-consultants, sub-contractors and such). Q2: The breakdown of project related cost should include project related costs related to the activities (and their out-puts) and include project related costs regarding the offered 5 key personnel, any additional person-

	<p>additional personnel needed for implementation under “B.4 Other project related costs” or in a separate schedule for breakdown of fees? Or is it expected to include all needed personnel (5 key personnel and all other needed personnel, including that of sub-contracted implementing partners) in the same schedule for breakdown of fees?</p> <p>Q2: Is it expected to include all project related expenses for the 5 key personnel as well as all other project expenses related to activities in the same schedule (“breakdown of project related expenses, page 66-68)?</p> <p>Q3: If yes, should all project expenses related to activities (including those expenses of sub-contracted implementing partners), which do not belong under B.1, B.2 or B3, be detailed under “B.4 Other project related expenses” and at what level of details?</p>	<p>nel, as well as any sub-consultants, sub-contracts and such</p> <p>Q3: All other costs should be detailed under B.4 Other Project Related Expenses. The costs should be related to the activities (and their output)</p>
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Under tilbudsprocessen modtog Udenrigsministeriet yderligere spørgsmål om vederlag. Spørgsmålene og svarene lød:

” ...

No.	Question	Answer
<p>... T100</p>	<p>... Kindly specify the types of activities that can be included in budget line B.4 ‘Other project related expenses’ in schedule 3. Or kindly specify where exactly in the tender document or contract notice</p>	<p>... It is the choice of the tenderer which expenses they wish to include in budget line B.4.</p>

	<p>we can find information about this.</p> <p>On page 78, section 3.5 the tender documents that ‘Other expenses only as specified in Appendix 1, Scope of Services’ but it is not clear to us where is Appendix 1, Scope of Services it is specified what ‘other project related expenses’ could consist of. Unless it is a reference to the required indicative budget as requested on page 55 in the tender document?</p>	
T101	<p>Kindly explain how the two required budgets – schedule 3 and the indicative budget for 2017-2021 as requested as part of the technical proposal (page 55 in the tender document) – should be inter-linked?</p> <p>Are we supposed to include the indicative budget 2017-2021 related to outcomes and activities at country and regional level with budget lines for administration and unforeseen expenses into the template in schedule 3? If yes, at which budget line(s)?</p> <p>Is the indicative budget required at page 55 to be understood as an unfolding of the budget line B.4?</p>	<p>Schedule 3 includes the fees, project expenses and other project expenses, c.f. schedule 3 section A and B.</p> <p>The budget for the first year based on outcome and output level and the following years can be presented either in the separate budget, named C, or by adding lines after section B. Please, refer to the updated tender document.</p> <p>Administration and unforeseen expenses can be included in section B under Other project expenses. Administration can be included as part of the fees. However, if the tenderer chooses to include the administration in the fees, the tenderer is requested to make a footnote of it in the schedule.</p>
...
T105	<p>On page 68 in the tender document it says that: ‘Time worked by Key Personnel or</p>	<p>Please, refer to schedule 3, section 2.1 last paragraph.</p>

	<p>expenses incurred other than those specified in the Schedule of Prices or where amounts are not entered in the Schedule of Prices shall not be remunerated by the Client, but shall be deemed covered by the Consultant's Overhead (see definition below)?</p> <p>Kindly specify exactly where in the tender document or contract notice we can find this definition of overhead?</p>	<p>” - The margin covering the Consultant’s overheads, profit and backstopping facilities such as (i) general administration and administration related to the Services (management, key personnel, secretarial services, book keeping and auditing, advance payment security, IT administration, engineering backup, other support, etc.), (ii) internal quality management and assurance, (iii) marketing (promotion, tendering, negotiations etc.), (iv) HRD and business development.”</p>
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Ministeriet modtog endvidere følgende spørgsmål vedrørende afgrænsningen mellem ”fees” og ”other project related expenses” (B.4):

YPET1	<p>Q&A on Budget issues no. T100, T101 and T115 – We point out the issue about the content of budget line B.4. Being such item excluded by the evaluation of the financial offer (as per criteria stated at page 13 of the tender document), it’s important in our opinion to share the prescriptions with respect to the expenses to be included within, in order to allow to comparable offers. Must project activities demanding specific service fees be considered sub A (Fees) or sub B4 (other project expenses)? Must administrative and/or unforeseen expenses other than overheads and profits be included in B.4? Depending on how to consider the above</p>	<p>Project activities demanding specific service fees should be included in sub A (fees).</p> <p>Administrative expenses (max 7 pct.) should be included in the fees.</p> <p>Unforeseen expenses other than overheads and profits should be included in B.4.</p>
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	(costs included in B.4 item), it can imply a substantial difference among prices to be evaluated, even in case of similar overall total budgets.	
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Tilbudsevaluering m.v.

Følgende fremgår af udbudsmaterialets bilag ”Introduction” dateret november 2016 vedrørende afleveringskrav til tilbud, herunder det maksimale sideantal:

”5. Content of the Tender

The Tenderer should complete the following documents:

- Appendix 1 - Technical Proposal, section 6 named: Requirements for the technical proposal
 - Technical proposal max 10 A4-pages
 - Annexes A-C to the Technical Proposal, cf. Appendix 1, section 6 “Requirements for the technical proposal”. Please note, that the tenderer should develop their own templates for the annexes as no template is provided.
 - The annexes A-C max 15 A4-pages)

...

- Appendix 3 – Renumeration and payment
- 3.1 – Schedule of Prices
 - Ceiling amounts
 - Break down of Fee for Year 1
 - Detailed Budget for Year 1 on outcome and output level
 - Budget for Year 2,3,4, and 5 on outcome level”

Oxfam IBIS’ tilbud indeholder blandt andet følgende vedrørende ”Technical Proposal”:

”Oxfam IBIS, 2016/S 193-347444, Schedule 1 Technical proposal

...

Results framework

A separate results framework for the four countries is attached as Annex B. The theory of change for the four countries is similar; however, since the starting point for the four countries differs (e.g. regarding context,

level of experience with job creation for youth, approach to job creation), the activities, outcomes and outputs also differ per country. As a result, the theory of change is a complex structure that is difficult to translate into only a two-level framework (outcome and outputs). Therefore we have chosen to formulate outputs more like short term outcomes. The results framework should be considered as a starting point for further discussion for the development of the programme and the details of the results framework will be discussed in further detail with partners if Oxfam is approved.

Country level results framework are enclosed as supporting documents to the bid.”

Oxfam IBIS vedlagde Annex B, som udgør i alt 5 sider, til sit tilbud. Til Annex B vedlagde virksomheden yderligere bilag, såkaldte ”Supporting documents”, bestående af i alt 17 sider.

Af Oxfam IBIS’ prisbilag vedrørende budgetterne fremgik følgende:

”Schedule of prices – Breakdown of Fees (Year 1)

DAPP consolidated budget final version 2016-12-19

...

