



## Denmark's biggest ever construction project faces multiple issues

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By: Michael Neumann

In March 2016, a majority of political parties in the Danish Parliament agreed on the contracts regarding the future tunnel between the Island of Lolland in the southeast of Denmark and the island of Fehmarn in the north of Germany (the Fehmarnbelt Tunnel).

The tunnel, which will be the longest immersed tube in the world, is expected to be finished in 2028 and will constitute an important part of Danish infrastructure connecting the eastern part of Denmark with Central Europe. However, a series of legal disputes may disrupt the process and delay the project.

### Northern Europe's biggest construction project

With the agreement of the different contracts regarding the Fehmarnbelt Tunnel, a big step has been taken towards establishing a permanent connection between the eastern part of Denmark and Germany. So far, it has only been possible to commute between the countries by ferry or over the border in the western part of Denmark, Jutland. Copenhagen, however, is situated in the eastern part of Denmark, and travelling from Copenhagen to Germany has been difficult until now. Consequently, the establishment of a permanent connection across the Fehmarnbelt has been a subject of discussion for many years, for political as well as commercial reasons. Although the project has generally received wide acceptance from the Danish public, some have argued that the project is too expensive. However, the Confederation of Danish Industries and the Confederation of Danish Enterprise have stressed the importance of the project, pointing out that it will improve the infrastructure between Scandinavia and the rest of Europe, and significantly reduce traffic on the Great Belt Bridge between the eastern and western parts of Denmark.

Amidst some disagreement, nevertheless the Danish and German governments agreed in June 2007 to cooperate on this project, and in September 2008, the Danish and the German Ministers for Transport signed a treaty regarding the establishment of a permanent connection between the two countries. Four different designs for the connection were

considered: two types of bridges and two types of tunnels. In 2011 a tunnel designed as an immersed tube was chosen.

This tube will be Northern Europe's biggest construction project to date and the biggest construction project in Danish history. The expected costs of €7.4 billion will not trouble Germany, although the construction works on land in Germany and Denmark will be paid by each country respectively. As those using the tunnel will be charged a fee to do so, the project is expected to pay for itself 36 years after its completion.

## Competitive dialogue

A project of this size is naturally highly complex. Consequently, the Danish authorities have used a type of open tendering called "competitive dialogue". This type of open tendering may only be used under special circumstances, including the situation when the contracting entities are not able to determine the project's technical specifications sufficiently, and/or when the contract cannot be tendered without a preceding dialogue.

Femern A/S, managing the Danish government's interests and fully owned by the Danish government, has chosen this type of open tendering, as it is considered to be both technically and economically the best solution for a project of this size and complexity. It should be noted that this type of open tendering constitutes an exception to the general rule of prohibition of negotiations set out in the EU Public Procurement Directive. Femern A/S has chosen the "Design and Build" method, meaning that Femern A/S is responsible for preliminary studies, environmental examinations, geotechnical studies, including studies regarding noise, dust, water quality, waste management, access, etc. Having conducted these studies, the different contractors are responsible for the detailed design, the choice of methods and the construction of the project. The contractors must be able to continuously document the quality of their work and ensure that the work meets the functional requirements laid out by Femern A/S.

Femern A/S has divided the project into four engineering contracts and, in May 2013, it pre-qualified nine different contractor consortiums. The bidding companies were all major international players. The final choice of contractors was made in March 2016.

## Legal issues arising

Despite being approved by the Danish Parliament, the biggest construction project in Danish history still faces some serious obstacles which may well further complicate the establishment of the tunnel.

First of all, Germany still needs to give its environmental approval. This is expected to be given in 2019 at the latest. Regardless of this being seen as a formality by some, a delay in such approval being given will result in increased costs. This is because the contractors are entitled to the equivalent of approximately €20 million for each year the tunnel is delayed. In an analysis conducted by Femern A/S themselves, it is estimated that delays in the construction process for two years, aside from the already assumed reserves, will amount to the equivalent of approximately €67 million annually.

When the environmental approval is given, there is a significant risk that one or more German environmental associations, including the Nature And Biodiversity Conservation Union (NABU) with almost 600,000 members, will sue the German government for its decision to grant permission for the project. The crucial factor will then be if the court grants the action suspensory effect, as this might result in further delays to the project. It should be noted that such suspensory effect was granted by the Federal Administrative Court in Leipzig in 70 per cent of all cases before it in 2014. Further, a possible ruling by the court supporting the environmental associations could place the project's future in serious jeopardy.

In the summer of 2015, the EU granted the project state aid. This gave rise to a complaint from the shipping company, Scandlines, which operates the ferries between Rødby and Puttgarden, that the granting of state aid was anti-competitive. The European Commissioner for Competition, Margrethe Vestager, has rejected this claim, stating that the tunnel will make travel time significantly shorter between Germany and the eastern part of Denmark, and the other Nordic countries. Thus she has argued that the establishment of the tunnel will ultimately benefit both the public and the economy. However, Scandlines Danmark and Scandlines Deutschland have brought an action against the European Commission, arguing that the decision to grant state aid should be annulled on the basis that it is a breach of EU law. The case is currently before the Court of Justice of the European Union.

## Conclusion

Whilst agreement in the Danish Parliament was a big step towards the establishment of a Fehmarnbelt Tunnel, the range of problems described above may well complicate matters and lead to serious delays in completion of the project. Thus the biggest construction project in Danish history looks set to have significant political and economic ramifications before it is completed.

Horten is DLA Piper's focus firm in Denmark.

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