

*Translation of a Request for an Advisory Opinion from
Frostating lagmannsrett
Registered at the EFTA Court under N° E-16/16-1
31 October 2016
Original language: Norwegian*

FROSTATING COURT OF APPEAL (FROSTATING LAGMANNRETT)

EFTA Court
1 rue de Fort Thüngen

Doc 21

L-1499 Luxembourg
Luxembourg

Your reference

Our reference

Date

15-187242ASD-FROS

24 October 2016

REQUEST FOR AN ADVISORY OPINION

1 INTRODUCTION

Frostating Court of Appeal (*Frostating lagmannsrett*) has decided to request an advisory opinion from the EFTA Court in Case 15-187242ASD-FROS; cf. Section 51a of the Courts of Justice Act.

The case concerns an appeal from Fosen-Linjen AS. The company claims damages for the net profit it claims it would have achieved had the company been awarded and performed the contract on operation of the Brekstad – Valset ferry service for the years 2016 to 2026. Principally, the company thus claims damages for “the positive contract interest”¹.

Alternatively, Fosen-Linjen claims damages for “the negative contract interest”², largely consisting of the expenses that the company incurred by participating in the tender procedure.

Fosen-Linjen AS is of the opinion that the company AtB AS made several errors in connection with the implementation of the tender procedure and is claiming damages pursuant to Section 11 of the Public Procurement Act (PPA). The tender procedure was carried out as a negotiated procedure in accordance with the rules set out in Part II of the Public Procurement Regulation (PPR).

Frostating lagmannsrett has scheduled an appeal hearing of the case from 27 March until 3 April 2017.

¹ In Norwegian “positiv kontraktsinteresse”: the loss of (reasonably) expected profits (*lucrum cessans*).

² In Norwegian “negativ kontraktsintesse”: an actual realised loss (*damnum emergens*).

| | | | | |
|--|---|--|--|---|
| Postal address P.O. Box 2315 Sluppen, NO-7004 Trondheim | Switchboard (+47) 73 54 24 60 | Case officer Anne-Grethe Johansen | Bank giro account 6345.05.09304 | Organisation number |
| Office address Munkegt. 20 | Fax (+47) 73 54 24 84 | Phone (+47) 73 54 24 60 | Office hours 8:45–15:45 (15:00) | Website/Email http://frostating.no frostating.lagmannsrett@domstol.no |

The procurement concerns ferry service operations. This is a service provision that falls under the scope of Annex II B to Directive 2004/18/EC, which means that the procurement is regulated by Article 23 and Article 35(4), cf. Article 21, of the Directive, and by the procurement law principles of equal treatment, competition and transparency, which can be derived from the provisions on the four freedoms in the EEA Agreement and which are inherent elements of Directive 2004/18/EC. EEA provisions are also applicable.

Section 11 of the PPA reads:

‘In the case of a breach of this Act or regulations issued in pursuance of this Act, the plaintiff is entitled to damages to cover the loss suffered as a consequence of the breach.’

Under Norwegian law of damages, the positive contract interest has traditionally not been seen as protected during the pre-contractual phase. In Rt. (Supreme Court Reports) 2001 page 1062, the Supreme Court of Norway (*Norges Høyesterett*) concluded that a tenderer that is passed over is entitled to damages on three conditions: The contracting authority must have committed a material error, the tenderer must have suffered financial loss and there must be a high degree of probability that there is an adequate causal link between the error committed and the loss incurred.

In Rt. 2008 page 1705, the Supreme Court of Norway found that the threshold for liability under Norwegian law is no higher than the threshold for liability as regards liability in damages for breach of EEA law by an EEA State.

The dispute raises questions of EEA law.

First, it raises the question of whether and, if so, what requirements Directive 89/665/EEC (the ‘Remedies Directive’) imposes on the content of national terms and conditions for awarding damages in connection with public procurements. Second, it raises the question of what requirements can be derived from EU law concerning the formulation of award criteria, and how thoroughly the contracting authority should check the information provided in the tender where the contracting authority is of the opinion that further verification is necessary.

Part 2 below contains a presentation of the facts of the case. Part 3 contains a presentation of the parties’ pleas in law and the Court of Appeal’s questions. Part 4 contains a presentation of the grounds for the request. The questions are specified in part 5.

2 THE FACTS OF THE CASE

2.1 The parties to the case and the Norwegian ferry market

Sør-Trøndelag County Authority has overall responsibility for public transport in that county. It is not viable to operate public transport in the county on a normal commercial basis. A very significant subsidy must be granted by the county each year in order to provide the county’s inhabitants with satisfactory public transport services.

The public transport services in Sør-Trøndelag are administered through a separate company, AtB AS. The company has three main tasks.

AtB’s primary task is to plan public transport, that is to determine which transport services should be by bus and ferry/express boat. Ensuring overall coordination of the county’s public transport services is of course an important part of the route planning. AtB’s design of the

public transport services is based on county guidelines provided for through political decisions and county administrative requirements.

AtB's second main task is to promote public transport, including the sale of season tickets etc.

AtB's third main task is procuring transport services.

AtB does not operate the actual services. In other words, AtB does not own the buses and ferries used to operate the services and does not employ bus drivers, captains etc. AtB procures transport services from privately owned operator companies, and acts as their contracting authority. AtB receives very significant subsidies from the county each year in order to be able to finance the operation of the service network, including to make payments under the contracts with the privately owned operator companies. In 2014, the company received a subsidy of NOK 667 million, which represented a little more than 50 per cent of the company's total operating revenues in the income statement for 2014.

