

K E N D E L S E

Selex ES Inc.
(advokat Birte Rasmussen, Aalborg)

mod

Forsvarsministeriets Materiel- og Indkøbsstyrelse
(advokat Niels Karl Heilskov Rytter, København)

Ved udbudsbekendtgørelse nr. 2018/S 041-088937 af 27. februar 2018 udbød Forsvarsministeriets Materiel- og Indkøbsstyrelse (FMI) som offentligt udbud efter udbudsloven en kontrakt om anskaffelse af ”Instrument Landing System” til brug for flyvestation Karup/Midtjyllands Lufthavn.

Den 13. august 2018 indgav Selex ES Inc. (Selex) klage til Klagenævnet for Udbud over FMI. Klagen er modtaget i standstill-perioden.

FMI har i svarskrift af 20. august 2018 anmodet klagenævnet om at afgøre sagen på det foreliggende grundlag og uden delkendelse om spørgsmålet om opsættende virkning.

Klagenævnet meddelte den 23. august 2018 parterne, at klagenævnet var indstillet på at træffe afgørelse om sagens realitet uden forinden at træffe afgørelse om opsættende virkning. Parterne har herefter haft mulighed for at udveksle replik og duplik.

Klagen har været behandlet skriftligt.

Selex har nedlagt følgende påstand:

”Påstand 1

Klagenævnet for Udbud skal konstatere, at [FMI] har handlet i strid med ligebehandlingsprincippet og gennemsigtighedsprincippet i udbudslovens § 2 ved at afvise Selex ES Inc.’s tilbud som ikke-konditionsmæssigt, idet Selex’ tilbud ikke, som påstået af [FMI], strider mod grundlæggende elementer i udbudsmaterialet, hvorfor [FMI] skal tilpligtes at annullere sin tildelingsbeslutning.”

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

Sagens nærmere omstændigheder

Udbudsbekendtgørelsen af 27. februar 2018 indeholder bl.a. følgende om den udbudte kontrakt:

”II.1.4)

Short description:

The Danish Defence Acquisition and Logistics Organisation (DALO) wishes to replace the existing Instrument Landing Systems at Airbase Karup / Midtjylland airport (EKKA) with two new Instrument Landing Systems. The existing Instrument Landing Systems – runway (RWY) 27L (CAT II) and RWY 09R (CAT I) were installed and commissioned in about 1977/87. This purchase concerns the replace of these 2 Instrument Landing Systems. All other prerequisites for existing CAT II and CAT I operations will be retained.”

I udbudsmaterialets kravspecifikation, ”DALO’s requirements concerning the Deliverables – Annex A”, står der:

”1.6 System description

The procurement comprises:

- Complete Instrument Landing System for RWY 27L (System 1) – CAT II Instrument Landing System
- Complete Instrument Landing System for RWY 09R (System 2) - CAT I Instrument Landing System

Each of these systems shall consist of:

- ...
- Commissioning, including Flight Check
- ...”
- ...

I kontraktudkastet, "Terms and Conditions for Trade with the Danish Defence Acquisition and Logistics Organization", er bl.a. anført følgende:

"4.14.4 Flight Inspection

Flight inspection is performed by a Flight Inspection Service company with the aid of a customized aircraft shall be conducted by the Supplier."

I udbudsbetingelserne, "Instructions to Tenderers", hedder det:

" ...

5.6 Reservations and Mandatory Requirements

All requirements in the tender documents are Mandatory Requirements. A Mandatory Requirement is a requirement that must unconditionally be complied with as deviations from the requirements will not be accepted.

Consequently, offers that do not comply with all the Mandatory Requirements are considered non-compliant and will not be taken into consideration.

..."