Code	Position	...	Unit:	Number of units	Unit Rate DKK	Amount in DKK		Year 1 Amount in DKK
...								
B.4.1	Please refer to country specific budgets, region, and steer		Lump-sums	0	0	0		0
B.4	Sub-ceiling amount					110.795.059		22.159.012

...

DAPP Steer 2016-12-19

All amounts in DKK

Code	Position	...	Unit	Numbers of units	Unit Rate DKK	Amount in DKK
...
B.4	Other project related expenses					

	(activities)					
B.4.1	Various costs related to F2F meetings		Costs	1	75.000	75.000
B.4.2	Project management tools		0	1	50.000	50.000
B.4.12	Local audit all countries		Annual	25	35.000	875.000
B.4.13	Bank costs and liability insurance		Annual	5	100.000	500.000
B.4	Sub-ceiling amount					1.500.000

...

DAPP Regional 2016-12-19

All amounts in DKK

Code	Position	...	Unit:	Number of units	Unit Rate DKK	Unit Rate + Margin	Amount in DKK
...
B.4	Sub-ceiling amount						16.893.102

...

DAPP Novib Egypt 2016-12-19

All amounts in DKK

Code	Position	...	Unit:	Number of units	Unit Rate DKK	Amount in DKK
...
B.4	Sub-ceiling amount					26.077.200

...

DAPP Novib - Tunis 2016-12-19

All amounts in DKK

Code	Position	...	Unit:	Number of units	Unit Rate DKK	Amount in DKK
...
B.4	Sub-ceiling amount					22.348.660

...

DAPP Intermon-Morocco 2016-12-19

Code	Position	...	Unit:	Number	Unit Rate DKK	Amount in
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				of units		DKK
...
B.4	Sub-ceiling amount					21.120.750

...

DAPP Jordan - OGB 2016-12-19

EUR-DKK 7,4368

All amounts in DKK

Code	Position	Unit:	Number of units	Currency	Unit Rate in Currency	Total EUR	Budget DKK
...
B.4	Sub-ceiling amount					3.073.277	22.855.347

”

Den oprindelige tildelingsbeslutning blev meddelt den 23. december 2016.
Af evalueringsrapporten fremgår blandt andet:

”ANNEX 2 – ORIGINAL TENDER EVALUATION REPORT

...

Tender Committee members

Name	Position	Organisation
Kurt Mørck Jensen	Chairman for the Committee Chief Advisor	The Ministry of Foreign Affairs of Denmark
Jette Samuel Jeppesen	Team Leader	The Ministry of Foreign Affairs of Denmark
Vibeke Jessen	Tender Consultant	COWI
Peter Michael Mallow	Technical specialist	COWI
Birgit Lindnæs	Technical Specialist	COWI

...

Summary of technical evaluation

Technical Quality	Weight	Score: International Alert	Score: Lattanzio Advisory S.p.A	Score: Mellempøkeligt Samvirke	Score: Oxfam IBIS
1. Approach and methodology 20%	70%	4	6	4	7
2. Partnership concept and strategic approach 20%		5	5	5	7
3. Objectives and Theory of Change		4	4	6	6

(ToC), 15%					
4. Result Framework		4	6	4	7
5. Management and organization		6	6	6	6
6. Monitoring and reporting, 10%		6	6	6	5
7. Risk management, 10%		6	5	6	7
Qualification and competences of offered key Personnel	30%				
1. Team leader – responsible for the programme					
a) General qualifications, 25%		7	5	6	6
b) Adequacy for the assignment, 55%		5	4	6	6
c) Experience in the region and language, 20%		6	4	6	6
2. International Senior Expert, 20%					
a) General qualifications, 25%		6	6	6	6
b) Adequacy for the assignment, 55%		6	6	6	5
c) Experience in the region and language, 20%		5	5	5	5
3. International Senior Expert, 20%					
a) General qualifications, 25%		5	6	6	6
b) Adequacy for the assignment, 55%		4	6	6	6
c) Experience in the region and language, 20%		4	5	6	6
4. Local Expert, 20%					
a) General qualifications, 25%		5	6	6	5

b) Adequacy for the assignment, 55%		4	6	5	6
c) Experience in the region and language, 20%		5	7	6	6
5. Local Expert, 20%					
a) General qualifications, 25%		5	6	6	4
b) Adequacy for the assignment, 55%		4	6	4	4
c) Experience in the region and language, 20%		5	7	4	6
Total Technical part	100%	4,84	5,48	5,24	6,23

...

1.9. The Evaluation of Oxfam IBIS:

Technical Quality:

...

6. Monitoring and reporting 10%

...

Assessment: Monitoring and reporting will be linked to the QA systems and verification of results and outcomes. Monitoring procedures and requirements will be presented in a manual to be applied by partners and for data to be consolidated. The country teams will be responsible for quarterly and annual reporting to OXFARM IBIS, and IBIS OXFARM ditto to DMFA/MENA. Midterm review is anticipated as well as an end evaluation of project results.”

Tilbudspriserne blev i den første bedømmelse evalueret således:

”

...

Tenderer	Price	Mark	Weighted
International Alert	DKK 31.941.616,	7,45	1,49
Lattanzio Advisory	DKK 33.367.108,58	7,13	1,43
Mellemfølgelig Samvirke	DKK 29.737.164	8,0	1,6
Oxfam/IBIS	DKK 35.000.000	6,8	1,36

”

...

I forbindelse med reevalueringen af tilbuddene anmodede Udenrigsministeriet den 6. januar 2017 pr. mail Oxfam IBIS om en afklaring af de anførte udgifter i henhold til tilbuddets finansielle del. Af anmodningen fremgår blandt andet:

”In your tender you have stated the following:

Total fees (A)	12.310753
Project expenses (B)	22.689.247
Other project expenses (B.4)	22.159.012
A+B excluding B.4	12.840.988

As shown in the table above costs under Project Expenses is almost the same as the “Other Project Expenses”. Our examination of the tender has shown, that the cost stipulated under B4 in your financial offer seems to entail activities in regards to the engagement more than Other Project related Expenses, which is audits, training (expenses not directly related to the activities in the engagement but still necessary to carry out the contract).

Our examination showed that the following amounts can be categorized as “Other Project Related Expenses”:

Other Project Expenses, B4	
Project tools, local audits all countries, bank costs and liability insurance (Steer budget)	1.500.000
Regional activities for partner interventions and seed funds activities (Regional budget)	(yearly amount) 3.378.620,40
Other Project Expenses B4 corrected	4.878.620,40

We kindly ask you to confirm/verify, that the above mentioned amount 4.878.620,40 is to be considered as “Other Project Related Expenses”

Your confirmation or de-confirmation should be received by me at Monday the 9.th of January at 12:00.

Please, be aware that the clarification cannot change your financial offer, c.f. the Tender Document section 8.6.”

