

Brussels, 1 December 2011
Case No: 68124
Event No: 595275

EFTA SURVEILLANCE
AUTHORITY

Ministry of Government Administration and Reform
Akersgata 59
0030 Oslo
Norway

Dear Sir or Madam,

Subject: Letter of formal notice to Norway for failure to comply with the EEA rules on public procurement

1 Introduction

On 16 April 2010, the EFTA Surveillance Authority ("the Authority") began an investigation on its own-initiative in the field of public procurement concerning a contract awarded jointly by the Hedmark office of the Norwegian Labour and Welfare Administration ("NAV Hedmark") and the Municipality of Kongsvinger ("Kongsvinger Kommune") to Torget Kongsvinger AS, understood to be a subsidiary of the public-private entity Kongsvinger Park AS. The subject of the contract, concluded on 7 December 2009, was the rental of offices for NAV Hedmark in the centre of Kongsvinger.

By letter dated 4 June 2010 (Event No 553873), the Authority sent a request for information to Norway regarding the above rental contract. By letter dated 29 June 2010, the Norwegian Government provided the requested information. On the basis of this information, it appeared that the above rental contract was part of a broader cooperation between Kongsvinger Kommune and the private undertaking KB Gruppen, aimed at developing the town hall area in Kongsvinger (*rådhuskvartalet*). This venture, involving various construction and urban planning projects, was to be undertaken by a public-private entity, Kongsvinger Park AS, established jointly by Kongsvinger Kommune and KB Gruppen by virtue of a framework agreement signed by them on 29 June 2007.

In light of the above, the investigation was extended to the aforementioned framework agreement and all projects covered by this agreement. By letters dated 27 October 2010 (Event No 574273) and 1 February 2011 (Event No 584851), the Authority sent further requests for information to Norway, and by letters of respectively 1 December 2010 and 1 March 2011, the Norwegian Government provided a reply to these requests.

2 Factual background

2.1 The framework agreement for the development of the town hall area and the establishment of Kongsvinger Park AS

In January 2007, Kongsvinger Kommune started to plan the development of the town hall area (*rådhuskvartalet*) in the centre of Kongsvinger and, in light thereof, it considered the option of entering into a cooperation with a private partner. In order to find such a partner, Kongsvinger Kommune initiated negotiations, apparently without any publication or tendering, with three local real estate development companies in March 2007: KOBBL, Eiendomsutvikler AS (KKNS) and KB Gruppen. The latter two showed interest in the project.

On 16 April 2007, Kongsvinger Kommune invited the two interested development companies to make an offer by 1 May 2007, based on 14 parameters/questions. Both companies made an offer, and Kongsvinger Kommune negotiated further with them on the basis of their offers.

By letter dated 14 June 2007, Eiendomsutvikler AS informed Kongsvinger Kommune that it had decided to withdraw its tender, which left KB Gruppen as the only candidate.

On 29 June 2007, Kongsvinger Kommune and KB Gruppen signed a framework agreement and a shareholders agreement with a view to establishing a public-private partnership for the development of the town hall area in Kongsvinger. This framework agreement laid down the basis for, *inter alia*, the following infrastructure projects:

- (i) development of the town hall,
- (ii) development of the town hall theatre,
- (iii) construction of a swimming pool,
- (iv) construction of school buildings,
- (v) construction of an underground car park, and
- (vi) development of a NAV regional office.

In addition, the framework agreement stated that the financing and the subsequent use of the above projects would be covered by long-term rental agreements, which must be concluded before the start of each project.

Part of the framework agreement was the establishment by the contracting parties of the company Kongsvinger Park AS, owned 66% by KB Gruppen and 34% by Kongsvinger Kommune. Under the terms of this agreement, Kongsvinger Park AS would perform all the works related to the projects covered by the framework agreement. The contribution in the share capital of the company by Kongsvinger Kommune consisted of the transfer of real estate owned by the municipality in that area, such as the town hall and the town hall theatre, at market value¹.

¹ The framework agreement stipulated that, for the purpose of financing the works, long-term rental contracts of at least 20 years have to be concluded between both partners before the start of the works, and that Kongsvinger Kommune would have the option to buy back the property after 10 years following the performance of the works (and afterwards after every 5 years). Furthermore, the rental price for the town hall and the town hall theatre was to be calculated on the basis of the following formula: cost price multiplied by the costs for financing the project, set at 6,25% of the cost price (Annex I to the shareholders agreement).