The market for ferry services in Norway is dominated by four or five major operator companies, including Norled AS. There are nonetheless some minor local vessel owners dispersed in the country that primarily serve their local areas. Fosen-Linjen is one such minor vessel owner. Fosen-Linjen was established in 1999 and has operated two minor ferry services for approximately 15 years. Measured in terms of the number of passenger vehicle units (PVU) per year, these two ferry services are small compared with the Brekstad – Valset ferry service.

2.2 About the disputed tender procedure

In June 2012, Sør-Trøndelag County Council decided to assign AtB the task of preparing tender specifications and carrying out a tender procedure for the procurement of ferry services. The tender specifications were to be in accordance with an overall requirements specification adopted by the County Council.

AtB's procurement of ferry services ('Rutetransport Ferge 2015') was announced on Doffin [national publication database for public procurements] on 5 June 2013. Tenders were invited for two lots, both for a contract period of ten years and with a unilateral option for AtB to extend the contract by up to two years.

The tender procedure was carried out using the negotiated procedure in accordance with the rules laid down in PPR Part II.

Of the two service lots that were announced, 'Lot 1' concerned the Brekstad – Valset service, which is the subject of the dispute before the Court of Appeal. According to the wording of the tender specifications, two ferries were requested for 'Lot 1'. The primary ferry, ferry 'A', was required to have the capacity to carry 50 passenger cars, while ferry 'B' was required to carry at least 35 passenger cars. In addition, the tenderers were required to have back-up ferries available to prevent prolonged operational interruptions in the event that both ferries were out of operation.

By 14 October 2013, the deadline for submitting tenders, tenders for Lot 1 had been received from three tenderers: Fosen-Linjen, Norled and Boreal Transport Nord.

After an extensive round of questions from the tenderers concerning the tender specifications,

answers from AtB and subsequent negotiations, revised tenders were submitted by Norled and Fosen-Linjen on 8 November and 21 November 2013, respectively. Once the tender proceedings were completed, the tenders received were evaluated by AtB. In connection with the evaluation, the award criterion 'Price' was to carry 50 per cent weight, while the criteria 'Environment' and 'Quality' were to carry 25 per cent weight each. This was in accordance with point 7 of the rules on procurement procedure in the tender specifications.

All award criteria were to be given a score on a scale from one to ten. The total score for each award criterion would then be weighted in accordance with the weight assigned to that criterion in the tender specifications; cf. point 7.2 of the rules on procurement procedure in the tender specifications.

The following elements were to be considered in the evaluation of 'Quality':

- Any elements of quality and/or functionality over and above the requirements and conditions specified in Part B Delivery Specification points 3.1 and 3.7.
- The tenderer's system for vessel maintenance.
- The functionality and layout of the tendered vessels. These factors were to be evaluated on the basis of General Arrangement (GA) drawings of the tendered vessels, which were to be enclosed with the tender.
- The tenderer's system for dealing with delays and for providing back-up ferries.
- The date on which the tendered vessel could be put into service on a permanent basis.

As a basis for the contracting authority's evaluation of the award criterion 'Quality', point 6.5 of the rules on procurement procedure required tenderers to submit the following as part of their tenders:

- Give a description of the tendered vessels. It was explicitly stated that any quality and/or functionality elements over and above the conditions set out in Part B Delivery Specification points 3.1 and 3.7 should be clearly described.
- Give a detailed description of the system for vessel maintenance
- Enclose General Arrangement (GA) drawings of the tendered vessels. In point 6.5, it was also explicitly stated that the GA drawings would be used to evaluate functionality and passenger comfort, including the location of lounges, access to lounges, placement of tables and chairs, staircases, location of toilets and access to these.
- A detailed description of the system for dealing with delays and for providing back-up ferries.

Concerning the award criterion 'Price', the tenders were to include a completed price form.

The evaluation of the award criterion 'Environment' was to be based on the tenderers' specification of fuel oil consumption for ferry 'A' and ferry 'B', respectively. The tenderers were not required to show how the fuel oil consumption was calculated or state on what assumptions the calculations were based.

Sør-Trøndelag District Court (*Sør-Trøndelag tingrett*) has relied on the following parameters being particularly important when calculating fuel oil consumption:

- Hull resistance. Hull resistance depends in particular on vessel displacement (the water mass/volume displaced by the vessel, which in turn has to do with factors like weight

and choice of materials), hull design and speed of service.

- Propulsive efficiency, that is the choice of propulsion/propeller system.
- Specific oil consumption, which depends on, for example, the engine type chosen and, if applicable, the possibility of running the engine at the most efficient levels; ref. the hybrid solution.
- Electrical and mechanical transmission loss
- The hotel load, that is the energy required for auxiliary systems like ventilation, cooling, heating, pumps, etc.
- Ship resistance during transit (that is weather and wind resistance during the crossing)

The District Court found that no information about any of these parameters was requested in the tender specifications.

As already mentioned, in the course of the tender procedure, AtB received several questions about the tender specifications. The questions were answered and made available to the tenderers before the expiry of the deadline for submitting tenders.

At the tender conference on 18 June 2013, one of the tenderers requested specification of a documentation requirement for the award criterion 'Environment'. This was recorded in the minutes of the tender conference as follows:

Requests reconsideration of the environmental criterion in relation to verifiability, for example documentation from engine manufacturers.

