# ADVISORY OPINION OF THE COURT

12 May 1999*

*(General prohibition on discrimination – Free movement of goods – Post-tender negotiations in public procurement proceedings)*

In Case E-5/98

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Hæstiréttur Íslands (Supreme Court of Iceland) in a case on appeal between

**Fagtún ehf.**

and

**Byggingarnefnd Borgarholtsskóla, the Government of Iceland, the City of Reykjavík and the Municipality of Mosfellsbær**

on the interpretation of Articles 4 and 11 of the EEA Agreement.

THE COURT,

composed of: Bjørn Haug, President, Thór Vilhjálmsson and Carl Baudenbacher (Judge-Rapporteur), Judges,

Registrar: Gunnar Selvik,

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* Language of the request for an Advisory Opinion: Icelandic.

after considering the written observations submitted on behalf of:

– the Appellant, Fagtún ehf., represented by Counsel Jakob R. Möller;

– the Defendants, Byggingarnefnd Borgarholtsskóla, the Government of Iceland, the City of Reykjavík and the Municipality of Mosfellsbær, represented by Counsel Árni Vilhjálmsson, Attorney at Law, Adalsteinsson & Partners, assisted by Mr. Óttar Pálsson;

– the Government of Norway, represented by Jan Bugge-Mahrt, Royal Ministry of Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, represented by Helga Óttarsdóttir and Bjarnveig Eiríksdóttir, Officers, Legal & Executive Affairs, acting as Agents;

– the Commission of the European Communities, represented by Michel Nolin, member of its Legal Service, and Michael Shotter, a national official seconded to the Commission under an arrangement for the exchange of officials, acting as Agents;

having regard to the Report for the Hearing,

after hearing the oral observations of the Appellant, the Defendants, the EFTA Surveillance Authority and the Commission of the European Communities at the hearing on 5 March 1999,

gives the following

**Advisory Opinion**

*Facts and procedure*

1 By a request dated 26 June 1998, registered at the Court on the same day, the Supreme Court of Iceland made a request for an Advisory Opinion in a case on appeal between Fagtún ehf. (a private limited-liability company) (hereinafter the "Appellant") and Byggingarnefnd Borgarholtsskóla (the building committee of Borgarholt school, hereinafter referred to individually as the "building committee") the Government of Iceland, the City of Reykjavík and the Municipality of Mosfellsbær (hereinafter collectively the "Defendants").

2 In January 1995, an invitation to submit tenders for the award of a public contract for construction work for the school Borgarholtsskóli was sent out. The contracting authorities were the Government of Iceland, the City of Reykjavík and the Municipality of Mosfellsbær, and tenders were to be submitted to the State Trading Centre (*Ríkiskaup*). The building committee was the purchaser of

the work and was responsible for contacts with tenderers. Act No. 65/1993 relating to the procedures for the award of contracts (*Lög um framkvæmd útboða*) was applicable to the award of the contract in question and, in the contract terms, an Icelandic standard (IST 30) was referred to as a part of the contractual documents. Byrgi ehf., a private limited-liability company, submitted a tender. As the use of roof elements was prescribed in the contractual documents, the company contacted the Appellant, which imports roof elements from Norway, asking for a tender regarding that particular part of the work. On 2 February 1995, the Appellant submitted a tender to Byrgi ehf. comprising the roof elements and their installation. The tender referred to the relevant points in the description of the work to be carried out contained in the contract notice. The Appellant's tender was for a total of 30 642 770 Icelandic crowns. In the tender, the Appellant stated that information regarding the work would be submitted, but that an application for an exemption from Building Regulation No. 177/1992 (*Byggingareglugerð*, hereinafter the "Building Regulation") would be required regarding the roof elements. The Appellant maintains that Byrgi ehf. accepted the tender and used it when submitting its own tender to *Ríkiskaup*. Byrgi ehf. submitted the lowest tender for the contract, but in the subsequent negotiations the building committee requested the use of roof elements produced in Iceland. A works contract was concluded, wherein section 3 reads: "The contractor's main tender is the basis for the contract and it is agreed that roof elements will be produced in the country". The Appellant submits that this condition of the works contract precluded use of the imported roof elements, resulting in his losing the works contract.