2.2 The rental contract for the NAV offices

With a view to establishing a new regional office of the Norwegian Labour and Welfare Administration (NAV) in the centre of Kongsvinger in the course of 2009, which would bring together various departments of the NAV in one office building, NAV Hedmark and Kongsvinger Kommune started to look jointly for proper infrastructure and, in light thereof, they set up a working group and a steering committee.

On 26 January 2007, the aforementioned entities made a publication in the local press, inviting interested parties owning property in the area to make a proposal for the rental and development of office infrastructure. Following the publication, five different companies made an offer, one of them being KB Gruppen. One of the locations offered by KB Gruppen was the site “Torget”, which was owned by a subsidiary of KB Gruppen called Center Eiendom AS.

On the basis of an evaluation of the tenders by the working group dated 5 March 2007, the steering committee considered that the offer with offices located in the town hall area (*Rådhuset*) as the best offer, while KB Gruppen’s offer for offices on the site “Torget” was ranked as second best.

However, Kongsvinger County Council, during its meeting on 31 May 2007, considered that the necessary works for offices in the town hall area could not be finalised before the set deadline. Therefore, on 15 August 2007, the steering committee decided to negotiate further with Center Eiendom AS with a view to establishing the new NAV regional office at the site “Torget”.

In the meantime and before the meeting on 15 August 2007, however, Kongsvinger Kommune and KB Gruppen had signed, on 29 June 2007, the framework agreement referred to in section 2.1 above, covering, *inter alia*, the NAV regional office project. At point 3.2 of the framework agreement, it is stated that Kongsvinger Kommune would strive to have the NAV offices established at “Torget”, provided that competitive conditions would be offered. The framework agreement further provided that the financing and the management of the NAV offices would be laid down in long-term rental agreements before the start of the works, which was the financial set-up for all projects covered by the framework agreement.

On 30 November 2007, Kongsvinger Kommune, NAV Hedmark and Kongsvinger Park AS signed a letter of intent, and on 7 December 2007 they signed the final contract for the rental of the office infrastructure² that would form the premises of the NAV regional office for the period 7.9.2009 to 31.8.2029, for a total value of approximately EUR 11.8 million (NOK 94,8 million) (hereafter “the NAV contract”).³ By separate agreement between NAV Hedmark and Kongsvinger Kommune, it was provided that NAV Hedmark would finance 76,3% of the contract, and Kongsvinger Kommune would finance the remaining 23,7%.

² The contract of 7 December 2007 was signed between Kongsvinger Kommune, NAV Hedmark and Torget Kongsvinger AS. The Authority understands Torget Kongsvinger AS to be a subsidiary of Kongsvinger Park AS.

³ This figure is based on an annual rental price of NOK 4.739.000 and the 20 year duration of the rental contract.

3 Relevant EEA law

The act relevant to the present case is the act referred to at point 2 of Annex XVI to the EEA Agreement (*Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts* (hereafter “Directive 2004/18”). Directive 2004/18 repealed Directive 93/37 on the award of public works contracts and entered into force for the EFTA States on 18 April 2007.

The Authority observes that part of the procedure subject to the present case took place before the entry into force of Directive 2004/18 for the EFTA States (*i.e.* 18 April 2007), and part of the procedure, most notably the decision to award the framework agreement and the NAV contract, took place after that date. Moreover, the Authority observes that the principle that public contracts above a certain threshold must be awarded by either the open or restricted procedure, and that the use of the negotiated procedure is exceptional upon the fulfilment of specific conditions, is reflected in both Directive 2004/18 and Directive 93/37⁴, which means that the failure to fulfil this obligation would result in a breach of EEA law under either Directive. In light of this, the Authority considers the award of the framework agreement in this case to be covered by Directive 2004/18⁵.

Directive 2004/18 is applicable to public works contracts with an estimated value (net of VAT) of not less than EUR 5 278 000 (NOK 43 543 500) (Article 7)⁶.

The relevant provisions of the Directive read as follows:

Article 9(9):

With regard to framework agreements and dynamic purchasing systems, the value to be taken into consideration shall be the maximum estimated value net of VAT of all the contracts envisaged for the total term of the framework agreement or the dynamic purchasing system.

Article 28:

In awarding their public contracts, contracting authorities shall apply the national procedures adjusted for the purposes of this Directive.

They shall award these public contracts by applying the open or restricted procedure. In the specific circumstances expressly provided for in Article 29, contracting authorities may award their public contracts by means of the competitive dialogue. In the specific cases and circumstances referred to expressly in Articles 30 and 31, they may apply a negotiated procedure, with or without publication of the contract notice.

Article 32(2):

⁴ See Article 28 of Directive 2004/18 and Article 7(1) of Directive 93/37.

