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Judgment in Case E-16/16 *Fosen-Linjen AS v AtB AS*

A SIMPLE BREACH OF PUBLIC PROCUREMENT LAW MAY IN ITSELF BE SUFFICIENT TO TRIGGER THE LIABILITY OF A CONTRACTING AUTHORITY

In a judgment delivered today, the Court answered questions referred to it by the Frostating Court of Appeal (*Frostating lagmannsrett*) on the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (“the Remedies Directive”).

Fosen-Linjen AS (“Fosen-Linjen”) is a small Norwegian ferry operator, which participated in a tender procedure for the operation of a ferry route. The tender procedure was carried out by AtB AS (“AtB”), acting as the contracting authority. Fosen-Linjen ranked second in the procedure, only after Norled AS (“Norled”). Arguing that there were irregularities in the procedure, Fosen-Linjen requested the Sør-Trøndelag District Court (*Sør-Trøndelag tingrett*) to stop by an interim measure the signature of the contract between AtB and Norled. Both the District Court and, upon appeal, the Frostating Court of Appeal prohibited the signature of the contract. Following the judgment of the Court of Appeal, AtB decided to cancel the tender procedure, on basis of an error it committed in relation to the evaluation and verification of the bid submitted by Norled. Fosen-Linjen did not contest this decision before the courts. AtB signed a contract with Norled for the operation of the procured ferry service, albeit for a shorter period than in the tender procedure. Subsequently, Fosen-Linjen filed a lawsuit against AtB. In these proceedings, it claimed damages for the positive contract interest (loss of profit) or, in the alternative, for the negative contract interest (costs of bidding).

Conditions for the award of damages in EEA public procurement procedures

In essence, the first four questions referred concern the issue of which conditions, if any, EEA law lays down for a claim for damages based on alleged irregularities in a tender procedure. In this regard, the first two questions referred relate to the issue whether the award of damages is conditional on a qualified breach of EEA law by the contracting authority. The national court pointed to different standards of assessment, such as the existence of culpability or whether there was a “material, gross and obvious error” on the side of the contracting authority. In this context, the Court analysed the purpose and the system established by Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. It held that a contracting body does not exercise an act of public authority (*actum jure imperii*) when conducting a tender procedure. This is contrary to the situation where the national legislature transposes EEA law on public procurement or where the national courts render judgments applying the principles set out therein. A tender procedure aims at the conclusion of a contract *inter partes*. The Court also recalled that Directive 2004/18/EC is intended to protect the interests of traders.

The Court noted that the Remedies Directive is closely related to Directive 2004/18/EC. It aims at providing adequate remedies that ensure compliance with the relevant EEA provisions on

public contracts. Moreover, the Remedies Directive must be interpreted in the light of fundamental rights, such as the right to an effective judicial remedy. Against this background, the Court found that it must be possible for unsuccessful tenderers to obtain a judgment finding a breach of the EEA rules on public procurement law. The Court recalled that the remedy of damages constitutes a procedural alternative to the other remedies provided for in the Remedies Directive only where the possibility of damages is no more dependent than those remedies on a finding that the contracting authority is at fault. As such, damages seek to achieve a three-fold objective: to compensate for any losses suffered; to restore confidence in the effectiveness of the applicable legal framework; and to deter contracting authorities from acting unlawfully. A limitation of the possibilities to claim damages could reduce the willingness of contracting authorities to comply with the relevant conditions of EEA public contracts law, or decrease their diligence in conducting a tender procedure.

Thus, the Court held that a rule requiring a breach of a certain type or gravity would ultimately substantially undermine the goal of effective and rapid judicial protection sought by the Remedies Directive and interfere with the objectives pursued by Directive 2004/18/EC. Therefore, the gravity of a breach of the EEA rules on public contracts is irrelevant for the award of damages. A simple breach of public procurement law is in itself sufficient to trigger the liability of the contracting authority to compensate the person harmed for the damage incurred, pursuant to Article 2(1)(c) of the Remedies Directive, provided that the other conditions for the award of damages are met including, in particular, the existence of a causal link.

The third question referred concerned a requirement of national law according to which the aggrieved tenderer is required to prove with “clear, that is, qualified preponderance of evidence,” that he would have been awarded the contract, had the contracting authority not committed the error. The Court found that the Remedies Directive does not preclude such a requirement, as long as it complies with the principles of effectiveness and equivalence. The fourth question concerned the issue whether a contracting authority may invoke defects of the procedure, which led it to cancel the procedure, as a defence against a damage claim. The Court held that EEA law does not preclude this. However, it pointed out that a contracting authority wishing to rely on such a defence must bear the burden of proof for the existence of the error, and justify the decision to withdraw the procedure in light of EEA law.

Effective verification

The fifth and the sixth questions referred concerned the requirement of effective verification. The Court held that the award criteria of a tender procedure must be formulated so to allow all reasonably well informed tenderers of normal diligence to interpret them in the same way. The contracting authority is obliged to verify whether the information submitted by the tenderer is plausible, i.e. that the respective tenderers are capable of providing what was offered in the bid, and whether that bid corresponds to the requirements set out by the contracting authority. The contracting authority may take into account any documentation in a tender as long as it has requested the same documentation from all tenderers and treats all tenderers equally. The verification requirement must comply with the principle of proportionality.

The full text of the judgment may be found on the internet at: www.eftacourt.int.

This press release is an unofficial document and is not binding upon the Court.