

Brussels, 9 February 2016
Case No: 77745
Document No: 781834
Decision No: 032/16/COL

Mission of Norway to the EU
Rue Archimède 17
B-1000 Brussels

Dear Sir or Madam,

Subject: Letter of formal notice to Norway for breach of EEA rules on public procurement in connection with the construction of an underground parking at Torvet i Kristiansand and the award of a concession for its operation

1 Introduction

By a letter dated 19 August 2015 (Doc. 769820), the EFTA Surveillance Authority (“the Authority”) informed the Norwegian Government that it had received a complaint against Norway concerning the award of a public contract by the Municipality of Kristiansand, having as its subject matter the construction and the operation of an underground parking. In the complainant's opinion, the circumstances related to this contract award amount to a breach of EEA rules on public procurement.

After having examined the complaint, the Authority considers that this contract award amounts to a breach of Articles 56, 58 (1) and 59 of *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*,¹ as adapted to the EEA Agreement by Protocol 1 thereto.

2 Correspondence

On 13 August 2015, the Authority received a complaint (Doc. No. 769808) against Norway indicating a breach of EEA rules on public procurement in the framework of an award procedure launched by the Municipality of Kristiansand for the construction and the operation of an underground parking at Torvet i Kristiansand.

By letter of 3 September 2015 (Doc. No. 771804), the Internal Market Affairs Directorate (“the Directorate”) sent a request for information to Norway in order to investigate the circumstances of the award procedure in question.

¹ Act referred to at point 2 of Annex XVI to the EEA Agreement. The Directive was incorporated into the EEA Agreement by Joint Committee Decision No 68/2006 (OJ L 245, 7.9.2006, p. 22 and EEA Supplement N° 44, 7.9.2006, p. 18), which entered into force on 18.4.2007.

The matter was discussed at the package meeting which took place in Oslo on 12-13 November 2015 (Doc. No. 781498).

3 Relevant EEA law

It follows from Article 65(1) of the EEA Agreement that Annex XVI to the Agreement contains specific provisions and arrangements concerning procurement which, unless otherwise specified, are to apply to all products and to certain specified services.

3.1 Directive 2004/18/EC

Directive 2004/18/EC *on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts* (“the Directive” or “the Public Procurement Directive”)² was incorporated into Annex XVI of the EEA Agreement by Joint Committee Decision No 68/2006. It entered into force on 18 April 2007 for Norway and the other EFTA States, which was also the deadline for the transposition of the Directive by those States.

Article 1(14) of the Directive provides that the “Common Procurement Vocabulary (CPV)” shall designate the reference nomenclature applicable to public contracts as adopted by Regulation (EC) No 2195/2002, while ensuring equivalence with the other existing nomenclatures.

Article 2(b) of the Directive defines “public works contracts” as public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A “work” means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

Article 2(3) of the Directive defines a “public works concession” as a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment.

Article 2(4) of the Directive provides that a “service concession” is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.

Article 56 of the Directive provides that Chapter I, entitled “rules governing public works concessions”, shall apply to all public works concession contracts concluded by the contracting authorities where the value of the contracts is equal to or greater than the threshold set out in this provision, i.e. 39.266.836 NOK (5.186.000 EUR) at the relevant time³.

² 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. Act referred to at point 2 of Annex XVI to the EEA Agreement.

³ EFTA Surveillance Authority – *Thresholds referred to in Directive 2004/17 and Directive 2004/18, as amended by Regulation (EU) No. 1336/2013, expressed in the national currencies of the EFTA States*, OJEU C 227, 17 July 2014 (published in Norwegian in the EEA Supplement to the OJEU No. 41, 17 July 2014).

Under Article 58(1) of the Directive, contracting authorities, which wish to award a public works concession contract shall make known their intention by means of a notice.

Article 58(2) of the Directive provides that notices of public works concessions shall contain the information referred to in Annex VII C and, where appropriate, any other information deemed useful by the contracting authority, in accordance with the standard forms adopted by the Commission pursuant to the procedure in Article 77(2).

Article 58(3) of the Directive provides that notices shall be published in accordance with the provisions laid down in Article 36(2) to (8). These provisions define form and manner of the publication of notices, which entails *inter alia* the obligation upon the contracting entity to send these notices to the European Commission for publication in the *Official Journal of the European Union* and the *Tenders Electronic Daily* (“TED”) database.

Article 59 of the Directive provides that when contracting authorities resort to a public works concession, the time limit for the presentation of applications for the concession shall be not less than 52 days from the date of dispatch of the notice, except where Article 38(5) applies.