Oxfam IBIS besvarede Udenrigsministeriets henvendelse samme dag pr. mail. Det fremgår blandt andet af besvarelsen:

”Oxfam IBIS can after verification of the budget confirm that your table below is correct:

Other Project Expenses, B4	
Project tools, local audits all countries, bank costs and liability insurance (Steer budget)	1.500.000
Regional activities for partner interventions and seed funds activities (Regional budget)	(yearly amount) 3.378.620,40
Other Project Expenses B4 corrected	4.878.620,40

- Please note that the 1,5 mio is an accumulated amount. Hence, the annual amount should be DKK 285.000 and “Other Project Expenses B4 corrected” should then read 3.678.620. Not a significant change though.
- Please also note that we expect to develop the regional budget in a way that it constitutes a significant part of the engagement project costs. Partner interventions and support for various employment activities through seed funding are well related to engagement.”

Udenrigsministeriet anmodede også den 6. januar 2017 International Alert om en afklaring af de angivne udgifter i henhold til tilbuddets finansielle del. Af anmodningen fremgår blandt andet:

”In your tender you have stated the following:

	Int. Alert
Total fees (A)	10.008.782
Project expenses (B)	21.932.834
Other project expenses B.4	16.621.667
A+B excludin B.4	28.905.703

...

Our examination of the tender has shown, that the cost stipulated under B4 in your financial offer seems to entail activities in regards to the engagement other than “Other Project Related Expenses”, which is audits, training (expenses not directly related to the activities in the engagement but still necessary to carry out the contract).

Our examination showed that the following amounts can be categorized as Other Project Related Expenses:

Inception workshops	200.000
Project baseline per country and regional	350.000
M&E training and tools development	70.000

Project staff reflection workshop	60.000
Internal audit	40.000
Unforeseen expenses	1.120.000
Total B4	1.840.000,00

We kindly ask you to confirm, that the above mentioned amount 1.840.000 is to be considered as Other Project Related Expenses.

Your confirmation or de-confirmation should be received by me at Monday the 9.th of January at 12:00.

Please, be aware that the clarification cannot change your financial offer, c.f. the Tender Document section 8.6.”

International Alert bekræftede samme dag Udenrigsministeriets korrektion.

Udenrigsministeriet underrettede den 9. januar 2017 tilbudsgiverne om den nye tildelingsbeslutning. Af evalueringsrapporten fremgår blandt andet følgende:

”1.1. Re-evaluation

On the 23rd of December 2016 the original evaluation was sent to the Tenderers. The Ministry of Foreign Affairs and COWI received afterwards a number of objections regarding the award decision. The objections regarded both the evaluation of the criterion Price as well as the evaluation of the criterion Quality. Therefore, the Ministry of Foreign Affairs decided to revoke the award decision, c.f. The Danish Act of Public Procurement section 170. ...

1.1.1. The objections to Price

The objection was that the evaluation of the Financial Offers did not follow the stipulated method in the tender document. According to page 13 of the Tender Document and the clarifications made in the process, the financial offers should be compared on the basis of the overall budget submitted, “but excluding amounts fixed by the Client budget line B 4”.

The objection was examined and it was concluded, that the original evaluation of the Financial Offers did not follow the method of evaluation stipulated in the Tender Document. Thus, a reevaluation of the Financial Offers was conducted, c.f. section 1.3.

1.1.2. The objections to the evaluation of Quality

The objections regarding evaluation of Quality were made both in regards to the evaluation of Qualifications and competences of Key Personnel as well as to the evaluation of Technical Quality.

The complainant stated that it was not possible to see which conditions had prevailed as particularly positive or negative with respect to assessments, thus it was not possible to deduct why the specific marks were given. Another complainant stated, that the evaluation of the criteria Technical Quality, especially the criteria Approach and Methodology, Partnership concept and strategic approach, Objective and Theory of Change (ToC) and Result Framework were insufficient as the assessment did not take civic engagement into consideration.

Also, a complainant stated that the total marks for Technical Quality was not weighted with 80% as stated in the Tender Document.

The objections regarding that the Technical Quality had not been weighted with 80% was examined and the conclusion was that the complainant was right.

1.2. Method of re-evaluation

The Tender Committee met on the 5th of January 2017 to evaluate the tenders. The Tender Committee consists of the following persons:

Tender Committee members

Name	Position	Organisation
Kurt Mørck Jensen	Chairman of the Tender Committee Chief Adviser, MENA	The Ministry of Foreign Affairs of Denmark
Jette Samuel Jeppesen	Team Leader, MENA	The Ministry of Foreign Affairs
Vibeke Jessen	Tender Consultant	COWI
Peter Michael Mallow	Technical specialist	COWI
Birgit Lindnæs	Technical Specialist	COWI

...

1.3. Re-evaluation of the Financial Offers

...

During the tender period it was clarified that the Tenderers were to decide upon which expenses to list under B4, c.f. T100. Furthermore, it was clarified that administration and unforeseen expenses could be included in B4. The administration could also be part of the fees.

...

In table 1 the stipulated prices regarding Total Fees, Project Related Expenses and Other Project Related Expenses is shown:

Table 1

	Int. Alert	Lattanzio	Mellemfolkeligt Samvirke	Oxfam/IBIS
Total fees (A)	10.008.782	18.320.208,58	9.895.200	12.310753
Project expenses (B)	21.932.834	15.046.109,14	19.841.963	22.689.247
Other project expenses (B.4)	16.621.667	11.834.435,53	4.552.957,00	22.159.012
A+B excluding B.4	28.905.703	21.532.673,19	25.214.206	12.840.988

On the basis of the figures shown in table 1, it was decided to request Oxfam/IBIS and International Alert to clarify “Other Project related Expenses” (B4), as the stipulated numbers showed that the tenderers both had stipulated “Project Related Expenses” under B4. The request for clarification was made with reference to the Tender Document 8.6 and the Danish Public Procurement Act 159, section 5.

The requests were sent by email on the 6th of January 2017 to both Tenderers. A copy of the requests and the confirmations received from the tenderers is attached as Annex 3.

...

In regards to the Financial Offers from Mellemfolkeligt Samvirke and Lattanzio the examination did not show reason to request clarifications of the financial offers.

...

Below the corrected numbers are shown as well as the mark for the criterion and the weighted mark for the criterion:

Table 3

	Int. Alert	Lattanzio	Mellemfolkeligt Samvirke	Oxfam/IBIS
Total fees (A)	10.008.782	18.320.208,58	9.895.200	12.310.753
Project related expenses (B)	21.932.834	15.046.109	19.841.963	22.689.247
Other project related expenses (B4)	1.840.000	11.834.435,53	4.522.957,00	3.678.620

Total price (A+B-B4)	30.101.616	21.531.882,19	25.214.206	31.321.380
Mark for Price	5,72	8,00	6,83	5,50
Weighted mark for Price	1,14	1,60	1,37	1,10

...

1.4.5. The re-evaluation of Technical Quality - Lattanzio Advisory S.pA

...