⁵ Noting that this does not contradict the case-law of the Court of Justice on the temporal application of the public procurement directives, see Case C-337/98 *Commission v France* [2000] ECR I-8377, paragraph 39.

⁶ The values of thresholds applicable as of 1 January 2006 for public works contracts pursuant to Directive 93/37/EEC, as amended by decision of the EEA Joint Committee No 96/1999 of 16 July 1999 amending Annex XVI (procurement) to the EEA Agreement by incorporating Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC.

For the purpose of concluding a framework agreement, contracting authorities shall follow the rules of procedure referred to in this Directive for all phases up to the award of contracts based on that framework agreement.(...)

Article 35(2):

Contracting authorities which wish to award a public contract or a framework agreement by open, restricted or, under the conditions laid down in Article 30, negotiated procedure with the publication of a contract notice or, under the conditions laid down in Article 29, a competitive dialogue, shall make known their intention by means of a contract notice.

Annex VIII 1(a):

Notices referred to in Articles 35, 58, 64 and 69 are sent by the contracting authorities to the Office for Official Publications of the European Communities(...)

4 Assessment

4.1 The Framework Agreement of 29 June 2007

4.1.1 The Framework Agreement falls within the scope of Directive 2004/18

In assessing the applicability of Directive 2004/18 to the present case, the Authority notes, firstly, that, being a local authority, Kongsvinger Kommune is a contracting authority within the definition of Article 1(9) of the Directive.

Secondly, based on the available information, the estimated total value of the framework agreement appears to exceed the threshold value for works contracts referred to in Article 7 of Directive 2004/18.

As regards the value, the Authority invited the Norwegian Government, by its letter of 1 February 2011 (Event No 584851), to provide information concerning the total value (costs) of the framework agreement as well as the total value (costs) of every individual project covered by the framework agreement.

Although the Norwegian Government stated, in its reply by letter dated 1 March 2011, that it could not provide this information due to the fact that some of the projects were either set aside or not yet completed, it appears from the prospectus for the Kongsvinger town hall area project, dated 8 March 2007, that the estimated total cost for developing the town hall and the town hall theatre alone was set at respectively NOK 34.4 million and NOK 99.8 million.

Furthermore, in the offer of KB Gruppen of 1 May 2007, reference is made to an estimated total cost for the entirety of projects covered by the framework agreement of NOK 1 billion.⁷ The Authority observes that the fact that some of the works falling under a framework agreement are in the end not or only partly performed does not affect the

⁷ See point 6 of KB Gruppen's tender of 1 May 2007.

initial estimated total value. Pursuant to Article 9(9) of Directive 2004/18, the value to be taken into consideration shall be the maximum estimated value net of VAT of all the contracts envisaged for the total term of the framework agreement. As a result, Directive 2004/18 must be deemed to be applicable to the present framework agreement.

In the view of the Authority, this conclusion is not prejudiced by the fact that contracts for the acquisition or rental of real estate are in principle excluded from the scope of the EEA public procurement rules⁸. The rental of real estate is only one element of the development projects governed by the framework agreement. The framework agreement also provides for considerable works, and it appears from the available information that the rent stipulated in the subsequent rental contracts, which form a condition for the execution of the works, is designed to include a remuneration for the substantial works required under the agreement.

4.1.2 *The award of the Framework Agreement to Kongsvinger Park AS, an IPPP⁹ between Kongsvinger Kommune and KB Gruppen AS*

The Authority takes the view that the award of public contracts under the auspices of a cooperation between a contracting authority and a private entity - such as that between Kongsvinger Kommune and KB Gruppen in the present case - has to take place in accordance with the rules applicable in the field of public procurement.

The Court of Justice of the European Union (hereafter “the Court of Justice”) has made it clear that the fact that a private party and a contracting authority co-operate within a public-private entity cannot serve as justification for the contracting authority not having to comply with the legal provisions on public contracts and concessions when assigning public contracts or concessions to the private partner or to the respective public-private entity¹⁰. This approach has also been followed by the Commission in its Communication on Concessions and Institutionalised Public Private Partnerships of February 2008¹¹.

The Court of Justice has further stated that the award of a public contract to a semi-public company without calling for tenders would interfere with the objective of free and undistorted competition and the principle of equal treatment of the persons concerned, in that such a procedure would offer a private undertaking with a capital presence in that undertaking an advantage over its competitors¹².

It follows further from the case law of the Court of Justice that the participation, even as a minority shareholder, of a private undertaking in the capital of a company in which the contracting entity in question is also a participant excludes in any event the possibility of an in-house relationship – to which, in principle, public procurement law does not apply – between that contracting entity and that company¹³.

