

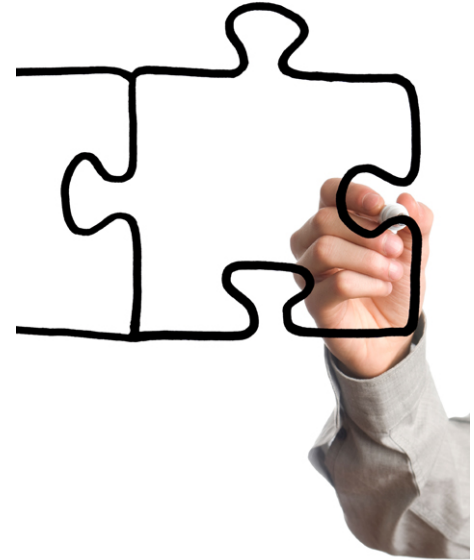


LEGAL ASPECTS OF ESCO

BUSINESS MODELS FOR DEEP ENERGY RETROFIT IN BUILDINGS AND COMMUNITIES

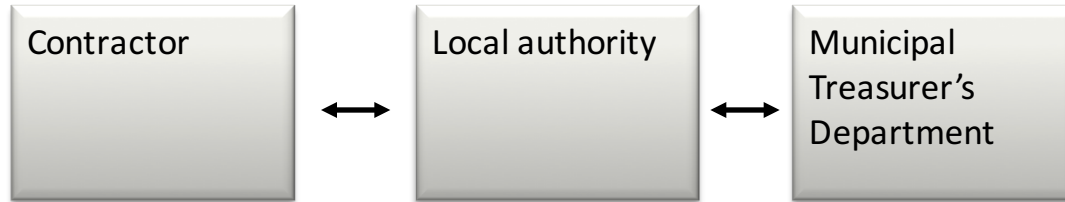
Andreas Christensten, Partner, Horten Law Firm

SPECIAL PROBLEMS WITH ESCO

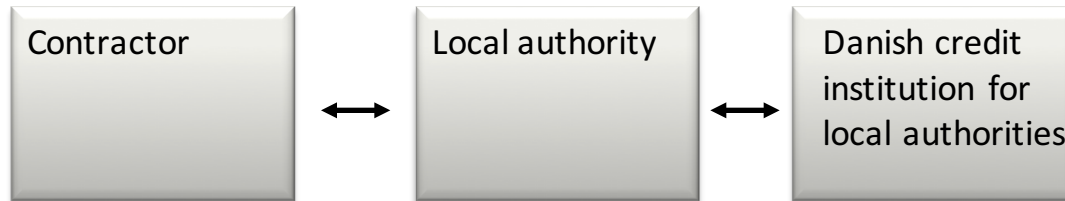


HOW DO LOCAL AUTHORITIES FINANCE PUBLIC PROCUREMENT/RENOVATION

Basis: No access to borrowing facilities:



If access:



THE LOAN ORDER

- **Section 2.** A municipality's access to borrow in each financial year, see section 3, is the sum of the following local government spending:

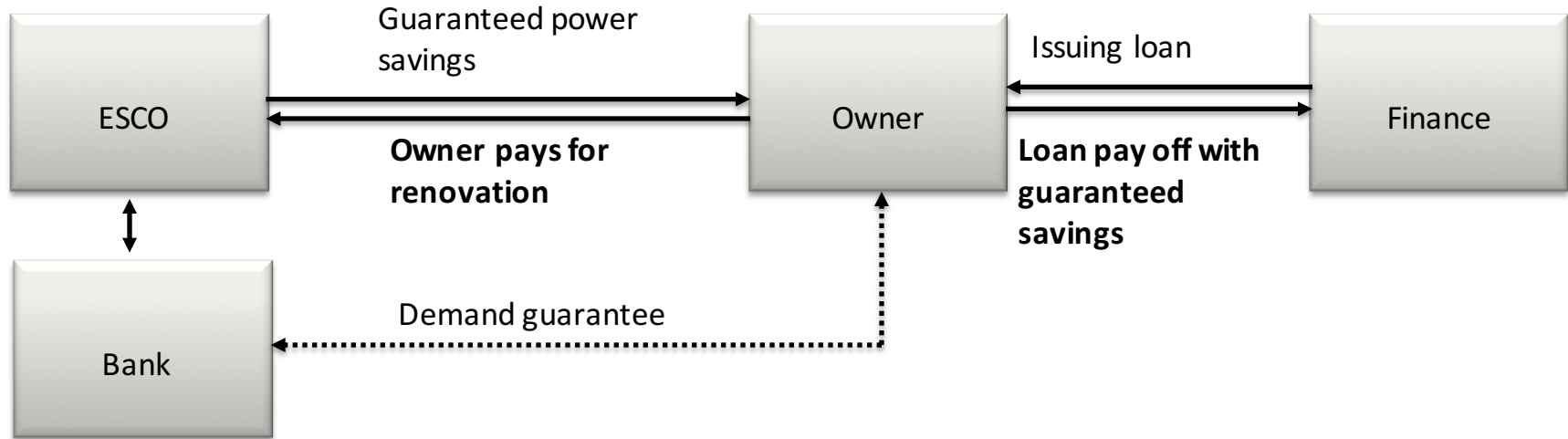
[...]