Qualifications and competences of Key Personnel

... However, the CV only to some extent demonstrate adequacy for the assignment as the involvement in the engagement areas is rather limited. It should be noted, that the CV exceeds the 4 pages, thus only the first 4 pages have been assessed as part of the evaluation.

...

1.4.11. The Re-evaluation of Technical Quality – Oxfam IBIS

...

4. Result Framework

The proposed result Framework is excellent and provides a precise overview of how the outcomes link to the outputs and annual targets at thematic and country level, which is considered to be positive. However, an overall impact indicator has not been defined. Targets are precise, e.g. online job seeking platforms, shadowing, mentoring and internships, enterprises becoming part of business networks, links to credit facilities for youth, standard setting and models for integration of women, which is considered positively. The defined targets are interconnected and at the same time detailed and tailored to each of the four countries, following consultation processes with local partners. This has also had a positive influence on the assessment.

Several of the outputs will be founded on baseline data and if these have not been delivered, the proposal (in a few instances) states "N/A (awaiting baseline data)". Targets gradually increases from the baseline year to 2017, 2019 and 2021. Most targets seem realistic (e.g. 3 focus groups established in 2017), while others may be too high (e.g. 5.000 young men and women empowered as youth leaders and change agents).

Activities in Egypt, clearly the most challenging context, are well defined. Egypt is not included in all types of activities, because of the political situation (e.g. CSR and labour rights, incl. women's rights and actors championing women's public role as economic actors), however the

activities is assessed to be realistic. In Jordan refugees are included in the broader target group of youth, not treated as a separate target group.

The proposal is assessed to be identifying and tailoring outputs to sectors and branches suitable for youth employment and in some cases specific branches have been prioritized, e.g. tourism, agriculture and micro-finance.

It is the assessment that the tender shows an excellent fulfilment of the criterion.

...

6. Monitoring and reporting

Monitoring and reporting will be linked to the QA systems and verification of results and outcomes. Monitoring procedures and requirements will be presented in a manual to be applied by partners and for data to be consolidated. The country teams will be responsible for quarterly and annual reporting to OXFARM IBIS, and IBIS OXFARM ditto to DMFA/MENA. Mid-term review is anticipated as well as an end evaluation of project results.

It is the assessment that the tender shows an above average fulfilment of the criterion.

...

1.5. The result of the tendering procedure

All the tenders have been re-evaluated, and the overall result is, that there are no substantial changes in the result. However, the total marks for each tenderer has been changed due to the use of the evaluation model for Price and due to the weighting of the criterion "Technical Quality" with the correct weight for the criterion.

...

	Int. Alert	Lattanzio	Mellemfolkeligt Samvirke	Oxfam IBIS
Weighted, Price, 20%	1,14	1,60	1,37	1,10
Weighted, Quality, 80%	3,90	4,46	4,29	5,03
Total sum	5,04	6,06	5,66	6,13

”

Evalueringsrapporten indeholder en oversigt over pointtildelingen ud fra de enkelte delkriterier til kriteriet Technical Quality. Af bilaget fremgår følgende:

» ...

Technical Quality	Weight	Score: International Alert	Score: Lattanzio Advisory S.p.A	Score: Mellemfolkeligt Samvirke	Score: Oxfam IBIS
1. Approach and methodology 20%	70%	4	6	5	7
2. Partnership concept and strategic approach 20%		5	5	5	7
3. Objectives and Theory of Change (ToC), 15%		4	4	6	6
4. Result Framework		4	6	4	7
5. Management and organization		6	6	6	6
6. Monitoring and reporting, 10%		6	6	6	6
7. Risk management, 10%		6	6	5	7
Qualification and competences of offered key Personnel	30%				
1. Team leader – responsible for the programme					
a) General qualifications, 25%		7	6	6	6
b) Adequacy for the assignment, 55%		5	4	6	6
c) Experience in the region and language, 20%		6	4	6	6
2. International Senior Expert, 20%					
a) General qualifications, 25%		6	6	6	6
b) Adequacy for the assignment, 55%		6	6	6	5
c) Experience in the region and language, 20%		5	5	6	5
3. International Senior Expert, 20%					
a) General qualifications, 25%		5	6	6	6
b) Adequacy for the assignment, 55%		4	6	6	6
c) Experience in the region and language, 20%		4	6	6	6
4. Local Expert, 20%					
a) General qualifications,		5	6	6	5

25%				
b) Adequacy for the assignment, 55%	4	6	6	6
c) Experience in the region and language, 20%	5	7	6	6
5. Local Expert, 20%				
a) General qualifications, 25%	5	6	6	4
b) Adequacy for the assignment, 55%	5	6	4	4
c) Experience in the region and language, 20%	5	7	5	5
Total Technical part	100%	4,87	5,57	5,36
				6,29

...”

Parternes anbringender

Ad påstand 1

Lattanzio har gjort gældende, at Udenrigsministeriet har handlet i strid med principperne om ligebehandling og gennemsigtighed ved i sin reevaluering af tilbuddene at have benyttet den samme evalueringskomité som ved den oprindelige evaluering. Tilbuddene blev således ikke evalueret i overensstemmelse med udbudsbetingelserne ved reevalueringen, idet komiteen allerede var blevet bekendt med tilbudsgivernes priser i forbindelse med den oprindelige evaluering.

Udenrigsministeriet har beskrevet evalueringsprocessen i udbudsmaterialet og er bundet af dette under tilbudsevalueringen. Der er ikke grundlag for at antage, at kravene til evalueringskomitéen alene skulle gælde ved den første evaluering.

Udenrigsministeriet har gjort gældende, at ministeriet ikke har handlet i strid med udbudslovens § 2, da ministeriet har foretaget en evaluering og reevaluering af tilbuddene – så vidt muligt – i overensstemmelse med beskrivelsen i udbudsbetingelserne af, hvordan evalueringen ville finde sted. Der kan ikke af udbudsloven eller af principperne i udbudslovens § 2 udledes et forbud mod, at evalueringen af de kvalitative kriterier foretages af en evalueringsgruppe, som kender tilbuddenes priser. Ligeledes kan der ikke udledes et forbud mod at anvende samme evalueringskomité ved en reevaluering af tilbud.

Reevalueringen blev foretaget som følge af en række konstaterede fejl ved den oprindelige evaluering. Denne situation var ikke beskrevet eller reguleret i udbudsmaterialet.

Den beskrevne tilrettelæggelse af evalueringen havde alene til formål at danne ramme for evalueringen og kunne ikke udstrækkes til også at regulere den særlige situation, der opstod ved reevalueringen. Formålet med reevalueringen var at vurdere, om der var grundlag for at ændre den oprindelige evaluering af de kvalitative kriterier, herunder at kontrollere om de tildelte point harmonerede med pointmodellen og afspejlede en saglig og korrekt vurdering på tværs af alle tilbud. Reevalueringen skulle derfor gennemføres af den samme evalueringskomité, som forestod den første evaluering. En reevaluering med en ny evalueringskomité ville ikke være i overensstemmelse med reevalueringens formål og ville være uforholdsmæssigt tidskrævende og forbundet med uforholdsmæssigt mange ressourcer.