3.2 Regulation (EC) No 2195/2002

*Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV)*⁴ (“the CPV Regulation”) was incorporated into the EEA Agreement by Joint Committee Decision No 180/2003.⁵ It entered into force on 6 December 2003 for Norway and the other EFTA States, which was also the deadline for the incorporation of the regulation by those States.

According to recital 1 of the CPV Regulation, the use of different classifications is detrimental to the openness and transparency of public procurement in Europe. Its impact on the quality of notices and the time needed to publish them is a *de facto* restriction on the access of economic operators to public contracts.

Recital 3 refers to the need to standardise, by means of a single classification system for public procurement, the references used by the contracting authorities and entities to describe the subject of contracts.

Recital 4 states that the Member States need to have a single reference system which uses the same description of goods in the official languages of the Community and the same corresponding alphanumeric code, thus making it possible to overcome the language barriers at Community level.

Recital 5 concludes that a revised version of the CPV needs to be adopted under the Regulation as a single classification system for public procurement, the implementation of which is covered by the Directives on the coordination of procedures for the award of public contracts.

⁴ Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the CPV. Act referred to at point 6a of Annex XVI to the EEA Agreement.

⁵ OJ L 88, 25.3.2004, p. 61 and EEA Supplement No 15, 25.3.2004, p. 18.

Article 1(1) of the CPV Regulation establishes the CPV as a single classification system applicable to public procurement. The CPV codes available are set out in detail in Annex I of the Regulation.

4 Relevant national law

The Norwegian *Public Procurement Act* (*Lov av 16 Juli 1999 no 69 om offentlige anskaffelser*; “the Norwegian Public Procurement Act”)⁶ determines that all public entities are required to follow the rules concerning procurement when issuing a tender.

This Act is supplemented by the Norwegian *Regulation on Public Procurement* (*Forskrift av 7 April 2006 no 402 om offentlige anskaffelser*; “the Norwegian Public Procurement Regulation”).⁷ The Norwegian Public Procurement Regulation was adopted on the basis of section 16 of the Public Procurement Law, implementing Directive 2004/18/EC. It contains detailed rules on tender procedures.

Section 1-3 (1) of the Norwegian Public Procurement Regulation provides that the regulation is applicable to the award of public contracts including delivery of goods, services or construction and works contracts.

The Norwegian Public Procurement Regulation section 4-1 c) defines “work contracts” as contracts regarding either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A “work” means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

Section 4-1 e) defines “service concession” as a contract of the same type as a public service contract except that the consideration for the provision of services consist either solely in the right to exploit the service or in this right together with payment.

“Concession of works” is defined in section 4-1 (f) as execution or planning of works in accordance with activities mentioned in Annex I where the compensation for the works consists of the right to exploitation of the construction or such exploitation in combination with payment.

Chapter 24 of the Norwegian Public Procurement Regulation “*Concessions of work and construction*” establish specified rules for the concession of public works contracts.

Under section 24-1 (1) contracting authorities that wish to award a public work concession contract shall make known their intention by means of a notice where the value of the contract is equal to or greater than 39 million NOK. The notice of the public work concession contract shall be in accordance with section 18-1 of the Norwegian Public Procurement Regulation.

Section 18-1 of the Norwegian Public Procurement Regulation lays down requirements on the award of public contracts. It follows therefrom that contracting authorities are obliged to draft a contract notice in accordance with the announcement forms issued by the competent Norwegian ministry. Furthermore, the Norwegian Public Procurement Regulation requires that the contract notice be published in both Norwegian and one of the

⁶ LOV-1999-07-16-69.

⁷ FOR-2006-04-07-402.

official languages of the European Union. The contract notice is to be delivered to Doffin, the Norwegian database for public procurement, which determines whether the substance of the notice complies with the requirements specified in the announcement forms. Contracting authorities are required to use the CPV nomenclature in the announcement forms. Approved contract notices are sent to the *Tenders Electronic Daily* (“TED”) by Doffin.

A contracting authority that wishes to award a works concession shall set a time limit for the presentation of application of no less than 45 days counting from the day the notice was made public according to Section 24-1 (6). The contracting authorities are on certain conditions required to extend the time limit according to section 24-1 (6) a-d.