6) The cost of energy-saving measures in buildings or structures belonging to the municipality or an institution whose borrowing attributable to the municipality, see section 3 (1), nos. 3 and 4

For energy-saving purposes:

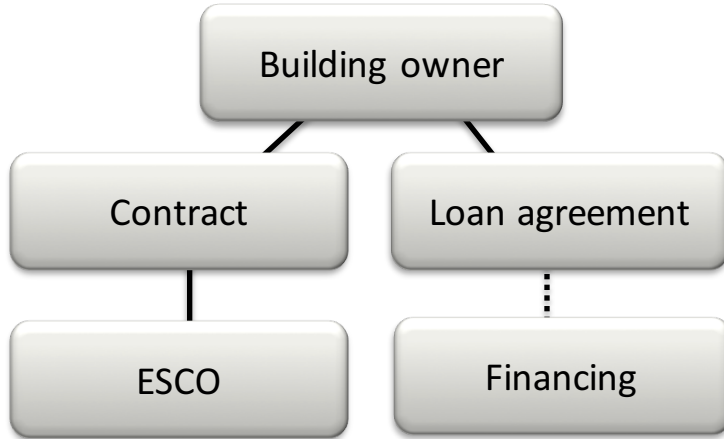
- a) such measures on energy consumption resulting from an energy labelling prepared under the Executive Order on Energy labelling etc. in buildings; and
- b) replacement of lamps and luminaires with more power-saving types, provision of automatic regulating or controlling electricity consumption and replacement of electrical installations and electrical appliances is made to power-saving types.

HOW TO FINANCE ESCO



FINANCE

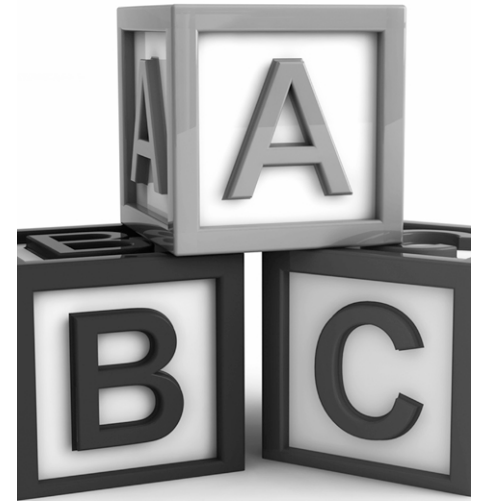
Guaranteed savings



Shared savings



HOW TO CLASSIFY THE CONTRACT



CLASSIFICATION OF THE CONTRACT

- Service or construction?