Reevalueringen blev foretaget med en opdeling af komitéen i to grupper, således at den del af komitéen, der forestod reevalueringen af den tekniske del, afsluttede denne evaluering, inden den anden gruppe af komitéen evaluerede priserne. Først efter afslutningen af evalueringen af den tekniske del blev gruppen, som forestod denne evaluering, bekendt med resultatet af den prismæssige evaluering. Evalueringskomitéen foretog således evalueringen efter samme evalueringsmetode som beskrevet i udbudsmaterialet og som anvendt ved første evaluering.

Det var i øvrigt uden konkret betydning, at evalueringskomitéen havde kendskab til de priser, der fejlagtigt blev lagt til grund ved den oprindelige evaluering, idet rækkefølgen mellem tilbudsgiverne og de konkrete point blev ændret væsentligt ved reevalueringen. Hensynet bag fremgangsmåden for tilbudsevalueringen var, at evalueringskomitéen under bedømmelsen af de kvalitative kriterier ikke skulle være påvirket af kendskabet til de tilbudte priser og disses betydning for den samlede evaluering. Som følge af de konkrete omstændigheder, herunder den væsentlige ændring af evalueringen af pris, der stod klart ved genoptagelsen af evalueringen, er dette hensyn ikke kompromitteret.

Ad påstand 2

Lattanzio har gjort gældende, at Udenrigsministeriet har handlet i strid med principperne om ligebehandling og gennemsigtighed ved at acceptere, at Oxfam IBIS og International Alert ændrede priserne vedrørende særlige udgifter i deres tilbud.

Oxfam IBIS' tilbudspris for så vidt angår B.4-udgifterne blev reduceret fra 22.159.012 kr. til 3.678.620 kr., og International Alerts B.4-udgifter blev reduceret fra 16.621.667 kr. til 1.840.000 kr. Tilbudspriserne fra Lattanzio og Mellempfolkeligt Samvirke forblev uændrede, da disse tilbudsgivere ikke blev opfordret til at ændre tilbuddene. B.4-udgifterne i Lattanzios tilbud var ligesom tilbuddene fra Oxfam IBIS og International Alert på et tocifret beløb. Lattanzio og Mellempfolkeligt Samvirke blev derfor ikke behandlet på lige fod med Oxfam IBIS og International Alert.

Reduceringen af B.4-udgifterne i de to tilbud er af så væsentlig en størrelse, at de medfører, at der er afgivet to nye tilbud i strid med udbudslovens § 159, stk. 5. Derudover opfordrede Udenrigsministeriet Oxfam IBIS til at lade "audits" indgå som en B.4-udgift, selvom det af udbudsmaterialet fremgår, at "audits" ikke var en B.4-udgift, men derimod skulle indgå under budgetposten "Fees". Hvis Oxfam IBIS i henhold til udbudsbetingelserne havde indregnet det fulde beløb på 1.500.000 kr. fra "Steer budget" under "Fees", ville evalueringen af den finansielle del have medført en vægtet score for underkriteriet "Pris" på 1,09 i stedet for 1,10, som Oxfam IBIS fik tildelt.

Udenrigsministeriet har gjort gældende, at ministeriet ikke har handlet i strid med udbudslovens § 2 ved at henvende sig til Oxfam IBIS og International Alert. På baggrund af konstaterbare fejl i de to tilbuds prisbilag afklarede og korrigerede Udenrigsministeriet i overensstemmelse med udbudsbetingelserne og udbudslovens § 159, stk. 5, tilbuddene fra de to tilbudsgivere. Formålet med korrektionen var at få de angivne oplysninger i tilbudsgivernes prisbilag til at harmonere med udbudsbetingelserne og sikre, at Oxfam IBIS og International Alert ikke opnåede en uretmæssig konkurrencefordel i forhold til de resterende tilbudsgivere.

Opgørelsen af omkostningerne

Evalueringen var baseret på en vurdering af omkostningerne på årsbasis, hvorfor ministeriet var forpligtet og berettiget til at foretage en korrektion for at sikre, at evalueringen skete på et korrekt og sammenligneligt grund-

lag i henhold til udbudsbetingelserne. Korrektionen var således af matematisk karakter og lå inden for rammerne af udbudsbetingelserne.

Det fremgår af International Alerts prisbilag, at ”unforeseen expenses” udgør 800.000 kr. for det første år og 1.200.000 kr. for de resterende fire år af kontraktperioden. Da evalueringen var baseret på omkostninger for det første år, fandt Udenrigsministeriet det mest korrekt at beregne et gennemsnitligt beløb for ”unforeseen expenses” for hele perioden. Beløbet for ”unforeseen expenses” på 1.120.000 beregnede Udenrigsministeriet således ved at sammenlægge omkostningerne for de 5 år under denne postering og herefter dividere med tallet 5 (5 år).

Det samlede beløb på 16.621.667 kr. for B.4-udgifterne dækkede over en række specifikke aktiviteter (Inception workshops, Project baseline per country and regional, M&E training and tools development, Project staff reflection workshop og Internal audit, i alt 720.000 kr.), som ifølge udbudsmaterialet ikke skulle henregnes til B.4-udgifter. På den baggrund foretog Udenrigsministeriet en korrektion, således at International Alerts B.4-udgifter blev reduceret til 1.840.000 kr. (1.120.000 kr. + 720.000 kr.).

Oxfam IBIS’ overordnede budget indeholdt et årligt beløb på 22.159.012 kr. for B.4-udgifter. Beløbet var en samlet opgørelse af B.4-udgifterne i de underliggende budgetter. De B.4-udgifter, som fremgik af budgetterne ”country specific budgets”, relaterede sig til konkrete aktiviteter og skulle ikke medregnes under Oxfam IBIS’ samlede B.4-udgifter, hvorfor Udenrigsministeriet i henvendelsen til Oxfam IBIS den 6. januar 2017 alene kategoriserede B.4-udgifterne fra ”Steer” og ”regional” budgetterne som B.4-udgifter.

I Steer-budgettet dækkede beløbet på 1.500.000 kr. over de samlede B.4-udgifter for kontraktperioden. Af beløbet på 1.500.000 kr. angik 875.000 kr. ”local audits all countries”. Beløbet for B.4-udgiften i henhold til ”Steer”-budgettet blev herefter korrigeret til et årligt beløb på 300.000 kr.

I ”Regional budget” foretog ministeriet under ”other project related expenses” ligeledes en matematisk korrektion som følge af, at Oxfam IBIS havde anført et samlet beløb på 16.893.102 kr., der omfattede kontraktens femårige periode. Beløbet blev derfor divideret med 5 og beregnet som det i skemaet anførte årlige beløb (”yearly amount”) på 3.378.620,40 kr.

Det samlede korrigerede beløb for Oxfam IBIS' B.4-udgift endte dermed på 3.678.620,40 kr. (3.378.620,40 kr. + 300.000 kr.)