AtB chose to answer this question by introducing a new sanction that would apply during the contract period. It was decided that deviations of more than 10 per cent from the fuel oil consumption specified in the tender during performance of the contract would trigger a charge of NOK 1 per litre.

During week 39 in 2013, a tenderer once again raised the question of documentation requirements for the award criterion 'Environment'. The tenderer submitted the following question:

How should the tenderer confirm fuel consumption, so that the weighting between the tenderers becomes verifiable?

AtB answered by referring to the sanction introduced in answer to the corresponding question at the tender conference. However, no documentation requirement was introduced specifically relating to the award criterion 'Environment' and the stated fuel oil consumption.

After an overall evaluation of the award criteria in the tender procedure, AtB was of the opinion that Norled had submitted the most favourable tender.

By letter of 17 December 2014, AtB informed the interested parties that Norled would be awarded the contract. Norled had been awarded a score of 9.39 points, Fosen-Linjen 9.06 points, and the third interested party 5.73 points. Fosen-Linjen offered the best price. Fosen-Linjen and Norled's tenders were ranked equally for the award criterion 'Quality'. Norled was considered best on 'Environment'.

Fosen-Linjen complained about the evaluation. The complaint resulted in 9.16 points to Norled, 9.06 point to Fosen-Linjen and 5.52 to the third tenderer. The interested parties were

informed of this in a letter of 15 January 2014.

The expiry of the standstill period was initially set to 12:00 on 6 January 2014.

The contract for the second part of the tender procedure, that is ‘Lot 2’, was awarded to Fosen-Linjen and was signed on 18 February 2014.

2.3 The sequence of events from the time of the award decision until the case was brought before the Court of Appeal

On 3 January 2014, Fosen-Linjen brought the case before Sør-Trøndelag District Court. Fosen-Linjen petitioned the District Court to stop the signature of the contract between AtB and Norled through an interim measure. After an oral hearing, Sør-Trøndelag District Court issued an order (*kjennelse*) on 27 January 2014 which, *inter alia*, prohibited the signature of the contract and ordered Fosen-Linjen to bring an ordinary legal action in order to resolve the dispute. AtB appealed the decision to Frostating Court of Appeal, which reached the same conclusion in an order of 17 March 2014.

To provide the context, reference is also made to what AtB has previously argued concerning verification; cf. its pleading (*prosesskriv*) of 3 March 2014, where the company argued that there was nothing to indicate that further scrutiny of Norled’s tender was necessary. AtB has stated the following concerning its own evaluation:

‘In that connection, AtB emphasised the following factors in particular:

Calculated number of operating hours per year
Stated hull construction material
Tendered propulsion machinery
Experience and knowledge of the applicable propulsion machinery
Experience and knowledge of transport services, operation and utilisation of capacity in the relevant service
[...]

In connection with the evaluation of the stated fuel oil consumption, the construction material is of great importance.’

After further elaboration, the company argued that ‘AtB had thus, based on its own competence and experience, a good basis for ascertaining that Norled had stated a realistic fuel oil consumption’.

The Court of Appeal notes that these views are no longer maintained by AtB. The reason is stated to be that AtB learnt a lot about the calculation of fuel oil consumption while preparing for the damages case before the District Court.

In a letter of 30 April 2014, AtB informed that the tender procedure was cancelled.

In the letter, AtB stated that the company had decided not to appeal the Court of Appeal’s order, and that the views that formed the basis for the Court of Appeal’s order must therefore form the basis for the company’s further handling of the tender procedure since the Court of Appeal’s order did not leave the company any option other than to cancel the tender procedure.

Reference was made to the fact that the Court of Appeal had concluded that AtB had failed to establish a reasonable basis for evaluation because it was not clear from Norled’s tender what vessel was to serve as ferry ‘A’. Second, AtB referred to the Court of Appeal’s conclusion that

AtB had committed an error when it failed to verify the reasonableness of Norled's stated fuel oil consumption. AtB believed it lacked grounds for rejecting the tender from Norled because AtB, according to its own statement, had defaulted on its obligation to provide guidance to Norled.

On 29 September 2014, AtB signed a contract with Norled for the operation of the Brekstad – Valsset ferry service for 2015 and 2016.

Following a tender procedure in 2015, Boreal Transport Nord AS was awarded a contract for operation of the Brekstad – Valsset service for 2017 and 2018. According to AtB, the reason for using such temporary, short contracts was that it was desirable to invite tenders for the operation of the Brekstad – Valsset ferry service together with the other major ferry service in the county, namely Flakk – Rørvik. The invitation to tender was announced in the beginning of 2016 and concerned operation of the two ferry services from 2019 up until 2029. The invitation to tender provided for the possibility of submitting tenders for one or both these ferry services. Fosen-Linjen did not submit a tender in this tender procedure. AtB intends to sign a contract in the course of summer 2016.

On 27 February 2014, between the orders of the District Court and the Court of Appeal in the interim measure case, Fosen-Linjen had filed a written application (*stevning*) concerning the principal claim in the interim measure case. At the same time, the company claimed damages for the loss it would suffer as a result of the delay in the tender procedure. AtB did not file a timely reply (*tilsvare*), and the District Court therefore pronounced judgment in default on 31 March 2014. The awarding of the contract to Norled was set aside and Fosen-Linjen was awarded NOK 5 million in damages.