FMI modtog i udbudsfasen bl.a. spørgsmål 3 og 8, som vedrører Flight Check (Flight Inspection). Spørgsmål 3 lyder:

"SUBJECT: FLIGHT CHECK. Flight Calibration Service cost. PREFACE: The Flight Calibration Services cost is quite unpredictable, because it depends from several external factors such as weather conditions, airport operations. Therefore this service is usually GFE. For this tender, in the relevant documentation it is noted the following:

Annex A "OPERATIONAL AND TECHNICAL REQUIREMENT SPECIFICATION DOCUMENT", paragraph 1.6 SYSTEM DESCRIPTION, specifies that each ILS/DME systems shall consist of several items and services, comprising: • Commissioning, including Flight Check

Annex K "DALO's DELIVERIES GOVERNMENT FURNISHED EQUIPMENT", paragraph 2. LIST OF GFE, includes the following: • Provide contact with Flight Check Provider

QUESTION: Please specify if the supplier Total price, which must be filled in the form Annex B "THE SUPPLIER'S OFFER", includes the cost for reimbursing the Flight Check Provider for their Flight Calibration Services (aircraft rental, flight hours, flight inspectors etc.).."

FMI besvarede spørgsmålet således:

“Comissioning, including Flight Check shall be part of the offer.”

Spørgsmål 8 lyder:

“GFE, §2, Provide contact with Flight Check Provider
Please elaborate whether the proposal shall include flight check and if DALO expect usage of one specific supplier..”

Hertil svarede FMI:

“Comissioning, including Flight Check shall be part of the offer. There is not a requirement regarding the use of a specific Flight Check provider.”

Selex afgav tilbud inden udløbet af fristen herfor den 15. maj 2018. I tilbuddets følgebrev står bl.a.:

“Our proposed solution is to replace existing shelters, towers and all existing electronics, antennas and cables, with the latest Selex configuration of hardware and software, including spares and test equipment as per DALO's requirements. Although working in Denmark would be new for Selex, we have hired a local Danish company, which enables us to utilize local content for various on-site activities, such as civil works and installation of our products.

Selex will tune, test and commission these systems, and train DALO representatives at our NavAids academy, also located in Overland Park Kansas, USA, so that this equipment can be easily maintained.”

Tilbudsbilaget ”Statement of Work” indeholder bl.a. følgende:

”2 SELEX ES INC. Program Approach

This Statement of Work (hereafter referred to as “SOW”) describes the mutual responsibilities of SELEX ES INC., and Danish Defence Acquisition and Logistics Organization (DALO) (hereafter referred as “CUSTOMER”) in support of the production and delivery of ground-based Navigational Aids equipment for Airbase Karup/Midtjylland Airport (EKKA) - Denmark (hereafter referred to as the “Project”).

...

Services such as Preliminary Site Acceptance and Final Site Acceptance Testing and Commissioning Flight Check Support are described below.

...

3.8 Phase 8 - Final Site Acceptance Testing (FSAT) and Flight Check

FSAT occurs after PSAT, and upon successful flight check of the Selex ES Inc. Equipment. Selex ES Inc. will provide Flight Check Ground Support / Commissioning for Selex ES Inc. provided equipment in order to ensure the equipment is operating in accordance with manufacturer's specifications. Selex ES Inc. will perform adjustments to the equipment as necessary to meet those specifications provided in Selex ES Inc.'s standard Preliminary Site Acceptance Test Data. The CUSTOMER will assist in communicating with the flight check crew as necessary and participate during Flight Check/Commissioning. CUSTOMER is responsible for scheduling the flight check and providing the flight check air craft, crew, and all associated costs, unless otherwise noted in the contract.

Successful Flight Check Testing in accordance with ICAO Annex 10 results in the system being Commissioned and Accepted by the CUSTOMER. A Site Acceptance Completion Certificate will be signed by both Selex ES Inc. and the CUSTOMER upon successful completion of Flight Check.

The CUSTOMER will provide the aircraft and crew for Flight Check and Commissioning. Selex ES Inc. will provide a ground support engineer for Flight Check/Commissioning. At least one of the CUSTOMERs technicians who will be operating and maintaining the equipment will take part in ground support during the Flight Check/Commissioning of Selex ES Inc.'s Equipment by assisting Selex ES Inc. engineers during this phase of the program. This allows the customer's technical staff to take part and to become familiar with the operation and system design.