Af kravene i Appendix 3 til udbudsmaterialet fremgår, at omkostninger, som relaterer sig til specifikke aktiviteter, skulle omfattes af "the Consultant's overheads". Omkostninger som vedrører specifikke aktiviteter, der udføres af kontraktens medarbejdere, skulle derfor indregnes som "overhead" under medarbejdernes fastsatte "fees". Dette angik blandt andet auditing i relation til konkrete aktiviteter. Generelle omkostninger, der var nødvendige for at opfylde kontrakten, men som ikke relaterede sig til specifikke aktiviteter, skulle henregnes til "other project related expenses" (B.4-udgift). Dette var tilfældet for "local audits all countries", og Udenrigsministeriet anførte derfor denne budgetpost som en B.4-udgift i henvendelsen til Oxfam IBIS. Det havde ikke medført en ændring af tildelingsbeslutningen, hvis Oxfam IBIS havde medregnet udgiften vedrørende "local audit all countries" under "fees", idet Oxfam IBIS i henhold til det samlede antal point fortsat ville have afgivet det bedste tilbud.

Korrektionen af de to tilbudsgiveres priser stillede Lattanzio bedre i den samlede vurdering af tilbuddene i forhold til underkriteriet "Pris" sammenlignet med den oprindelige vurdering, idet korrektionen indebar, at Lattanzios tilbud efterfølgende var billigst. Ved at korrigere (nedsætte) B.4-udgifterne i tilbuddene fra Oxfam IBIS og International Alert blev de priser, der blev lagt til grund ved evalueringen for deres tilbud, væsentligt forøget. Konkret stillede afklaringen og korrektionen af de to tilbudsgiveres priser således Lattanzios tilbud væsentligt bedre i den samlede evaluering.

Henvendelsen til Oxfam IBIS og International Alert indeholdte alene en anmodning om, at tilbudsgiverne skulle bekræfte, at Udenrigsministeriets korrektion var korrekt, og virksomhederne fik ikke adgang til at afgive nye tilbud.

Ligebehandling af tilbudsgiverne

Der var ikke grundlag for at anmode om en afklaring eller foretage korrektioner af B.4-udgifterne i tilbuddene fra Lattanzio eller Mellemløst Samvirke. Udenrigsministeriet henvendte sig til Oxfam IBIS og International Alert på baggrund af en gennemgang af de to tilbudsgiveres prisbilag, idet de var behæftet med åbenlyse fejl. Udenrigsministeriet var ikke beretti-

get eller forpligtet til at rette henvendelse til Lattanzio og Mellempfolkeligt Samvirke, idet ministeriet ikke kunne konstatere fejl eller uklarheder i prisbilagene til deres tilbud. Lattanzio og Mellempfolkeligt Samvirke befandt sig derfor ikke i samme situation som Oxfam IBIS og International Alert, hvorfor Udenrigsministeriet handlede i overensstemmelse med udbudslovens § 159, stk. 5, og ligebehandlingsprincippet.

Ad påstand 3

Lattanzio har gjort gældende, at Udenrigsministeriet har handlet i strid med principperne om ligebehandling og gennemsigtighed ved i forhold til Oxfam IBIS' tilbud at evaluere delkriteriet "Monitoring and reporting" forkert. Ifølge evalueringsrapporten blev Oxfam IBIS' tilbud i forhold til delkriteriet "Monitoring and reporting" vurderet til at være "above average fulfillment of the criterion", hvilket ifølge udbudsbetingelserne skulle udløse 5 point. Oxfam IBIS blev imidlertid tildelt 6 point, hvorfor Udenrigsministeriets bedømmelse ikke var i overensstemmelse med den fastsatte pointskala i udbudsmaterialet.

Udenrigsministeriet har gjort gældende, at ministeriet ikke har handlet i strid med udbudslovens § 2, idet der blev foretaget en saglig og korrekt evaluering af Oxfam IBIS' tilbud i forhold til delkriteriet "Monitoring and reporting". Tilbuddet blev i forhold til delkriteriet tildelt 6 point, og der er alene tale om en fejl i begrundelsen.

Der er en uoverensstemmelse mellem de tildelte 6 point og den verbale opsummering i begrundelsen, men det beror imidlertid på en fejl og har sammenhæng med, at pointet for dette delement blev ændret ved reevalueringen fra 5 til 6. Tilføjelsen af de opsummerende sætninger blev indsat ved den første tilretning af evalueringsrapporten og var dermed baseret på det point, der var tildelt Oxfam IBIS' tilbud i den oprindelige evaluering. Ved en fejl blev formuleringen ikke tilrettet efter konstatering af, at pointet rettelig skulle være 6. Udenrigsministeriet fandt ikke grundlag for at evaluere Oxfam IBIS dårligere end de øvrige tilbudsgivere, der alle var blevet tildelt 6 point for delementet. I overensstemmelse med ligebehandlingsprincippet blev alle tilbudsgivere derfor tildelt det samme antal point i reevalueringen.

Uoverensstemmelsen i evalueringsrapporten for reevalueringen strider isoleret set mod gennemsigtighedsprincippet i forhold til begrundelsen, men den foretagne evaluering er ikke objektivt forkert. Det havde ikke ændret på tildelingsbeslutningen efter reevalueringen, hvis Oxfam IBIS var blevet tildelt 5 point i stedet for 6, idet Oxfam IBIS fortsat ville have afgivet det bedste tilbud.

Ad påstand 4

Lattanzio har gjort gældende, at Udenrigsministeriet har handlet i strid med principperne om ligebehandling og gennemsigtighed i udbudslovens § 2 ved at evaluere Oxfam IBIS' bilag vedrørende delkriteriet "Results Framework" på trods af, at bilagene ikke opfyldte kravene i udbudsmaterialet.

Det fremgår af udbudsbetingelserne, at "You may attach more annexes than listed, if relevant. The total pages of annexes must not exceed 15 pages". I de tilfælde, hvor en tilbudsgiver vedhæftede et sideantal, der oversteg det maksimale antal, har Udenrigsministeriet set bort fra de sider, der lå ud over det maksimale antal sider. Dette var tilfældet for Lattanzio, hvor Udenrigsministeriet i sin evaluering bemærkede, at "It should be noted, that the CV exceeds the 4 pages, thus the first 4 pages have been assessed as part of the evaluation".

I forbindelse med aktindsigt i Oxfam IBIS' tilbud blev det klart for Lattanzio, at Oxfam IBIS havde tilføjet bilag bestående af i alt 17 sider til deres tilbud i forhold til delkriteriet "Result Framework". Udenrigsministeriet bemærkede imidlertid ikke i evalueringsrapporten, at Oxfam IBIS overskred det tilladte sideantal.

Udenrigsministeriet skulle have set bort fra de sider, som lå ud over det tilladte sideantal, idet denne del af tilbuddet reelt var ukonditionsmæssigt. Ministeriet overtrådte således principperne om ligebehandling og gennemsigtighed i forbindelse med evalueringen af Oxfam IBIS' tilbud.