After an appeal, the judgment in default was annulled by Frostating Court of Appeal's order of 20 November 2014. By that order, AtB was granted reinstatement (*oppfriskning*) for not having filed a timely reply. The case was then sent back to Sør-Trøndelag District Court. Fosen-Linjen's claim for damages for the positive contract interest was included in the case through a pleading from Fosen-Linjen of 4 March 2015.

The main hearing before the District Court was held in the period 26 August to 2 September 2015. As AtB had cancelled the tender procedure on 30 April 2014 and Fosen-Linjen had not contested this decision through a petition for an interim measure, the case was now limited to the claim for damages.

Fosen-Linjen argued that AtB should have rejected Norled's tender because it was unclear and because it did not meet a minimum requirement set out in the tender specifications. AtB contested the view that Norled's tender did not meet the minimum requirements set out in the tender specifications. Apparently, AtB did not contest that Norled's tender was unclear and that this lack of clarity might have had an impact on the outcome of the tender procedure. AtB argued that the competition should in any case have been cancelled because AtB had defaulted on its obligation to provide guidance to Norled during the tender procedure.

During the preparation of the case, AtB also argued that the award criterion 'Environment' was unlawful and that the tender procedure should in any case have been cancelled on that basis. Fosen-Linjen argued that AtB had no reasonable grounds for cancelling the tender procedure and that the evaluation of the award criterion 'Quality' was incorrect. Fosen-Linjen argued that it would have been awarded the contract had AtB not been in breach of the procurement rules. AtB contested these pleas in law.

Before the District Court, AtB argued that the cancellation of the tender procedure was legitimate and that Fosen-Linjen could not therefore claim damages for the positive contract interest. AtB argued that the cancellation of the tender procedure was legitimate, first because the award criterion 'Environment' was unlawfully formulated because it was not accompanied by any requirements for documentation. AtB was of the opinion that the tender procedure could not be lawfully completed with an unlawful award criterion.

Furthermore, AtB argued that the tender specifications did not request, and the tenders did not include, information that made it possible to carry out a reliable verification of the stated fuel oil consumption, and that this also precluded a lawful evaluation. Third, AtB argued that, if the views of the Court of Appeal in the order of 17 March 2014 were used as a basis, then AtB had defaulted on its obligation to provide guidance to Norled. AtB argued that this, too, meant that AtB was obliged to cancel the tender procedure.

Sør-Trøndelag District Court gave judgment in the case on 2 October 2015. The judgment found in favour of AtB and rejected both the claim for damages for the negative contract interest and the claim for damages for the positive contract interest.

The District Court held that there is a requirement under EEA law that award criteria should be linked to a requirement for documentation and that the contracting authority had not done so in the case under consideration. It was pointed out that, in the tender specifications, AtB had not requested information about any of the parameters that were important for the calculation of fuel oil consumption, and that none of the tenderers had understood the tender specifications to mean that they were required to document fuel oil consumption at the time of submitting the tender. That was why the tenders did not include any such documentation. In an *obiter dictum*, the District Court also concluded that the tenders did not contain information that made it possible to effectively verify the fuel consumption stated by the tenderers in the tenders.

Fosen-Linjen appealed the District Court's judgment to Frostating Court of Appeal on 30 October 2015.

3 THE LEGAL ISSUES IN THE CASE

3.1 Introduction

On 30 October 2015, Fosen-Linjen filed a notice of appeal against the District Court's judgment with Frostating Court of Appeal (Case No 15-187242ASD/FROS), and sought the following form of order (*påstand*):

1. *AtB AS pays damages to Fosen-Linjen AS stipulated at the court's discretion and limited upwards to NOK 81,720,334 with the addition of statutory interest on overdue payment of NOK 5,000,000 from 27 March 2014 and also from 4 April 2015 until payment is made.*
2. *Fosen-Linjen AS is awarded the costs of the case before the District Court and the Court of Appeal.*

The grounds for point 1 in the order sought are that Fosen-Linjen had the best tender, and that the outcome of a correct implementation of the tender procedure would have been that Fosen-Linjen had been awarded the contract.

First, Fosen-Linjen argues that a correct implementation of the tender procedure should have led to rejection of Norled's tender, in which case Fosen-Linjen would have been awarded the contract. This was primarily because Norled's tender did not meet the minimum requirement in the tender specifications that the ferries should be suitable for the two ferry landings. Fosen-Linjen argues that this was in breach of Section 11-11(1)(e) of the PPR and of the principles of transparency and equal treatment under EEA law.

Norled's tender should in any case have been rejected because it was unclear.

Norled offered two different 'A' ferries, while only stating one fuel oil consumption. Fosen-Linjen argues that the failure to reject Norled's tender was in breach of PPR Sections 11-11(1)(f), 11-11(2)(b) (extending the scope) and the principles of transparency and equal treatment under EEA law.

Second, it is argued that Fosen-Linjen's tender should in any case have been evaluated as being better than Norled's tender. Here, the error is not the failure to reject, but an error of evaluation under the award criterion 'Quality'. Fosen-Linjen argues that this was in breach of Section 5 of the PPA, Section 13-2 of the PPR, and the principles of transparency and equal treatment under EEA law.

The appellant also argues that it was wrong of AtB to cancel the tender procedure because AtB did not have reasonable grounds for such cancellation. This is argued to be in breach of Section 13-1(1) of the PPR and the principles of transparency and equal treatment under EEA law.

AtB has submitted a prayer for relief for the appeal to be rejected.