Note: CUSTOMER provided Flight Check/Commissioning shall be coordinated with Equipment delivery, Installation and PSAT. Any delays in start of the Flight Check/Commissioning services that result in additional costs up to and including requirement for an additional mobilization of Selex ES Inc.'s Engineer to complete successful Flight Check/Commissioning, will be the responsibility of the CUSTOMER."

I underbilaget "Appendix A: Responsibility Matrix" er anført et skema over ansvarsområder for henholdsvis Selex og FMI. I bilaget står der:

”

No.	Task	SELEX	CUSTOMER	Comments
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...
13.	Arrange for and provide Flight Inspection/Commissioning services, crew, test plane and all fees associated with Flight Inspection.	X		

”

Selex har i tilbudslisten angivet priser ud fra følgende positioner:

”

18	1	1 ILS/ 1 DME Installation in Year 1 for up to thirteen (13) days with one (1) Selex Engineer. Includes Mobilization for installation and flight check.	\$
19	1	1 ILS/ 1 DME Installation in Year 2 for up to thirteen (13) days with one (1) Selex Engineer. Includes Mobilization for installation and flight check.	\$
20	1	1 ILS/1 DME Flight Tune & Test and Flight Check Support in Year 1 for up to nine (9) days with one (1) Selex Engineer. Mobilization is included with Installation.	\$
21	1	1 ILS/1 DME Flight Tune & Test and Flight Check Support in Year 2 for up to nine (9) days with one (1) Selex Engineer. Mobilization is included with Installation.	\$

”

Ved brev af 3. august 2018 underrettede FMI tilbudsgiverne om tildelingsbeslutningen. I brevet til Selex står der:

”
...

DALO regrets to inform you that, following the evaluation process, your offer is deemed non-compliant with the tender documents, as it does not meet the following minimum requirements in the Contract Section 4.14.4. Flight Inspection:

...“Flight inspection is performed by a Flight Inspection Service company with the aid of a customized aircraft shall be conducted by the Supplier.”...

Furthermore it was specified in Questions and Answers:

...

In the received offer Statement of work section 3.8 Phase 8 Selex has stated:

“CUSTOMER is responsible for scheduling the flight check and providing the flight check air craft, crew, and all associated costs, unless otherwise noted in the contract.”

Furthermore the received price list “18176 Price List” does not include Flight Check.

DALO regards this as a reservation to the Contract section 4.14.4 Flight Inspection.

Consequently, as required by the The Public Procurement Act (Act no. 1564/2015 in Danish: “Udbudsloven”), Your offer has been found non-compliant by DALO and has not been taken into consideration for the award of the contract.

The winning offer was submitted by Indra Navia AS to whom DALO intends to award the contract.

...”

Ved mail af samme dato skrev Selex følgende til FMI:

“ ...

The Selex Proposal did in fact include the Flight Inspection (Flight Check Aircraft and Crew and all associated costs) as part of our offer as evidenced below. As you will see in the detailed response, Selex evidences inclusion of the complete Flight Inspection per Contract Section 4.14.4 requirements in the Statement of Work Appendix A (Responsibility Matrix No. 13). There was a clerical error in the generalized Statement of Work section 3.8 stating "CUSTOMER" instead of "SUPPLIER" which was incorrect and needs to be clarified to DALO as a discrepancy statement as compared to Appendix A (Responsibility Matrix No. 13), and also the Price List 18176 (Line Items 18 and 19) where Selex affirms including the Flight Inspection in the offer. In two places of our offer (Price List 18176 Line Items 18 and 19, and Statement of Work Appendix A, Responsibility Matrix No. 13) Selex includes the Flight Inspection per requirement.

Referring to the first non-compliant point, we would like to respond as follows:

"In the received offer Statement of work section 3.8 Phase 8 Selex has stated: "CUSTOMER is responsible for scheduling the flight check and providing the flight check air craft, crew, and all associated costs, unless otherwise noted in the contract. "

Selex Response:

As part of our proposal procedures, Selex includes in the submittals a Statement of Work, to detail the scope of work, project schedule and responsibilities for buyer and supplier.