5 Brief summary of the facts

On 20 April 2015, the Municipality of Kristiansand published a contract notice on *Doffin*⁸ for the award of a public contract concerning the “design, construction, financing and the operation of an underground car park”.⁹ The CPV code used for the classification of the contract in question was the code equivalent for “parking services” (63712400). According to the contract notice on *Doffin*,¹⁰ the value of the contract has been estimated to be between 24.000.000 and 100.000.000 NOK. The contract notice specifies that the car park shall be established and operated on the operator’s own account and at its own risk. One tender was submitted within the prescribed deadline on 15 May 2015. The tender was revised after negotiations, and the contract was eventually awarded on 24 June 2015. The contracts were signed by the parties on 29 June 2015.

6 The Authority’s assessment

The Authority has assessed the merits of the case and has arrived at the conclusion that the actions of the Municipality of Kristiansand (“the contracting authority”) are not in compliance with the EEA rules on public procurement. More specifically, the contracting authority has failed to publish a contract notice in accordance with the legal requirements laid down in Articles 56, 58(1) of the Directive. Furthermore, the contracting authority has also incorrectly described the subject matter of the public contract by failing to use a complete and sufficiently precise set of CPV codes. Lastly, it did not respect the minimum time limit for the submission of applications in an award procedure, as prescribed by Article 59 of the Directive. The Authority takes the view that these breaches are the consequence of an incorrect legal classification of the subject matter of the public contract in question as a “services concession”. In what follows, the Authority will present an account of the reasons leading to this conclusion.

⁸ The Norwegian database for the publication of notices in the area of public procurement.

⁹ Point II.1.4) of the contract notice, containing a brief description of the subject matter of the contract, states in Norwegian: “Kommunen søker derfor etter en privat leverandør som kan projekte, bygge, finansiere og drifte et parkeringsanlegg i privat regi” (Doc. No. 787493).

Available under: <https://www.doffin.no/Notice/Details/2015-530214>

¹⁰ Point II.2.1) of the contract notice.

6.1 The contracting authority has incorrectly classified the public contract as “services concession”

6.1.1 The award of a “works concession”

Contrary to the contracting authority’s assessment, the Authority takes the view that a public contract such as the one in question, having as its subject matter both the construction and operation of an underground parking, qualifies as a “public works concession”.

According to the legal definition laid down in Article 1(3) of the Directive, a “public works concession” is a contract of the same type as a “public works contract” except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment. The right to exploit the work involves the economic operator bearing the financial risk of operation.

6.1.1.1 A contract of the same type as a “public works contract”

It follows from the above definition that the concept of a “public works concession” necessarily encompasses – among other aspects to be further assessed – *“the execution, or both the design and execution, of works”* related to one of the activities referred to in Article 2(b) and specified in Annex I of the Directive.

The Authority notes, first of all, that the contracting authority does not question the fact that the performance of the contract required both the design and the construction of the underground car park by the contractor himself or by subcontractors before its subsequent operation. The Authority further notes that the contract notice clearly refers to the design and the construction (*“prosjektere, bygge”*) as an essential aspect of the contract. An assessment of the subject matter of the contract by the Authority suggests that the type of construction works to be executed corresponds to the category of activities listed in Annex I of the Directive, in particular to the activity described as “underground car park construction work” (CPV code: 45223310-2). Therefore, it must be concluded that the public contract in question is, in principle, of the same type as a “public works contract”.

The fact that the public contract in question also foresees the provision of services by the operator in form of “parking services” (CPV code: 63712400) does not alter this conclusion. While it is true that the distinction between works and services contracts is typically made on the basis of the *main object of a contract* (“the centre of gravity”),¹¹ it must nonetheless be borne in mind that the definition of a “public works concession” in Article 1(3) of the Directive comprises both elements. A contract having as its subject matter a “public works concession” generally implies (1) the construction of a physical structure (tunnels, bridges, buildings, roads, etc) (2) for the purpose of its economic exploitation by the concessionaire in form of services to be provided to the public in general. This view is confirmed by the European Commission’s *“Interpretative communication on concessions under Community law”*, which states that public works concessionaires often provide services to users on the basis of the structure they have built.¹² The communication also elaborates on the element of works contained in the

¹¹ See Recital 11 and Article 1(d) third subparagraph of the Directive. See also Case C-331/92, *Gestión Hotelera Internacional v Comunidad Autónoma de Canarias*, ECLI:EU:C:1994:155.

¹² See *“Commission interpretative communication on concessions under Community law”* (2000/C 121/02) of 29/4/2000, point 2.3, which emphasizes the importance of the distinction between “works concessions”

definition in Article 1(d) of the Directive by explaining that the main distinctive feature of a works concession is that “a right to exploit a *construction* is granted as a consideration for having *erected* it.” The right of exploitation allows the concessionaire to demand payment from those who use the structure (e.g. by charging tolls or fees) for a certain period of time. The concessionaire does not receive remuneration directly from the awarding authority, but acquires from it “the right to obtain income from the use of the *structures* built.”