AtB argues that it was correct to cancel the tender procedure. **First, AtB argues** that the company was obliged to cancel the tender procedure because the award criterion 'Environment' was unlawful. AtB refers to the fact that there was no requirement for documentation linked to the award criterion 'Environment', and that this is required by the general principles of equal treatment, predictability, transparency and verifiability laid down in Section 5 of the PPA and Section 3-1 of the PPR.

Second, AtB argues that the company was obliged to cancel the tender procedure because the information received in the tenders did not enable any reliable verification of the fuel oil consumption stated in the tenders. Hence it was not possible to carry out an evaluation in accordance with the fundamental requirements in Section 5 of the PPA.

Third, AtB argues that, if the views in the Court of Appeal's order of 17 March 2014 are used as a basis, then the company had failed to fulfil its obligation to provide guidance to Norled; cf. Section 11-8 of the PPR. In such a situation, AtB was also obliged to cancel the tender procedure.

If it is concluded that AtB was not obliged (or entitled) to cancel the tender procedure, **the company argues further** that it was not obliged (or entitled) to reject Norled's tender.

AtB also argues that it has not committed any error of evaluation that would imply that the tender from Fosen-Linjen would be more favourable than the tender from Norled. AtB finds *inter alia* that the court proceedings have shown that, in its performance of the contract, Fosen-Linjen would have more than doubled the fuel consumption stated in its tender, and that it is therefore beyond any doubt that Fosen-Linjen's tender was materially less favourable than

Norled's tender.

AtB also believes that Fosen-Linjen would have run at a loss had the company been awarded the contract, meaning that AtB believes that Fosen-Linjen would not have been able to operate the Brekstad – Valsset ferry service at a profit on the basis of the company's tender. AtB questions whether Fosen-Linjen would have been able at all to finance the purchase of those vessels the company offered in the contract, thereby questioning whether Fosen-Linjen would have been able to start operating the ferry service at all.

Based on the parties' pleas in law, the Court of Appeal has identified some questions concerning interpretation of EEA law.

Concerning the question of whether AtB was obliged (or entitled) to cancel the tender procedure, the parties **first disagree on** what requirements apply to the formulation of award criteria. This question seems to be largely linked to what is the correct interpretation of C-448/01 *Wienstrom*, and the requirements derived from the principle of equal treatment in that judgment.

Fosen-Linjen argues that an award criterion will not be unlawful under EEA law even if it is not accompanied by any specific requirements for documentation over and above the information that is to form the direct basis for the evaluation, insofar as the contracting authority is otherwise able to sufficiently verify the information provided in the tender, either based on other parts of the tender documentation (for example drawings and specifications) or in some other way.

AtB argues that it follows from the *Wienstrom*-judgment that an award criterion must be accompanied by a requirement for documentation that makes it possible to effectively verify the accuracy of the information provided in the tender. Among other things, this means that the tenders must include sufficient documentation to enable effective verification of the accuracy of the information to be given weight in the evaluation of the award criterion in question.

Second, the parties appear to disagree about what requirements the principle of equal treatment under EEA law places on the contracting authority with respect to verification of the information provided in the tenders linked to the award criteria where verification is necessary.

Fosen-Linjen believes that it is sufficient to reliably verify the level and not necessary to make a detailed assessment.

AtB believes that the contracting authority must effectively verify the accuracy of the information provided. AtB believes that this is not possible where the tender does not contain information about any of the parameters that are decisive for the fuel oil consumption stated in the tender.

If it is concluded that AtB has committed one or more errors, **the parties disagree whether** and, if so, to what extent the Remedies Directive imposes requirements on the content of the conditions under national law for awarding damages.

First, this concerns what should be the content of the basis for liability in damages. In the appealed decision, the District Court relied on the following concerning the basis for liability, making reference to *inter alia* Rt. 2001 page 1062 and Rt. 2008 page 1705: 'For the decision in this case, it is nonetheless sufficient to apply the high threshold for liability in damages established by the Supreme Court, whereby it is required that a material error has been

committed. This issue for consideration is often phrased so that the error must be obvious and gross’.

Fosen-Linjen argues that any breach of a procurement law provision on the part of the contracting authority establishes a basis for liability for the positive contract interest, provided that the conditions of adequate causal link and loss are met. Fosen-Linjen is of the opinion that a requirement for material error, which encompasses subjective elements of culpability on the part of the contracting authority, is in contravention of the Remedies Directive.

Second, it concerns the content of the requirement for a causal link. Fosen-Linjen argues that it is the factual causal link that must be decisive under EEA law, and that a more stringent requirement in the form of clear preponderance of evidence cannot be applied.

AtB is of the opinion that damages for the positive contract interest are out of the question where the contracting authority was obliged to cancel the tender procedure. AtB is also of the opinion that Fosen-Linjen cannot be entitled to damages for the positive contract interest for a contract that could not lawfully have been awarded to Fosen-Linjen. AtB believes that this applies in general, and that it must in any case apply where a tender procedure has actually been cancelled. Nor can AtB see that the requirement for a causal link established by the Supreme Court of Norway as a condition for awarding damages for the positive contract interest is in contravention of EEA law.

As the case raises questions of EEA law, Frostating Court of Appeal submits a request for the EFTA Court’s opinion on certain specific questions of interpretation. In the following, Fosen-Linjen’s pleas in relation to EEA law are presented in point 3.2, while the respondent AtB’s pleas in relation to EEA law are presented in point 3.3. The grounds for the request are presented in part 4, and the Court’s questions for the EFTA Court are set out in part 5.