How to classify ESCO in terms of procurement law

- Article 1 (d), paragraph (d), of the procurement directive, section 3:
 - ▶ *What is the principal object of the contract?*

SERVICE OR CONSTRUCTION? (II)

ESCO:

<i>Analytical phase</i>	-	Service
<i>Construction phase</i>	-	Construction
<i>Operating phase</i>	-	Service
<u>Total project</u>	=	<u>Depends on a specific assessment</u>

CLASSIFICATION OF THE CONTRACT

- **Classification of ESCO projects:**
- Elsparefonden's project group recommends classifying ESCO projects as services:
- *“We find support for our opinion in annex 1 (10) for the Executive order no. 937 of 16 September 2004 [implementation of the procurement directive].”*
- (= 10th whereas-clause for the procurement directive)

CLASSIFICATION OF THE CONTRACT

- *"A contract shall be deemed to be a public works contract only if its subject-matter specifically covers the execution of activities listed in Annex I, even if the contract covers the provision of other services necessary for the execution of such activities. Public service contracts, in particular in the sphere of property management services, may, in certain circumstances, include works. However, in so far as such works are **incidental** to the principal subject-matter of the contract, and are a possible consequence thereof or a complement thereto, the fact that such works are included in the contract does not justify the qualification of the contract as a public works contract."* [our italics]
- The committee: *"We consider the necessary energy-efficiency measures to be works as a result of the principal reason for the award procedure ("incidental"), i.e. achieving guaranteed savings over several years. Consequently, we find that energy services should be subject to a public award procedure as services. The contract is therefore a service contract."*

WHICH AWARD PROCEDURE IS MOST APPROPRIATE?

- > Restricted procedure (most common); or
- > Competitive dialogue?

COMPETITIVE DIALOGUE

– Scope:

- If the contracting authority is not capable, objectively, of specifying the technical terms of the contract; **or**
- If the contracting authority is not capable, objectively, of specifying the legal and/or financial conditions in connection with a project;
- **and**
- The contracting authority, **through no fault of its own**, finds itself in a situation where it is impossible for the contracting authority to make an objective description.
- *In general, the access to apply a competitive dialogue is very narrow.*

PRACTICE OF THE COMPLAINTS BOARD

The Complaints Board's decision of 1 November 2010, P-Nordic vs. the Municipality of Aalborg

- Award of contract for change/renewal of parking meters in the municipality of Aalborg
- Competitive dialogue

Statement of the Complaints Board:

- The contracting authorities are left with a limited estimate in assessing whether the requirements for applying a competitive dialogue have been met.
- The burden of proof is on the contracting authority.

PRACTICE OF THE COMPLAINTS BOARD

The Complaints Board's decision of 1 November 2010, P-Nordic vs. the Municipality of Aalborg

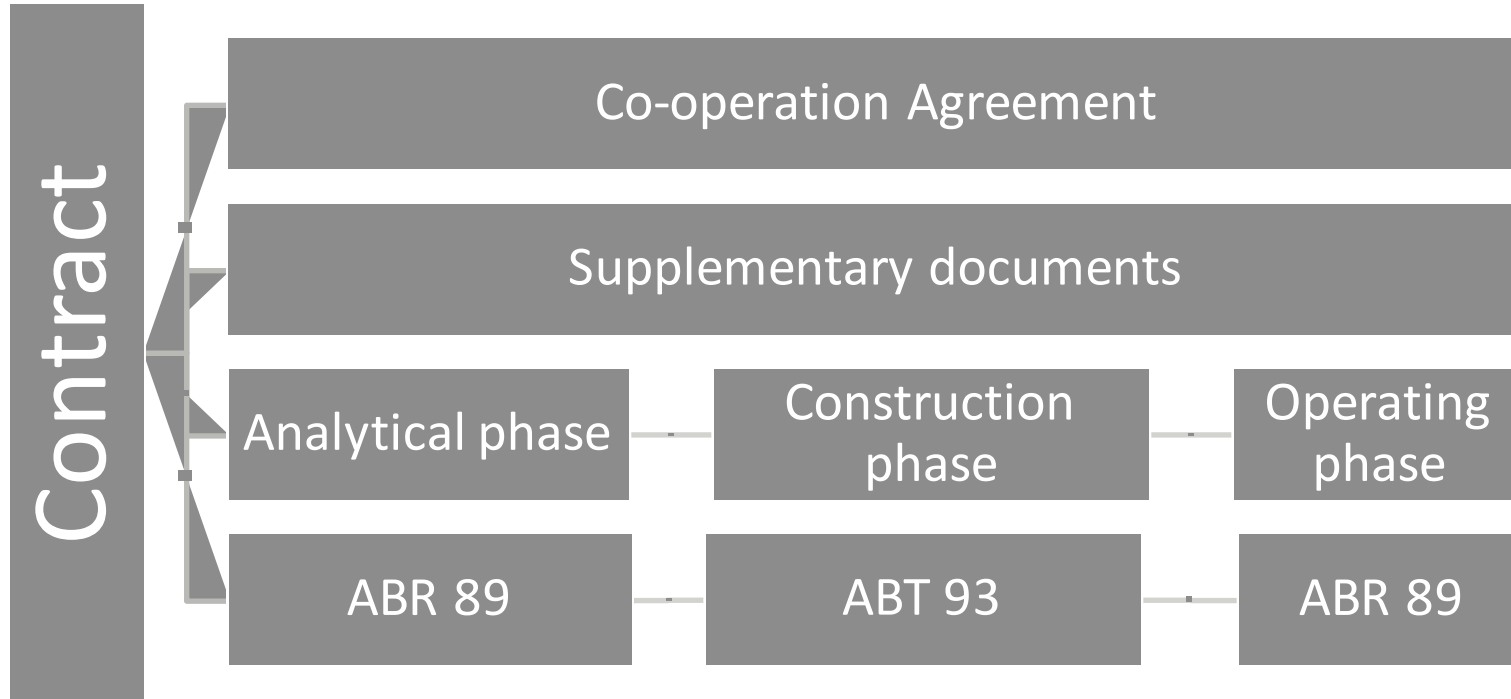
Statement of the Complaints Board:

- *“There is a presumption against the project of replacing payment card meters from magnetic reading to chip reading being of a technical complexity which in reality prevented the party complained against from describing the service awarded. The fact that they had to consider an already established system of payment card meters in connection with the performance of the project cannot in itself cause the task to be considered complex from a technical point of view. The fact that they have received tenders with prices deviating significantly from each other does not prove that the party complained against has been incapable of objectively specifying the contract terms with regard to legal and/or financial matters”.*

CONTRACT
MANAGEMENT,
PARTNERSHIP AND RISK
SHARING



REGULATION OF THE RELATIONSHIP BETWEEN THE CONTRACTING AUTHORITY AND ESCO CONTRACTOR



HANDLING OF DISAGREEMENTS

How to handle disagreements in the contract term?

- If agreement cannot be reached via the dispute resolution bodies of the Cooperation Agreement and arbitration?
- Termination for convenience?
- Termination for cause?
- Damages?

How to handle staff relations?

- Is ESCO free to replace the staff?
- Handling the municipality's dissatisfaction with an ESCO employee?

NEW PROCUREMENT DIRECTIVE

- ESCO related to procurement: Easier access to use competitive procedure with negotiation

- Art. 26 section 4:
 - *“Member States shall provide that contracting authorities may apply a competitive procedure with negotiation or a competitive dialogue in the following situations”:*
 - *(i) the needs of the contracting authority cannot be met without adaptation of readily available solutions;*
 - *(ii) they include design or innovative solutions;*

NEW PROCUREMENT DIRECTIVE

- Article 29: Competitive procedure with negotiation
- *“In competitive procedures with negotiation, any economic operator may submit a request to participate in response to a call for competition containing the information set out in Annex V parts B and C by providing the information for qualitative selection that is requested by the contracting authority.”*

PROFILE | ANDREAS CHRISTENSEN

Andreas Christensen is specialised in competition law, EU law, public procurement law and state subsidies. He was working comprehensively with those practice areas when being employed with the law department of the Ministry of Justice and subsequently as a lawyer. Andreas Christensen has considerable experience advising private and public and semi-public enterprises and has conducted a large number of litigation and arbitration cases within his areas of expertise. He has been involved in competition cases both as prosecuting attorney and defence attorney and is one of the lawyers having conducted most cases before the Complaints Board for Public Procurement. He has significant expertise within PPP and ESCO (Energy Service Company) and has advised on some of the first PPP projects and ESCO cooperations in Denmark.

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Right of audience before the Supreme Court, 2011
Partner, Horten, 2005
Right of audience before the High Court, 2005
Admitted to the Danish bar, 2002
Assistant Attorney and Attorney, Bech-Bruun Dragsted Law Firm, 2001-2005
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Litigation
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