3 By a letter of 9 June 1995 to the Ministry of Finance, the Appellant objected to the above-mentioned section of the works contract. The Appellant submitted that section 3 was contrary to Act No. 65/1993 relating to the procedures for the award of contracts, rules regarding public procurement and works within the European Economic Area, as well as the Government's policy regarding awards of public work contracts.

4 The Defendants point out that it was noted in the description of the works to be carried out that drawings included in the contractual documents did not show the fully-designed structural systems of the roof, and that the contractor was supposed to submit to the purchaser of the work the final drawings and ensure necessary approvals from the public building authorities of the structural system and technical solutions. The building committee's letter of 13 September 1995 states that the reason for the agreement that the roof elements should be produced or assembled in Iceland is that the work may be kept under review, as the committee imposes strict requirements regarding quality and finish and seeks to avoid unknown solutions which are subject to a special exception from the provisions of the Building Regulation, granted by the public building authorities. Pursuant to the opinion of a consultant, the building committee estimated that this approach would result in a better roof.

5 The Appellant sued Byrgi ehf. in damages, claiming compensation for expenses relating to the preparation of the tender and for lost profit. Héraðsdómur

Reykjaness (District Court of Reykjanes) rendered its judgment on 9 December 1996, concluding that section 3 of the works contract was contrary to Articles 4 and 11 of the Agreement on the European Economic Area (hereinafter variously "EEA" and "EEA Agreement"). The Court found that the unlawful provision in the works contract had, in effect, resulted in the rejection of the Appellant as a sub-contractor for the work. The rejection of the Appellant did not follow from objective reasons. The Appellant's claim for costs relating to the preparation of the tender was upheld. The claim for lost profit was rejected on the grounds that a binding contract had not been concluded between the Appellant and Byrgi ehf. according to IST 30, section 34.8.0.

6 On 19 June 1997, the Appellant brought a claim against the Defendants before Héraðsdómur Reykjavíkur (Reykjavík City Court) for compensation for lost profit. The City Court found in favour of the Defendants on the grounds that no works contract had been concluded between the Appellant and Byrgi ehf., and even less so between the Appellant and the Defendants. In its negotiations with Byrgi ehf., the building committee had rejected the Appellant as a sub-contractor and based itself on the roof elements being produced in the country. In the contractual documents it was not stated that the roof had to be made in Iceland, and both options were available according to the contractual documents, in other words, the roof could be made in Iceland or abroad. The Defendants' obligation to approve the material and the performance of the work proposed by the Appellant had not been substantiated and, in addition, the Appellant's solution was subject to a special approval by the public building authorities. Further, it was not considered substantiated that section 3 of the works contract between the Defendants and Byrgi ehf. infringed the EEA Agreement nor that there was such a relationship between the Appellant and the Defendants that it could be a basis for the Defendants having to pay compensation to the Appellant.

7 Fagtún ehf. appealed the decision of Reykjavík City Court to the Supreme Court of Iceland on the grounds that the conclusion of the City Court that section 3 of the works contract does not infringe provisions of the EEA Agreement was incorrect.

8 It is not in dispute that the tender procedure prior to the conclusion of the contract was carried out in accordance with the requirements laid down in Council Directive 93/37/EEC of June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), referred to in point 2 of Annex XVI to the EEA Agreement, as amended by Decision of the EEA Joint Committee No 7/94 (hereinafter the "Directive").

9 The questions referred by the national court concern the interpretation of Articles 4 and 11 EEA. The parties have, however, also submitted pleadings on the interpretation of Article 13 EEA. The Court will deal with this provision as well.

*Legal background*

*1. EEA law*

10 Article 4 EEA reads:

> "Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

11 Article 11 EEA reads:

> "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between the Contracting Parties."