3.2 Presentation of the appellant’s pleas in relation to EEA law

3.2.1 Basis for liability

The Remedies Directive has been incorporated into Annex XVI of the EEA Agreement and is thereby applicable as Norwegian law.

Article 1(1) of the Remedies Directive provides for the following:

‘Member States shall take the measures necessary to ensure that [...] decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles [...], on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.’

Article 2(1)(c) of the Remedies Directive provides for the following:

‘Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to [...]

c) award damages to persons harmed by an infringement.’

Fosen-Linjen takes the view that the Remedies Directive is applicable to contracts for services listed in Annex II B to Directive 2004/18/EC. This means that, also for contracts listed in Annex II B, the Remedies Directive regulates national enforcement of infringements of ‘Community law in the field of public procurement’, including the principles of transparency and equal treatment; cf. Article 1(1) of the Remedies Directive. In that connection, the appellant

refers to *inter alia* ‘Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives’, point 2.3.2 and the references therein.

Fosen-Linjen argues that applying a requirement for material error, where the consideration of whether the error gives rise to liability in damages includes consideration of subjective elements of culpability on the part of the contracting authority, is an infringement of the Remedies Directive’s requirement for rapid and effective sanctions. The appellant has made reference to *inter alia* the ECJ’s decisions in *Commission v Portugal* (Case C-275/03) and *Strabag* (Case C-314/09), in which it is stated that the application of a requirement for culpability – that the error must be by negligence or intent for damages to be awarded – is in contradiction with the Remedies Directive.

In the opinion of the appellant Fosen-Linjen, the above-mentioned decisions by the ECJ show that it is a requirement in the Remedies Directive that any breach of the procurement rules should be sufficient to recognise the existence of a basis for liability. According to the appellant, the decisions in any case show that a rule in national law that links a claim for damages to subjective elements, including culpability, on the part of the contracting authority constitutes a breach of the Remedies Directive, and that it is therefore in contradiction with the Remedies Directive to make the awarding of damages conditional on the contracting authority having committed a material or sufficiently qualified error, where the assessment includes considering the question of the contracting authority’s culpability in connection with a marked deviation from a justifiable course of action.

3.2.2 Causal link and standard of proof

Fosen-Linjen argues that it constitutes a breach of the Remedies Directive’s requirement for rapid and effective sanctions to apply a requirement for a causal link that entails that the contracting authority can free itself from liability because the tender procedure should in any case have been cancelled on account of an error that the contracting authority has not invoked during the tender procedure. In the appellant’s opinion, the establishment of such a requirement for a causal link would constitute a breach of the Remedies Directive, because it is the factual causal link that must be decisive under the directive. In the appellant’s view, the decisive factor is therefore whether the appellant would actually have been awarded the contract if it is envisaged that the error that gave rise to the liability had not been committed. The appellant has referred to *inter alia* the ECJ’s decision in *GAT* (Case C-315/01).

The appellant further believes that it is in contradiction with the Remedies Directive to apply a more stringent standard of proof for clear (qualified) preponderance of evidence of a causal link in cases concerning public procurement liability, as opposed to the requirement for general preponderance of evidence that is applicable in other cases concerning damages liability. The appellant has referred to *inter alia* Advocate General Villalon’s opinion in *Combinatie* (Case C-568/08), which shows that the burden of proof under the Remedies Directive cannot be so strict as to make it difficult to ascertain the loss sustained, and argues that a general requirement for clear preponderance of evidence constitutes a breach of the Directive. Even if a national rule on more stringent standard of proof would in principal be considered lawful under the Remedies Directive, the appellant argues that, in a case like the one under consideration, where the contracting authority has invoked an alleged error that was not invoked during the tender procedure as grounds for not being liable in damages – it must in any case be the contracting authority that carries the burden of proof and that must prove that such an error and its own cancellation obligation exist.

3.2.3 Award criteria and documentation requirements

The question of whether a cancellation obligation exists is linked to what requirements the principle of equal treatment under EEA law establishes as regards the contracting authority's verification of the information provided in the tenders linked to the award criteria. Fosen-Linjen believes that it is sufficient to reliably verify the level and not necessary to make a detailed assessment. The appellant holds that such verification will be sufficient to meet the requirements for effective verification that follow from the ECJ's decision in *Wienstrom* (Case C-448/01). Reference is also made to the fact that AtB, in connection with the interim measure case, stated both that it was able to carry out verification on the basis of the tenders and that it had in fact done so.

Concerning the lawfulness of the award criteria, the appellant argues that an award criterion would not constitute a breach of the principle of equal treatment under EEA law even if it was not accompanied by more specific documentation requirements linked to each award criterion over and above the requirement for providing information for direct use in the evaluation.

Fosen-Linjen is of the opinion that the decisive factor must be whether the contracting authority can reliably verify the correctness of the information provided in the tender. In the appellant's view, an award criterion will not constitute a breach of the principle of equal treatment simply because there has not been established specific documentation requirements for each award criterion, as long as it in some other way is possible for the contracting authority effectively, that is reliably, to verify the information provided under the award criterion, either by means of information provided in other parts of the tender documents (for example drawings or specifications) or otherwise.

The appellant holds that such verification will be sufficient to meet the requirements for effective verification that follow from the ECJ's decision in *Wienstrom* (Case C-448/01). Here, too, reference is made to the fact that AtB, in connection with the interim measure case, stated both that it was able to carry out verification on the basis of the tenders and that it had in fact done so.