Udenrigsministeriet har gjort gældende, at Oxfam IBIS' bilag vedrørende delkriteriet "Results Framework" opfyldte de fastsatte krav, og at ministeriet ved evalueringen alene lagde vægt på bilag, som ikke oversteg det fastsatte maksimale antal sider.

Den del af Oxfam IBIS' tilbud, der vedrører delkriteriet "Results Framework", består af et kortfattet afsnit i Oxfam IBIS' Technical Proposal og en beskrivelse i Annex B, som dækker de fire lande samlet. Oxfam IBIS udarbejdede derudover separate dokumenter for hvert af de enkelte lande med tilsvarende skemaer, der indeholder de samme informationer som anført i Annex B, men blot mere uddybende. Disse dokumenter var vedlagt tilbuddet i en undermappe benævnt "Supporting Documents", og de var derfor ikke en del af Annex B.

Evalueringen af delkriteriet blev foretaget på grundlag af afsnittet i Oxfam IBIS' Technical Proposal og Annex B, hvilket også kommer til udtryk i Udenrigsministeriets begrundelse for evalueringen. Annex A-C i Oxfam IBIS' tilbud overskred ikke det fastsatte maksimum på 15 sider, og evalueringen var ikke baseret på oplysninger, der fremgik af sider udover det tilladte antal sider.

Ad påstand 5

Lattanzio har gjort gældende, at udbudsbetingelserne var behæftet med fejl, idet vægtningen af underkriterierne ikke var konsistent. Det fremgår ét sted i udbudsbetingelserne, at underkriteriet "Teknisk kvalitet" vægtede 80 %, og at "Pris" vægtede 20 %, hvorimod det fremgår et andet sted i samme dokument, at "Teknisk kvalitet" vægtede 20 %, og at "Pris" vægtede 80 %. Der foreligger således en væsentlig mangel i udbudsbetingelserne, som er i strid med gennemsigtighedsprincippet, jf. udbudslovens § 2.

Udenrigsministeriet har gjort gældende, at der er tale om en åbenbar fejl i udbudsmaterialet, som ikke har haft betydning for tilbudsgivernes tilbud, hvorfor gennemsigtighedsprincippet ikke er overtrådt. Den korrekte vægtning af underkriterierne er "Pris" med 20 % og "Teknisk kvalitet" med 80 %, hvilket fremgår af udbudsbetingelsernes indledende afsnit samt i opstillingen af underkriterierne. Endvidere blev den korrekte vægtning oplyst ved informationsmødet og under dialogfasen i forbindelse med spørgsmål/svar-processen. Tilbudsgiverne kunne derfor ikke være i tvivl om den korrekte vægtning af underkriterierne, hvilket understøttes af tilbudsgivernes ageren under udbudsprocessen, som ikke bar præg af, at der var tvivl om vægtningen.

Ad påstand 6

Lattanzio har gjort gældende, at de i påstand 1-5 angivne mangler ved Udenrigsministeriets reevaluering af tilbuddene bør bevirke, at tildelingsbeslutningen skal annulleres således, at ministeriet skal foretage en fornyet evaluering af tilbuddene.

Udenrigsministeriet har gjort gældende, at der ikke er handlet i strid med de udbudsretlige regler, hvorfor der ikke er grundlag for at annullere tildelingsbeslutningen.

Det følger af fast klagenævnsspraksis, at en mangelfuld begrundelse i henhold til evalueringen ikke kan føre til annullation. Tilsvarende gælder i sagens natur uoverensstemmende oplysninger i begrundelsen, herunder en åbenbar fejl i den opsummerede angivelse af begrundelsen, Begrundelse vedrørende evalueringen af delkriteriet ”Monitoring and reporting” kan dermed ikke føre til annullation af tildelingsbeslutningen. Udenrigsministeriets fejlagtige angivelse af vægtingen af underkriterierne, kan tillige ikke føre til annullation, idet fejlen ikke har haft konkret og væsentlig betydning for afgivelsen af tilbuddene eller evalueringen heraf.

Ad påstand 7

Lattanzio har gjort gældende, at de i påstand 1-5 angivne mangler ved Udenrigsministeriets reevaluering af tilbuddene bør bevirke, at udbuddet skal annulleres.

Udenrigsministeriet har gjort gældende, at Udenrigsministeriet ikke har handlet i strid med de udbudsretlige regler, hvorfor der ikke er grundlag for at annullere udbuddet.

Klagenævnet udtaler:

Ad påstand 1

Det fremgår af udbudsmaterialet, at evalueringen af underkriteriet ”Pris” skulle foregå ved, at ”B.4-udgifterne” fratrækkes den samlede tilbudte pris, hvorefter den tilbageværende pris ville danne grundlag for evalueringen. De fejl, som lå til grund for Udenrigsministeriets tilbagekaldelse af den oprin-

delige tildelingsbeslutning, bestod blandt andet i, at ”B.4-udgifterne” ikke var fratrukket de priser, som ministeriet evaluerede på.

Det er ubestridt, at Udenrigsministeriets beslutning om at tilbagekalde tilbudsbeslutningen var saglig.

Når en ordregiver tilbagekalder sin tildelingsbeslutning, skal der træffes en ny tildelingsbeslutning med anvendelse af den fremgangsmåde, som er beskrevet i udbudsmaterialet, jf. udbudslovens § 170, stk. 2.

Det fremgår af udbudsbetingelsernes pkt. 8.3, at ”The evaluation of the technical parts shall be completed before opening the envelopes with the price parts”. Udenrigsministeriet har oplyst, at baggrunden for den fastsatte fremgangsmåde var, at evalueringskomitéen under bedømmelsen af de kvalitative kriterier ikke skulle være påvirket af kendskabet til de tilbudte priser og disses betydning for den samlede evaluering.

Denne fremgangsmåde kunne af åbenlyse årsager ikke følges ved den fornyede tilbudsevaluering med deltagelse af den samme komité, som forestod den første evaluering. Det er dog oplyst, at evalueringskomitéen ved reevalueringen blev opdelt i to grupper, således at den del af komitéen, der forestod reevalueringen af tilbuddene i forhold til de kvalitative kriterier, afsluttede denne evaluering, inden den anden gruppe evaluerede tilbuddene i forhold til priserne.

Klagenævnet finder, at den fastsatte fremgangsmåde i udbudsbetingelserne ikke kunne udstrækkes til også at skulle følges under en fornyet evaluering, som Udenrigsministeriet ikke havde taget højde for i udbudsbetingelserne. Der er ikke et udbudsretligt krav om, at evalueringen af et priskriterium og evalueringen af kvalitative kriterier skal ske adskilt, således at ordregiveren ikke er bekendt med prisen, når de kvalitative kriterier evalueres.

Udenrigsministeriet har herefter ikke handlet i strid med udbudslovens § 2 ved at anvende samme evalueringskomité ved den fornyede tilbudsvurdering.