We have reviewed the document we submitted to DALO and in section 3.8 Phase 8, we made a clerical error as the word "CUSTOMER" was not changed for the word "SUPPLIER".

However, in Appendix A- Responsibility Matrix, No. 13, it clearly states that Selex is responsible to "Arrange for and provide Flight Inspection/Commissioning services, crew, test plane and all fees associated with Flight Inspection". Please refer below to the copy of the matrix submitted.

...

This is a discrepancy that Selex hopes DALO would have asked for clarification during the evaluation process as is stated in the Instruction to Tenderers Section 6, whereby ... "DALO may obtain additional information and clarifications in accordance with the procedure stated in § 159(5) of the Public Procurement Act."

Undoubtedly, the Responsibility Matrix states that Selex is responsible to procure the Flight check services, including aircraft, crew and all related costs.

The discrepancy statement due to a clerical error of the SUPPLIER is therefore clarified, and Selex is responsible for abiding to the terms and requirements of the Tender, including Contract Section 4.14.4. Selex hereby affirms such responsibility and as evidenced below and throughout the proposal.

Referring to the second non-compliant point, we would like to respond as follows:

"Furthermore, the received price list "18176 Price List" does not include Flight Check. DALO regards this as a reservation to the Contract section 4.14.4 Flight Inspection".

Selex Response: Price list 18176 submitted by Selex, line items No. 18 and 19 include the flight inspection (...)

...

Selex Flight check in Line Items 18-19 includes all the cost related to the flight inspection. This is supported by Line Items 20 and 21 which then identifies other related support (Flight Check Support) as separately priced items.

...”

Hertil svarede FMI:

“ ...

Under the public procurement law § 159 (5) DALO is entitled – but not obligated – to request a tenderer to supplement, clarify or complete a faulty tender, taking into account the principles of equal treatment and transparency. The request may not result in submission of a new tender by the tenderer.

Unfortunately the error that Selex ES Inc. refers to in the generalized Statement of Work section 3.8:

“CUSTOMER is responsible for scheduling the flight check and providing the flight check air craft, crew, and all associated costs, unless otherwise noted in the contract.”

is considered by DALO as a statement that can not be clarified given that it will give Selex ES Inc. the possibility to make a significant change in their offer which essentially would result in submission of a new tender for Selex ES Inc.

Due to the principles of equal treatment it is therefore not possible for DALO to clarify the error and DALO maintains the decision.

...”

Selex har ved breve af 6. og 8. august 2018 til FMI fastholdt indsigtelsen.

FMI har besvaret henvendelserne fra Selex og fastholdt tildelingsbeslutningen.

Parternes anbringender

Ad påstand 1

Selex har gjort gældende, at FMIs erklæring om, at Selex’ tilbud er ukonditionsmæssigt, skal vurderes som grundløs og i strid med udbudslovens § 2.

Selex har nærmere anført, at virksomheden har begået en åbenlys fejl i sit tilbud under pkt. 3.8 i ”Statement of Work”, idet standardteksten her ikke er blevet opdateret til kravspecifikationen, og ordet ”COSTUMER” er dermed

ikke blevet udskiftet med "SUPPLIER", som ellers er tilfældet i resten af Selex' tilbud.

Sætningen "unless otherwise noted in the contract" indgår i det første afsnit af pkt. 3.8 i "Statement of Work". Denne del af beskrivelsen skal betragtes som hovedbeskrivelsen, og de følgende afsnit er detaljerede beskrivelser af hovedbeskrivelsen. Derfor gælder "unless otherwise noted in the contract" også for resten af pkt. 3.8, og der er derfor ikke noget forbehold i Selex' tilbud, jf. herved også klagenævnets kendelse af 11. oktober 2011, HHM A/S mod Københavns Kommune. I bilaget "Appendix A – Responsibility Matrix" har Selex endvidere sat kryds i det felt, som angiver, at Selex bærer ansvaret for bl.a. Flight Inspection.