3.3 Presentation of the respondent's arguments under EEA law

3.3.1 Basis for liability

AtB points out that, procedurally, a claim for damages for the positive contract interest and a claim for damages for the negative contract interest constitute two different claims under Norwegian law. It also follows from Norwegian case law that the content of the conditions for awarding damages are different for the two claims. The conditions for awarding damages are phrased so that the threshold for being awarded damages for the positive contract interest is higher than the threshold for being awarded damages for the negative contract interest, which means that in a specific case, the conditions for being awarded damages for the negative contract interest may be met without the conditions for being awarded damages for the positive contract interest being met.

First, AtB raises the question of whether the Remedies Directive sets requirements for the formulation of conditions in national law for awarding damages for infringement of provisions in the EEA Agreement.

Pursuant to Article 21 of Directive 2004/18/EC, only two articles of the Directive are applicable to services listed in Annex II B to the Directive. These are Article 23 and Article

35(4). These articles are of no relevance in the present case.

However, the ECJ has found that the provision of services listed in Annex II B to the Directive remain subject to the fundamental EU law principles of freedom of establishment and free exchange of services; cf. *inter alia* C-226/09 paragraph 29. Furthermore, the ECJ has deduced from Articles 49 and 56 TFEU that there is a fundamental requirement for ensuring transparency and equal treatment insofar as the contract is clearly of cross-border interest; cf. paragraph 31 of the judgment.

AtB cannot see, however, that the Remedies Directive aims at regulating the enforcement of breaches of the provisions of the EU Treaty. The judgments in which requirements for transparency and equal treatment are derived from Articles 49 and 56 TFEU were pronounced long after the adoption of the Remedies Directive. The ECJ also appears to have found that the Remedies Directive does not regulate breaches of the provisions of the EU Treaty; cf. C-145/08 and C-149/08 *Club Hotel Loutraki* paragraph 63.

Second, AtB raises the question of whether the Remedies Directive requires the courts to be competent to award damages for the positive contract interest to a passed-over tenderer. This is not discussed or concluded on in any judgment by the ECJ. The General Court has concluded that EU bodies cannot be ordered to pay damages for the positive contract interest in the case of breach of the procurement rules by which the EU bodies are bound. It is difficult to see why the solution should be different for contracting authorities in the individual Member States.

Third, AtB takes the view that Article 2(1)(c) of the Remedies Directive does not lay down specific requirements for the content of conditions for awarding damages under national law. The provision is a specification of the principle that the State is liable for losses suffered by its citizens as a result of EU law being set aside where this must be ascribed to the State. This principle has been established in the EU legal order through the development of case law after the adoption of the Remedies Directive, and the ECJ has stipulated three conditions for liability in damages to exist. One condition is that the setting aside of the EU provision must be sufficiently qualified.

This interpretation of Article 2(1)(c) of the Remedies Directive was relied on in C-568/08 *Combinatie Spikjer*; cf. paragraphs 86 and 87.

Concerning the award of damages for the negative contract interest, Norwegian law relies on the basis for liability being *culpa in contrahendo*. The threshold for such *culpa in contrahendo* liability is lower than the threshold established by the ECJ for breach of EU law. Hence, neither here is there any issue involved in relation to EEA law. AtB invokes the same arguments as for being awarded damages for the positive contract interest.

3.3.2 Causal link and standard of proof

Concerning the requirement for a causal link, AtB's view of the scope of application and the interpretation of the Remedies Directive is the same as for the basis for liability. AtB therefore holds that the requirement for clear preponderance of evidence established by the Supreme Court of Norway is in accordance with EU law. AtB also points out that the requirement for a causal link established by the Supreme Court is in accordance with the requirement for a causal link established by the ECJ; cf. *inter alia* Cases T-160/03, T-271/04 and T-461/08.

Furthermore, AtB takes the view that the requirement for a causal link entails that a tenderer cannot be awarded damages for the positive contract interest for a contract that could not lawfully have been awarded to that tenderer. AtB is therefore of the opinion that a tenderer cannot be

awarded damages in a tender procedure where errors have been committed whereby the tender procedure could not lawfully have led to the award of a contract, for example because the tenderer [*sic*] has committed an error that cannot be remedied except by cancellation of the tender procedure.

AtB cannot see that it is of significance whether the error is mentioned in the reasoning for cancelling the tender procedure as stated in the notice to the tenderers. Where a contracting authority has committed an error whereby he is obliged to cancel the tender procedure, the contracting authority is obliged to do so even if the grounds for such cancellation are not adequately stated. This point of view can also be seen as a question of what interests are protected under the law of damages. AtB cannot see that this question is regulated by EEA law.

3.3.3 Award criteria and documentation requirements

AtB holds that it follows from C-448/01 *Wienstrom* that an award criterion must be accompanied by a documentation requirement that enables effective verification of the accuracy of the information provided by the tenderer in the tender concerning that specific award criterion; cf. in particular paragraph 52. The ECJ's view has now been codified in Article 67(4) of Directive 2014/24/EU. AtB's view is that this entails that, in the present case, the company should have linked a requirement for documentation of hull resistance, propulsive efficiency, specific oil consumption, and hotel load to the award criterion 'Environment'. When such a documentation requirement is not linked to the award criterion 'Environment', the contracting authority has no possibility of effectively verifying the accuracy of the fuel oil consumption stated in the tenders.