Klagenævnet tager derfor ikke påstanden til følge.

Ad påstand 2

Udgangspunktet er, at tilbudsgivernes tilbud ikke kan ændres efter tilbudsafgivelsen, hverken på ordregiverens eller tilbudsgiverens initiativ. Tilbudet kan dog i visse tilfælde berigtiges eller suppleres, hvis tilbuddet åbenlyst kræver en præcisering eller for at bringe åbenlyse indholdsmæssige fejl til ophør, forudsat at ændringen ikke fører til, at der fremsættes et nyt tilbud.

Udenrigsministeriets henvendelse til tilbudsgiverne skulle ske under overholdelse af ligebehandlingsprincippet, og det påhvilede ministeriet at behandle tilbudsgiverne ens og rimeligt i den forbindelse.

En ordregivers anmodning om supplerende oplysninger skal rettes mod alle virksomheder i samme situation, og alene objektivt verificerbare omstændigheder kan begrunde en forskellig behandling af tilbudsgiverne.

Udenrigsministeriet kunne ud fra budgetterne udlede, hvordan fejlene i Oxfam IBIS' og International Alerts tilbud var opstået. Ministeriet vurderede, at der ikke var grundlag for at rette henvendelse til Lattanzio og Mellemfolkeligt Samvirke, idet der ikke forekom åbenlyse fejl i disse tilbudsgiveres budgetter. Der forelå således omstændigheder, som gjorde, at Udenrigsministeriet i overensstemmelse med ligebehandlingsprincippet kunne henvende sig til Oxfam IBIS og International Alert. Hertil kommer, at Oxfam IBIS og International Alert ikke opnåede en fordel ved ministeriets henvendelse, idet det beløb, som kunne fradrages i prisen ("fees" og "project related expenses") – B.4-udgifterne – blev reduceret væsentligt med den virkning, at den tilbudte pris blev forøget.

Klagenævnet tager herefter ikke påstanden til følge.

Ad påstand 3

Det fremgår af evalueringsrapporten for reevalueringen, at der vedrørende delkriteriet "Monitoring and reporting" i Oxfam IBIS' tilbud er uoverensstemmelse mellem det tildelte antal point og den verbale begrundelse for tildelingen. Oxfam IBIS fik tildelt 6 point, mens begrundelsen svarede til en bedømmelse på 5 point ifølge udbudsbetingelserne. Ministeriet har oplyst, at der er tale om en fejl i evalueringsrapporten i forhold til begrundelsen, og

har samtidig erkendt, at uoverensstemmelsen isoleret set strider imod gennemsigtighedsprincippet.

Der er efter de foreliggende oplysninger ikke grundlag for at fastslå, at Udenrigsministeriet handlede i strid med ligebehandlingsprincippet ved at tildele Oxfam IBIS' tilbud 6 point i forhold til delkriteret "Monitoring and reporting". Derimod har Udenrigsministeriet handlet i strid med gennemsigtighedsprincippet som følge af uoverensstemmelsen mellem det tildelte pointantal og begrundelsen for pointtildelingen.

Klagenævnet tager i dette omfang påstanden til følge.

Ad påstand 4

Det fremgår af udbudsbetingelserne, at tilbudsgiverens Annex A-C maksimalt måtte fylde 15 sider tilsammen. Når Udenrigsministeriet valgte at stille dette krav, skal ministeriet tilsvarende overholde kravet ved vurderingen af tilbuddene. Udenrigsministeriet måtte derfor alene evaluere på maksimalt 15 sider i forhold til delkriteriet "Results Framework".

Annex A, B og C i Oxfam IBIS' tilbud består af i alt 11 sider, hvoraf Annex B udgør 5 sider. Til Annex B har Oxfam IBIS endvidere vedlagt "Supporting documents", som udgør i alt 17 sider. I evalueringsrapporten står, at Udenrigsministeriet hovedsageligt har evalueret delkriteriet i henhold til Annex B.

Ud fra de foreliggende oplysninger er der ikke grundlag for at konstatere, at ministeriet under tilbudsevalueringen i forhold til delkriteriet "Results framework" har lagt vægt på oplysninger, der fremgik af bilag, som oversteg det fastsatte maksimale antal sider.

Klagenævnet tager derfor ikke påstanden til følge.

Ad påstand 5

Det er angivet i udbudsmaterialet, at underkriteriet "Pris" vægtes med 20 %, og at underkriteriet "Teknisk kvalitet" vægtes med 80 %. Det er dog også anført, at "The total score of the tender shall be obtained by weighting and

adding the technical (20 %) and price (80 %) scores”. Der foreligger således en uoverensstemmelse i udbudsmaterialet om underkriteriernes vægtning.

Det er Udenrigsministeriets ansvar, at udbudsmaterialet fremstår klart og utvetydigt. Efter udsendelsen af udbudsmaterialet og inden tilbudsfristens udløb besvarede ministeriet imidlertid et antal spørgsmål fra tilbudsgiverne angående udbudsmaterialet. Det fremgår af besvarelsen af et af spørgsmålene, at underkriteriet ”Pris” vægter 20 % og dermed implicit, at underkriteriet ”Teknisk kvalitet” vægter 80 %. Denne vægtning af underkriterierne fremgår tillige af PowerPoint præsentationen fra informationsmødet den 29. november 2016. Klagenævnet finder herefter, at det var en åbenbar fejl, at vægtningen af underkriterierne et enkelt sted i udbudsmaterialet var anført forkert, og at tilbudsgiverne ikke kan have været i tvivl om vægtningen mellem kriterierne.

Klagenævnet tager derfor ikke påstanden til følge.

Ad påstand 6 og 7

Der er ikke grundlag for at antage, at den overtrædelse, som klagenævnet har konstateret vedrørende påstand 3, har haft konkret betydning for Udenrigsministeriets tildelingsbeslutning eller udbuddet i øvrigt.

Klagenævnet tager derfor ikke påstandene til følge.

Herefter bestemmes:

Ad påstand 3

Udenrigsministeriet har handlet i strid med princippet om gennemsigtighed i udbudslovens § 2, da der ikke er overensstemmelse mellem det tildelte pointantal og begrundelsen for pointtildelingen ved evalueringen af det vindende tilbud i forhold til delkriteriet ”Monitoring and reporting”.

Klagen tages i øvrigt ikke til følge.

Lattanzio Advisory S.p.A, Fundación Educación Para el Empleo (Europ-EFE), EFE Egypt, Jordan Career Education Foundation, EFE Maroc, EFE Tunisie, EFE US og Danish Forum for International Cooperation (FIC) skal

inden 14 dage efter modtagelsen af denne kendelse betale 30.000 kr. i sagsomkostninger til Udenrigsministeriet.

Klagegebyret tilbagebetales ikke.

Erik P. Bentzen

Genpartens rigtighed bekræftes.

Julie Just O'Donnell
fuldmægtig