I den udfyldte tilbudsliste omhandler positionerne 18-19 ydelsen Flight Check. Denne ydelse er dermed prissat og inkluderet i den samlede tilbudspris. Tilbudslistens position 20-21 prissætter Flight Check Support, hvilket inkluderer teknisk support på landingsbanen. Både fly, mandskab, teknisk support på landingsbanen og alle relaterede omkostninger er dermed prissat og inkluderet i den samlede tilbudspris. Der ville således ikke være tale om et nyt tilbud eller brud på ligebehandlings- og gennemsigtighedsprincippet, såfremt FMI havde benyttet sig af muligheden for at få præciseret tilbuddet, jf. udbudslovens § 159, stk. 5.

Samlet giver fejlen i "Statement of Work" ikke anledning til at misforstå selve omfanget af tilbudsindholdet, idet tilbuddets øvrige bilag tydeligt beskriver, at kravet vedrørende Flight Check er omfattet af tilbuddet.

FMI har gjort gældende, at styrelsen har handlet i overensstemmelse med ligebehandlings- og gennemsigtighedsprincippet ved at afvise Selex' tilbud som ukonditionsmæssigt.

FMI har nærmere anført, at styrelsen var berettiget til at afvise tilbuddet, da det indeholdt et forbehold, som skabte en betydelig usikkerhed om Selex' forpligtelser under kontrakten.

Idet alle udbudsmaterialets krav var angivet som mindstekrav, var FMI både berettiget og forpligtet til at afvise tilbuddet fra Selex. Det er således et grundlæggende princip, at tilbudsgiver bærer risikoen for uklarheder i tilbuddet, og at ordregiver ikke har pligt til at stille opklarende spørgsmål til

tilbudsmaterialet, jf. herved klagenævnets kendelse af 13. december 2017, IP-Only Qbrick ApS mod Folketinget.

FMI har bestridt, at det er en åbenlys fejl, at "COSTUMER" ikke var udskiftet med "SUPPLIER". I "Statement of Work" står under pkt. 3.8, afsnit 1, 3 og 4 klart, at ansvaret og omkostningerne for gennemførelse af Flight Check ligger hos FMI. Særligt det 4. afsnit ville savne mening, såfremt "COSTUMER" blev udskiftet med "SUPPLIER", idet afsnittet netop beskriver koordineringen og snitflader mellem leverandørens og kundens leverance, herunder konsekvensen af, at kunden måtte blive forsinket med sin levering i form af Flight Check. I samme dokument står endvidere, at Selex vil "provide ground support" for Flight Check. Selex' forpligtelser i forbindelse med gennemførelse af Flight Check er således afgrænset til teknisk support på landingsbanen, mens ansvaret og omkostningerne til det egentlige Flight Check er pålagt FMI.

Den omstændighed, at "unless otherwise noted in the contract" er anført under det 1. afsnit i pkt. 3.8, medfører ikke, at FMI skulle have ignoreret forbeholdet. Rækkevidden af tilføjelsen er i sig selv uklar, og den er kun nævnt et enkelt sted. Selex' synspunkt om, at den skulle gælde i forhold til alt, hvad der er skrevet i pkt. 3.8, har ingen støtte i den øvrige tekst. Situationen er endvidere ikke sammenlignelig med den i klagenævnets kendelse af 11. oktober 2011, HHM A/S mod Københavns Kommune.

Selex har anført, at position 20-21 alene vedrører teknisk support på landingsbanen. Den egentlige gennemførelse af Flight Check må derfor efter Selex' opfattelse være omfattet af tilbudslistens position 18-19. Tilbudslistens position 18-19 relaterer sig imidlertid til selve installationsarbejderne af udstyret. Installationsarbejderne skulle udføres af én tekniker fra Selex, og dennes arbejder omfattede også selve klargøringen - "mobilization" - af Flight Check. Posterne 18 og 19 omfatter derimod ikke selve gennemførelsen af Flight Check. En tekniker ville endvidere ikke kunne gennemføre Flight Check alene. Tilbuddets prissætning understøtter ligeledes, at gennemførelsen af Flight Check ikke var indeholdt i tilbuddet. Det er således ikke sandsynligt, at der i position 18-19 udover installationsarbejderne skulle være indeholdt prisen for et egentligt Flight Check.