⁸ See recital 24 and Article 16(a) of Directive 2004/18

⁹ Institutionalised Public-Private Partnership.

¹⁰ Case C-26/03, *Stadt Halle and Lochau*, [2005] ECR I-1, Case C-196/08, *Acoset*, [2009] ECR I-9913, paragraph 57, Case C-215/09 *Mehilainen*, not yet published, paragraph 34.

¹¹ Commission Interpretative Communication of 5 February 2008 on the application of Community law on Public Procurement and Concessions to Institutionalised Public Private partnerships (IPPP), C(2007) 6661, point 2.1.

¹² Case C-26/03, *Stadt Halle*, cited above, paragraph 51; Case C-29/04 *Commission v Austria*, [2005] ECR I-9705, paragraph 48, Case C-196/08, *Acoset*, [2009] I-9913, paragraph 56.

¹³ Case C-26/03, *Stadt Halle*, cited above, paragraph 49, Case C-410/04, *ANAV*, [2006] ECR I-3303, paragraphs 30-33, Case C-573/07 *SEA* [2009] ECR I-8127, paragraph 46.

As a result, irrespective of how the IPPP is set up, EEA law on public contracts and concessions requires a contracting entity to follow a fair and transparent procedure, either when selecting the private partner, who supplies goods, works or services through his participation in the IPPP, or when granting a public contract or a concession to the public-private entity¹⁴.

It appears that the framework agreement in fact reserved all the works related to the development of the town hall area to the selected private partner, *i.e.* Kongsvinger Park AS (owned 66% by KB Gruppen), thereby *de facto* excluding any competitive tendering for the projects covered by the framework agreement¹⁵. Therefore, all these projects must be considered jointly for the purpose of the valuation of the framework agreement, in accordance with Article 9(9) of Directive 2004/18. As a result, Kongsvinger Kommune should have selected the private partner in accordance with the procedural rules laid down in Directive 2004/18. It follows from Articles 28, 32(2) and 35(2) of Directive 2004/18 that contracting entities must apply the open, restricted or negotiated procedure with prior publication of a contract notice when awarding a framework agreement for public works with a total value exceeding the threshold referred to in Article 7 (EUR 5 278 000 (NOK 43 543 500)). It further follows from Article 35(2) and point 1 of Annex VIII that contracting authorities who wish to award a framework agreement for public works by open, restricted or negotiated procedure with prior publication of a contract notice shall make known their intention by means of a notice, which must be sent to the Office for Official Publications of the European Communities.

Although the total value of the framework agreement (estimated around NOK 1 billion) is clearly above the threshold, Kongsvinger Kommune did not publish a notice and instead invited a selected number of local companies to express their interest in a public-private cooperation for the development of the town-hall area. According to Article 31 of Directive 2004/18, contracting authorities may only award their public works contracts by negotiated procedure without prior publication of a contract notice in the very specific circumstances referred to in that article. In the view of the Authority, there are no indications in the information available to it that any of the specific circumstances referred to in Article 31 could be legitimately invoked in the present case.

It follows further from the case law of the Court of Justice that a breach of the EEA rules on public procurement remains in place as long as the contract awarded in breach thereof continues to produce effects and the state has not taken appropriate measures to rectify the breach¹⁶. Since the framework agreement covers various projects of which, according to the information provided by the Norwegian Government, the majority have not yet been initiated and since all projects covered by the framework agreement are financed by long term (rental) contracts, it is obvious for the Authority that the framework agreement is still producing effects.

Therefore, the Authority takes the view that Kongsvinger Kommune has not complied with the obligations laid down in Directive 2004/18 when it awarded the framework agreement to Kongsvinger Park AS.

¹⁴ Case C-196/08, *Acoset*, cited above, paragraphs 58-60; Commission Interpretative Communication on IPPPs, point 2.2.

¹⁵ This is for example reflected in the report from the Municipality Council (Kommunestyret) of 21.6 2007 and in point 2.1 of the framework agreement, which states that the partnership between Kongsvinger Kommune and KB Gruppen is established in view of operating the projects referred in to Chapter 1 of the agreement.

¹⁶ Joint Cases C-20/01 and C-28/01, *Commission v Germany*, [2003] ECR I-3609, paragraphs 34-36.