12 Article 13 EEA reads:

> "The provisions of Articles 11 and 12 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Contracting Parties."

*2. National law*

13 Act No. 65/1993 relating to the procedures for the award of contracts applies when an award of a contract is used as a means to conclude contracts between two or more entities for works, goods or services. Its application is not limited to contracts made by public parties.

14 Act No. 63/1970 relating to the procedures for the award of public works contracts (*Lög um skipan opinberra framkvæmda*) applies to construction or modification work which is partially or wholly financed by the Government, provided that the Government's cost is at least 1 000 000 Icelandic crowns.

15 The Building Regulation laid down in section 7.5.11 rules for roofs and roof structures. That section reads:

> "7.5.11.1 Roofs shall be designed and constructed in such a way that damaging humidity condensation does not occur in the roof structure or on its inner surface.
>
> 7.5.11.2. In roofs made of wood or wood materials, ventilation openings shall be inserted and placed so that ventilation is even above the upper surface of the roof insulation. Ventilation shall be described in special designs and by calculations, if necessary.
>
> 7.5.11.3 … "

*Questions*

16 The following questions were referred to the EFTA Court:

> *1 Does Article 4 of the EEA Agreement prohibit the inclusion in a works contract of a provision to the effect that roof elements are to be produced in Iceland?*
>
> *2 Does Article 11 of the EEA Agreement prohibit such a provision?*

17 The Court takes note of the observations made by the parties to the case to the effect that the Icelandic term "*smíðaðar*" could be reflected in English by the term "crafted" or "constructed". The Court however also notes the distinction between the terms "*settar saman*", i.e. "assembled" and "*smíðaðar*", i.e. "crafted", "constructed" or "produced". Taking due account of these observations, the Court will in the following refer to the roof elements as being "produced" in Iceland.

18 Reference is made to the Report for the Hearing for a more complete account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

*Findings of the Court*

*The second question*

19 In its second question, which the Court finds should be dealt with first, the national court asks whether Article 11 EEA prohibits a provision in a works contract to the effect that roof elements are to be produced in Iceland.

*Applicability of Article 11 EEA*

20 The *Defendants* argue that measures can only be held to be contrary to Article 11 EEA if they are taken by an authority exercising its public power, they are binding in nature and they have certain legal effects. The building committee did not exercise any public power during the contractual negotiations. Consequently, this case does not concern a provision of a legislative act, an administrative rule, a recommendation or any other decision published or enacted by a public authority in a unilateral manner. Section 3 of the works contract was freely negotiated by the parties. In the view of the Defendants then, what is at issue is a contract of private law between private parties that is not subject to Article 11 EEA.

21 Against this standpoint, the *Appellant* states that the award of the contract was a matter of public law because the works were subject to Act No. 63/1970 on awards of public works contracts and the Directive, and they were financed by the State and the municipalities. Furthermore, the address of the building committee was at the Ministry of Education and the individuals composing the building committee were high-ranking officials of the Ministries of Education and Finance and the City of Reykjavík General Council. The Appellant points out that Article 30 EC (now after modification Article 28 EC) is applicable even though a private undertaking is acting on behalf of a government.

22 The *Court* notes that it follows from the case law of the Court of Justice of the European Communities ("ECJ") that provisions contained in public works contract specifications may be caught by the prohibition in Article 30 EC (now after modification Article 28 EC), which corresponds to Article 11 EEA, see the judgments of the ECJ in Case 45/87 *Commission* v *Ireland* [1988] ECR 4929, and Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353.

23 In the present case, it is quite clear that the building committee acted on behalf of the Government and thus must be considered a public contracting authority. The committee itself was established by a contract between the Government of Iceland, the City of Reykjavík and the Municipality of Mosfellsbær. Its members were appointed by the Ministry of Education, the City of Reykjavík and the Municipality of Mosfellsbær. They were, in fact, essentially chosen from the ranks of these public entities. The funding of the committee is wholly provided by public means and, according to information received from the Defendants, the owners of the school building are the Government of Iceland, the City of Reykjavík and the Municipality of Mosfellsbær. These links between the State and the building committee bring the procurement activities of the building committee into the public law sphere.