AtB also holds that the requirement for equal treatment entails that the contracting authority must be able effectively to verify the accuracy of the information provided in the tender where the contracting authority finds that such verification is necessary; cf. C-448/01 *Wienstrom* paragraph 52. The verification must be based on what the tenderers in the tenders have committed themselves to deliver when it comes to hull resistance, propulsive efficiency, specific oil consumption, and hotel load. If the tenders contain no information about these parameters, it is not possible effectively to verify the accuracy of the stated fuel oil consumption.

4 THE GROUNDS FOR THE COURT OF APPEAL'S DECISION TO REQUEST AN OPINION

The case appears to raise questions of EEA law on which the EFTA Court has not established relevant case law. This generally applies for both the question of what requirements, if any, the Remedies Directive imposes on the conditions for awarding damages under national law procurement rules, and the question of what requirements apply to documentation and effective verification of information linked to an award criterion in order for it to be lawful under the EEA principle of equal treatment.

Concerning the basis for liability, it may appear difficult to reconcile the ECJ's decisions in *Commission v Portugal* (Case C-275/03) and *Strabag* (Case C-314/09) with the decision in *Combinatie* (Case C-568/08).

If further appears unclear what conditions, if any, the Remedies Directive imposes on the requirement for a causal link in national law. This issue can be formulated in two ways: One alternative is to phrase it as a question about standard of proof and whether the contracting authority can free itself of liability in damages by referring to the fact that the tender procedure

should in any case have been cancelled on account of an error on the part of the contracting authority, which the contracting authority did not invoke during the tender procedure. Another alternative is to phrase it as a question about standard of proof and whether a tenderer can claim damages for the positive contract interest for a contract that could not lawfully have been awarded to that tenderer.

Concerning the questions about the Remedies Directive's requirements for national conditions for awarding damages, there is thus no *acte éclairé* (no directly relevant and clarifying decision) from the EFTA Court or the ECJ, and the questions of interpretation that arise in the case are on several points characterised by a lack of clarity and a complexity that should therefore be resolved by the EFTA Court.

Concerning requirements for documentation and effective verification of information provided in the tenders, the parties disagree on the implications of the ECJ's decision in *Wienstrom* (Case C-448/01). These questions are central to the case, and the Court of Appeal therefore finds it appropriate to request an opinion also on these questions.

The Court of Appeal has asked the parties to present agreed proposals for the wording of the questions. The parties have not succeeded in doing so. The parties have expressed rather great differences of opinions on how the questions should be worded.

To illustrate the disagreement, the Court of Appeal encloses the questions proposed by the respondent in a pleading of 17 June 2016 to the Court of Appeal from AtB AS.

Annex 1: AtB's proposed questions, included in a pleading of 17 June 2016 from AtB AS.

5 THE COURT OF APPEAL'S QUESTIONS

1. Do Article 1(1) and Article 2(1)(c) of Directive 89/665/EEC, or other provisions of that Directive, preclude national rules on awarding damages, where the award of damages due to the contracting authority having set aside EEA law provisions concerning public contracts, is conditional on
 - a) the existence of culpability and a requirement that the contracting authority's conduct must deviate markedly from a justifiable course of action?
 - b) the existence of a material error where culpability on the part of the contracting authority is part of a more comprehensive overall assessment?
 - c) the contracting authority having committed a material, gross and obvious error?
2. Should Article 1(1) and Article 2(1)(c) of Directive 89/665/EEC, or other provisions of that Directive, be interpreted to mean that a breach of an EEA procurement law provision under which the contracting authority is not free to exercise discretion, constitutes in itself a sufficiently qualified breach that may trigger a right to damages on certain conditions?
3. Do Article 1(1) and Article 2(1)(c) of Directive 89/665/EEC, or other provisions of that Directive, preclude national rules on awarding damages, where the award of damages due to the contracting authority having set aside EEA law provisions concerning public contracts is conditional on the supplier that brings the case and claims compensation proving with a clear, that is qualified preponderance of evidence, that [said supplier] should have been awarded the contract had the contracting authority not committed the error?

4. Do Article 1(1) and Article 2(1)(c) of Directive 89/665/EEC, or other provisions of that Directive, preclude national rules whereby the contracting authority can free itself of the claim for damages by invoking that the tender procedure should in any case have been cancelled as a consequence of an error committed by the contracting authority, other than the error invoked by the plaintiff, when that error was not in fact invoked during the tender procedure? If such other error can be invoked by the contracting authority, does Directive 89/665/EEC preclude a national rule whereby the supplier that brings the action has the burden of proof for the non-existence of such an error?
5. What requirements does the EEA law principle of equal treatment place on the contracting authority's effective verification of the information provided in the tenders linked to the award criteria? Will the requirement for effective verification be met if the contracting authority is able to verify that the properties offered in the tender appear to have been reliably determined on the basis of the documentation provided in the tender? How accurately must the contracting authority be able to verify the properties of the contract object offered in the tender? If the tenderer commits himself to a certain consumption figure for the tendered object, and this figure is incorporated in the tender evaluation, is the contracting authority's verification obligation met if he is able to verify that this figure is reliable with a certain uncertainty margin, for example in the order of plus/minus 20 per cent?
6. When the contracting authority is to verify the information provided by a tenderer in connection with an award criterion, can the requirement for effective verification of the tenders under the principle of equal treatment be met by the contracting authority having regard to documentation provided elsewhere in the tender?

Frostating Court of Appeal

(Signature)

Ivar Sølberg

Court of Appeal Judge