



ROYAL NORWEGIAN MINISTRY OF
CLIMATE AND ENVIRONMENT

EFTA Surveillance Authority
Rue Belliard 35
1040 Brussels
Belgium

Your ref
Case No. 78085

Our ref
15/2910

Date
27.09.2016

The legal basis under Norwegian law for the award of the exclusive rights in the area of commercial/hazardous waste management

Dear Madam/Sir,

Reference is made to the EFTA Surveillance Authority's request for information 15 December 2015, the Norwegian Governments reply 1 April 2016 and the letter with additional information 20 May 2016.

As stated in our letter 1 April 2016, the Norwegian government would like to provide some additional comments regarding the legal basis for the award of exclusive rights under Norwegian law in the area of municipal commercial waste and hazardous waste management.

The basis for the award of exclusive rights - commercial/hazardous waste

The municipalities are the producers of municipal commercial waste, including hazardous municipal waste. As the complainant points out, handling of waste originating from all other sources than households (commercial waste), is the obligation of the respective waste producer. Furthermore, municipalities assume responsibility for hazardous waste that has been collected by or delivered to the municipality. A municipality will in practice be in possession of hazardous waste both due to the obligation to receive such waste pursuant to Section 11-10 of the Waste Regulation and due to the obligation by Section 30 of the Pollution Control Act to collect household waste. It is hence within the discretion of the municipalities to decide whether they handle the waste they have themselves or award an

exclusive right in this regard to fulfil their responsibility, following the conditions set forth in Article 18 of Directive 2004/18/EC, cf. Regulation 7 April 2006 no. 402 on Public Procurement Article 1-3 paragraph 2 letter h.

The legal basis for awarding exclusive rights in the area of waste management – understood as inter alia the collection, transport, recovery and disposal of waste, pursuant to article 3(9) of Directive 2008/98/EC on waste – is the Regulation on Public Procurement of 7th April 2006 no. 402. The regulation transforms Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts into Norwegian law. According to Section 1-3 paragraph 2 letter h, which largely corresponds to Article 18 of Directive 2004/18/EC, the Regulation does not apply to public service contracts

- awarded to a contracting authority or to an association of contracting authorities as defined in Section 1-2
- on the basis of an exclusive right which the authority enjoys pursuant to a publicly notified law, regulation or an administrative provision
- which is compatible with the EEA-agreement.

Accordingly, the framework and scope of discretion within which municipalities choose to award exclusive rights is conditioned upon the cumulative conditions provided by EU secondary legislation.

To be in compliance with EEA law, the award of exclusive rights has to be legitimate according to certain criteria as established by practice. The purpose must be the fulfilment of a legitimate public purpose and awarding an exclusive right must be suited for this purpose. It must also be proportionate; it must not be possible to achieve the same objective by less restrictive means. This has to be assessed on a case-by-case basis. Norway holds the opinion that awarding exclusive rights concerning the collection and treatment of municipal commercial waste and hazardous waste can in general pursue legitimate public interests and is as such capable of justification.

It could also be mentioned that the Norwegian Complaints Board for Public Procurement has assessed the awarding of exclusive rights for the collection and treatment of municipal commercial waste and considered it compatible with the EEA Agreement, cf. Decision by KOFA in cases 2012/157-165, 2012/169 and 2012/181.

Yours sincerely,

Ida Juell
Deputy Director General

Ann Ida Østensen
Adviser

This document is electronically approved and sent without signature