24 Consequently, the Court finds that Article 11 EEA is, in principle, applicable to a clause such as the one at issue in the main proceedings.

*Interpretation of Article 11 EEA*

25 The *Appellant* states that the inclusion of a provision according to which roof elements are to be produced in Iceland is considered to have an effect equivalent to a quantitative restriction when applied to imports of roof elements from another Contracting Party. No evaluation was made to determine whether the roof elements offered by the Appellant and originating in Norway would meet the standards laid down in the Building Regulation or qualify for an exemption from the provisions of that regulation. Moreover, the Icelandic building authorities have granted exemptions for the use of the roof elements at issue here on two occasions prior to the tender for Borgarholtsskóli and on at least one occasion since that tender for other, similar projects.

26 Against this argument, the *Defendants* contend that the parties simply decided to use quality roof elements which were in conformity with the Building Regulation. This did not restrict in any way the freedom of the Appellant to import roof elements into Iceland. The parties only intended to ensure a certain quality of the work and that the work could be carried out in conformity with Icelandic legislation. The solution offered by the Appellant comprised the use of unventilated roof elements and fulfilled neither of those conditions. The Building Regulation stated in substance that only ventilated roof elements are allowed to be used in buildings. The Defendants maintain that such roof elements are the only ones proven to provide sufficient protection under Icelandic weather conditions, although exemptions from the Building Regulation have, on a few occasions, been granted by the competent authorities.

27 The Defendants point out that a new Building Regulation No. 441/1998 (*Byggingarreglugerð*) came into force in July 1998. That regulation still requires that roof elements made of wood or wooden material are to be ventilated unless an equally good solution is provided for.

28 According to the *Government of Norway*, the *EFTA Surveillance Authority* and the *Commission of the European Communities*, Article 11 EEA covers all measures concerning production that may restrict imports between EEA Contracting Parties. The effect of a provision in a works contract requiring that roof elements be produced in Iceland may be to preclude the use of imported roof elements. Therefore, it discriminates against foreign production.

29 The *Court* notes that Article 11 EEA corresponds to Article 30 EC (now after modification Article 28 EC). According to the case law of the ECJ, this provision prohibits, as measures having an equivalent effect to quantitative restrictions on imports, all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (see judgment in Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837). The EFTA Court has adopted the same view with regard to Article 11 EEA (Cases E-5/96 *Ullensaker kommune and Others* v *Nille* [1997] EFTA Court Report 30; E-6/96 *Tore Wilhelmsen AS* v *Oslo kommune* [1997] EFTA Court Report 53).

30 The present case concerns the issue of whether a provision in a public works contract requiring that roof elements be produced in Iceland is compatible with Article 11 EEA. It is clear that the effect of such a provision is to preclude the use of imported roof elements for the work in question. The clause thus constitutes a restriction on trade within the meaning of the case law cited above and, consequently infringes Article 11 EEA.

31 In the case at hand the contested clause was not part of the specifications that were the basis for the tender procedure, as was the situation in the cited judgments of the ECJ. The contested clause was inserted into the final contract at the contract stage after the bids in the tender had been received and considered, at the contracting authority's request. This can, however, not lead to a different

assessment with regard to the applicability of Article 11 EEA, as the post-tender negotiations cannot be separated from the procedure itself. The contract was concluded after a tender procedure under the Directive had been carried out. The contract is so closely linked to the preceding procedure that the principles underlying the Directive and the provisions of Article 11 EEA must apply to it.

32 A provision in a works contract requiring that roof elements be produced in Iceland is contrary to Article 11 EEA. By including the clause: "The contractor's main tender is the basis for the contract and it is agreed that roof elements will be produced in the country", the Defendants excluded all products made abroad. This amounts to clear discrimination in favour of national production.