4.2 The award of individual project contracts to Kongsvinger Park AS

Furthermore, in addition to the above, the Authority has not been provided with any information allowing it to conclude that the individual projects covered by the framework agreement were, or were to be, awarded with respect to the tender obligations laid down in Directive 2004/18 or, in case their value would be below the threshold referred to in Article 7 of Directive 2004/18, with respect to the general principles of EEA law. The Authority has further not been provided with any information allowing it to conclude that the works covered by the individual projects would be of a value below the aforementioned threshold value. With regard to contracts below the threshold, the Authority observes that the award of such contracts is still subject to the fundamental rules of EEA law, and the principle of non-discrimination in particular,¹⁷ which implies a duty of transparency for the contracting authority which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of the procedure to be reviewed¹⁸.

The Authority's view that Kongsvinger Kommune did not have the intention to award works contracts forming part of the individual projects covered by the framework agreement in accordance with Directive 2004/18 or, in the alternative, with the general principle of non-discrimination, may be illustrated by the award of the NAV contract, concluded between Kongsvinger Kommune, NAV Hedmark and Kongsvinger Park AS on 30 November 2007 (and subsequently signed on 7 December 2007). The Authority observes that, according to the Norwegian Government, the reconstruction and rental of the NAV regional office is so far the only project under the framework agreement which has been executed.

The NAV contract was concluded after the framework agreement was entered into on 29 June 2007 establishing Kongsvinger Park AS, and further to point 3.2 of the framework agreement that covered the project for the development and rental of office infrastructure for the NAV Regional Office. It appears to the Authority that initially the award procedure for the NAV regional office contract took place independently of the award procedure for the framework agreement (see the timeline in section 2.2 above). However, as the negotiations in both procedures progressed, the NAV regional office contract was included in the scope of the framework agreement. As for all projects covered by the framework agreement, the construction works would be performed by Kongsvinger Park AS and a long-term rental contract would be concluded prior to the start of these works in order to finance the project. In effect, this meant that the works contract would be indirectly awarded to KB Gruppen, the private partner in Kongsvinger Park AS with the competencies to perform the works. Hence, despite the initial publication in the local newspaper and the competition between the various bids, the NAV contract was awarded directly to Kongsvinger Park AS and the related works part to KB Gruppen, as a result of the conclusion of the framework agreement.

¹⁷ Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 60, Case C-324/98 *Coname*, cited above, paragraph 16.

¹⁸ In its letter of 29 June 2010, the Norwegian Government informed the Authority that the cost of the works for the NAV offices amounted to NOK 13,5 million (EUR 1,68 million). However, it cannot be excluded that the remuneration exceeded the actual costs of the works. Furthermore, and in any event, it follows from established case-law that contracts below the threshold have to comply with the general principles of equal treatment and transparency.

The Authority recognises that contracts for the acquisition or rental of real estate are in principle excluded from the scope of the EEA public procurement rules. However, the Authority is of the view that the rent stipulated in the subsequent long-term rental contracts, which had to be concluded before the works could be executed, is designed to include a remuneration for the works. As it is not possible for the Authority to identify the part of the rent representing remuneration for the works, the Authority is unable to conclude whether the total value of the individual contracts is above or under the threshold referred to in Article 7 of Directive 2004/18¹⁹. However, as stated above, this issue is in the end not relevant since it is the framework agreement that should have been awarded in accordance with the EEA rules on public procurement, and that it is clear that the total value of the various projects covered by the framework agreement is above the threshold value referred to in Article 7.

Lastly, the Authority observes that the fact that the projects were not yet worked out in detail and the legal and financial set-up not yet determined at the time of the award of the framework agreement is, in the view of the Authority, irrelevant as such uncertainties are inherent to a framework agreement. Furthermore, the framework agreement was a legally binding contract between the parties for the execution of the works and the projects covered by it.

5 Conclusion

Accordingly, as the information available to it presently stands, the Authority concludes that the framework agreement of 29 June 2007 entered into by Kongsvinger Kommune and KB Gruppen, which awarded contracts for the development of the town hall area in Kongsvinger to Kongsvinger Park AS, was awarded in breach of the Articles 28, 32(2) and 35(2) and of point 1 of Annex VIII of the act referred to at point 2 of Annex XVI to the EEA Agreement (*Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts*).

In these circumstances, and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority invites the Norwegian Government to submit its observations on the content of this letter *within two months* following receipt thereof.

After the time limit has expired, the Authority will consider, in the light of any observations received from the Norwegian Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

For the EFTA Surveillance Authority


Sverrir Haukur Gunnlaugsson
College Member

¹⁹ In its letter of 29 June 2010, the Norwegian Government informed the Authority that the cost of the works for the NAV offices amounted to NOK 13,5 million (EUR 1,68 million). However, it cannot be excluded that the remuneration exceeded the actual costs of the works. Furthermore, and in any event, it follows from established case-law that contracts below the threshold have to comply with the general principles of equal treatment and transparency.