Selvom der måtte være oplysninger i tilbuddet, der peger i en anden retning, har Selex ved beskrivelserne i pkt. 3.8 skabt en sådan tvivl om, hvorvidt det

pågældende mindstekrav var opfyldt, at FMI havde både ret og pligt til at afvise tilbuddet, jf. herved kendelse af 5. januar 2016, Multiline A/S mod Aarhus Universitet.

Klagenævnet udtaler:

Ad påstand 1

Af kravspecifikationens pkt. 1.6 og kontraktudkastets pkt. 4.14.4 fremgik det klart, at tilbuddet skulle indeholde ydelsen Flight Check. Dette blev bekræftet under Spørgsmål/Svar i forbindelse med spørgsmålene 3 og 8. I udbudsbetingelserne var fastsat, at samtlige krav var mindstekrav og skulle opfyldes for, at tilbuddet kunne betragtes som konditionsmæssigt.

I tilbuddets ”Appendix A - Responsibility Matrix” er det anført, at Selex er ansvarlig for Flight Check, ligesom dette fremgår af følgebrevet og tilbudslisten under positionerne 18-21.

I dokumentet ”Statement of Work”, pkt. 3.8, om Flight Check er imidlertid anført i tre afsnit, at ”COSTUMER” udfører Flight Check og services forbundet hermed. I et indledende afsnit har Selex tilføjet sætningen ”unless otherwise noted in the contract”. Denne formulering er ikke anført i de øvrige afsnit under pkt. 3.8 og kan efter klagenævnets vurdering ikke udstrækkes til at omfatte de efterfølgende afsnit. Af ”Statement of Work”, pkt. 2, fremgår, at dokumentets formål er at beskrive parternes ansvarsområder i relation til den udbudte kontrakt, herunder ydelsen Flight Check. Det er oplyst, at FMI i dokumentet betegnes som ”COSTUMER”. Selex er betegnet som ”Selex ES Inc Equipment” eller ”SELEX”.

Klagenævnet finder, at beskrivelsen under pkt. 3.8 i tilbuddets ”State of Work” efterlader en sådan tvivl om parternes ansvarsområder i relation til Flight Check, og dermed om mindstekravet var overholdt, at FMI ikke alene har været berettiget, men også forpligtet til at afvise tilbuddet fra Selex, jf. også udbudslovens § 159, stk. 6. Formuleringen i pkt. 3.8 kan ikke anses for en åbenlys fejl, som FMI efter omstændighederne kunne have søgt at afklare i medfør af udbudslovens § 159, stk. 5. Det er således ikke åbenbart, at ”COSTUMER” skulle udskiftes med ”SUPPLIER”, bl.a. henset til, at 4. afsnit efter sit indhold ville savne mening, hvis ”COSTUMER” erstattes med ”SUPPLIER”. Det ændrer ikke herved, at bl.a. følgebrevet og Appen-

dix A - Responsibility Matrix” indeholdt modsatte oplysninger om Flight Check. Klagenævnet bemærker i den forbindelse, at risikoen for usikkerhed vedrørende indholdet af et tilbud påhviler tilbudsgiveren.

Påstanden tages herefter ikke til følge.

Herefter bestemmes:

Klagen tages ikke til følge.

Selex ES Inc. skal i sagsomkostninger til Forsvarsministeriets Materiel- og Indkøbsstyrelse betale 15.000 kr., der betales inden 14 dage efter modtagelsen af denne kendelse.

Klagegebyret tilbagebetales ikke.

Hanne Aagaard

Genpartens rigtighed bekræftes.

Julie Just O'Donnell
fuldmægtig