*Justification under Article 13 EEA*

33 In the opinion of the *Defendants*, section 3 of the works contract can be justified under Article 13 EEA. Particular reference is made in that Article to the protection of health and life of humans. The Defendants argue that extraordinary geographical conditions, especially weather conditions, may justify a contractor and a purchaser of work stipulating in their contract that roof elements must be produced in the country, so that a purchaser may monitor construction and take the relevant measures to ensure conformity with domestic legislation.

34 The *Government of Norway* submits that neither Article 13 EEA nor the principle set out in Case 120/78 *Rewe* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 (hereinafter "*Cassis de Dijon*") is applicable in this case.

35 According to the *EFTA Surveillance Authority*, the clause in question is overtly discriminatory. It cannot be justified by reference to the mandatory requirements recognized by the ECJ in *Cassis de Dijon* and subsequent case law nor under Article 13 EEA.

36 In the opinion of the *Commission of the European Communities*, a justification under Article 13 EEA or on other grounds based on the need to keep the work under review and to impose strict requirements regarding quality and finish is not possible.

37 The *Court* notes that the arguments of the Defendants concerning a possible justification under Article 13 EEA cannot be upheld. If a Contracting Party claims to need protection from dangerous imported products, it will have to satisfy the Court that its actions are genuinely motivated by health concerns, that they are apt to achieve the desired objective and that there are no other means of achieving protection that are less restrictive of trade. In the case at hand, the Defendants have not shown that the use of roof elements built in Norway could lead to a danger for the health and life of humans within the meaning of Article 13 EEA. On the contrary, it is undisputed that the authorities in Iceland have granted an exemption for the use of the roof elements in other cases. Therefore, a provision which *a priori* favours certain products by a mere reference to their

origin cannot be considered as necessary or proportionate within the meaning of Article 13 EEA.

38 Furthermore, the provision in question leads to overt discrimination and, therefore, cannot be justified by reference to mandatory requirements within the meaning of the case law of the ECJ (*Cassis de Dijon*) on Article 30 EC (now after modification Article 28 EC).

*The first question*

39 In its first question, the national court seeks to ascertain whether Article 4 EEA prohibits the inclusion in a works contract of a provision to the effect that the roof elements are to be produced in Iceland.

40 The *Appellant* contends that Article 4 EEA may be applied independently of other articles prohibiting discrimination in the areas covered by the four freedoms. The *EFTA Surveillance Authority* concurs with this view as regards the free movement of goods.

41 The *Defendants*, the *Government of Norway* and the *Commission of the European Communities* are of the opinion that Article 4 EEA does not apply in a case covered by Article 11 EEA.

42 Article 4 EEA provides, as a general principle that, within the scope of application of the Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. It follows both from the wording of the provision and from the case law of the ECJ concerning the corresponding provision in Article 12 EC (ex Article 6 EC) that Article 4 EEA applies independently only to situations governed by EEA law in regard to which the EEA Agreement lays down no specific rules prohibiting discrimination, see e.g. the judgment of the ECJ in Case C-379/92 *Peralta* [1994] ECR I-3453. Since the *Court* has found the contested clause to be contrary to Article 11 EEA, it is not necessary to examine whether it is contrary to Article 4 EEA.

*Costs*

43 The costs incurred by the Government of Norway, the EFTA Surveillance Authority and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by Hæstiréttur Íslands by the request of 26 June 1998, hereby gives the following Advisory Opinion:

**A provision in a public works contract that has been inserted after the tender procedure at the contracting authority's request and which states that roof elements required for the works are to be produced in Iceland constitutes a measure having effect equivalent to a quantitative restriction prohibited by Article 11 EEA. Such a measure cannot be justified on grounds of protection of the health and life of humans under Article 13 EEA.**

Bjørn Haug Thór Vilhjálmsson Carl Baudenbacher

Delivered in open court in Luxembourg on 12 May 1999.

Gunnar Selvik
Registrar

Bjørn Haug
President