Against this background, it does not appear compulsory in all circumstances to carry out a distinction between “works” and “services”, which would lead to an exclusion of one of these two categories. This conclusion is particularly true where none of the two aspects of a public contract can be considered predominant, as is the case of the public contract in issue. As stated above, evidence shows that the design and the execution of works was deemed essential by the contracting parties for the achievement of the ultimate objective to provide parking services. Therefore, the Authority takes the view that it would be incorrect from a perspective of EEA public procurement law to assume in the case at hand that the element of “services” predominates over the element of “works”. In other words, the works in question cannot be regarded as merely incidental to the main object of the award. Instead, the fulfilment of the obligations laid down in the contract appears to depend entirely on the construction of the underground car park. Any failure by the contractor to finalise the construction – voluntarily or for reasons outside his sphere of responsibility – would undermine the purpose of the contract.

The Authority notes that there are other indications in support of the assumption that the element of “works” is more important than alleged by the contracting authority. One indication is the wide range between the estimated minimum and maximum value of the public contract stated in the contract notice, which is, as the contracting authority has explained, due to the uncertainty as regards the exact cost of the construction. In the Authority’s opinion, this wide range reflects the considerable value of the structure to be built. Furthermore, the considerably long duration of the concession (lasting up to 60 years) indicates that it was expected by the contracting authority that the concessionaire would need this time to recoup an important financial investment,¹³ principally connected to the construction of the underground car park rather than to the management of the parking services.¹⁴ The contracting authority has not contested this conclusion. It is therefore fair to say that the value of the works has had a clear impact on the total estimated value of the public contract, which can hardly be ignored. Accordingly, the contract authority should have taken this aspect into account in the legal classification of the contract.

In its letter to the Authority dated 22 September 2015, the contracting authority invoked European and Norwegian case-law in support of its claim that a contract such as the one in

and “service concessions” in view the fact that Directive 93/37/EEC (now Directive 2004/18/EC) provides for a special system of procedures for granting public works concessions.

¹³ It follows from the the case-law of the Court of Justice that the grant of concessions of up to 15 years is liable to foreclose competition and have a detrimental effect on the freedoms guaranteed by Articles 31 and 36 EEA (see Case C-64/08, *Engelmann*, ECLI:EU:C:2010:506, para. 46-48). This applies *a fortiori* for a concession granted for a duration of 60 years. A justification for long-term concession can be the concessionaire’s need to have a sufficient length of time to recoup the investments required.

¹⁴ As regards the considerable duration of the concession of 60 years (50 years, with an almost automatic extension to 10 more years), the contracting authority admitted that it had been calculated so as to allow the private undertaking to recover the financial investment made, also for the construction of the underground parking (see follow-up letters to the package meeting of 12-13 November 2015 (Doc. No. 781498)).

question qualifies as a “services concession”.¹⁵ Nevertheless, the Authority notes that the judgment of the Court of Justice of the European Union (“Court of Justice”) in Case C-458/03, *Parking Brixen*, referred to therein did not concern the construction of an underground parking space but rather the management of above-ground public pay car parks, which were already operational.¹⁶ In view of the absence of any element related to works in the award at issue, the Court of Justice had no reason to pronounce itself on the distinction between a “public works concession” and a “public service concessions”.¹⁷ As the Court of Justice rightly established, where a concession contract only involves operating an existing structure, it must be regarded as a “service concession”.¹⁸ This, however, is clearly not the case of the contract subject to the present examination. The Authority therefore notes that, given the difference as regards the facts and the legal issues analysed by the Court of Justice, the case-law cited by the contracting authority does not have any relevance for the assessment of the case at issue. Similar arguments hold true in regard to the decisions adopted by the Norwegian *Complaints Board for Public Procurement* (“*Klagenemnda for offentlige anskaffelser*” or “*KOFA*”)¹⁹, which concerned the distinction between a “public service contract” and a “services concession”. The Authority fails again to see the relevance of these decisions.

It follows from the above considerations that the incorrect application of the EEA rules on public procurement (and the implementing national provisions) consists in the fact that the relevance the element of “works” has for the project as a whole is not duly reflected in the contracting authority’s classification of the contract.

In view of the circumstance that the element of “works” must be seen as too significant to be ignored, a classification of the public contract as “services concession” must be discarded.

6.1.1.2 Conferral of the right to exploit the work

The public contract awarded by the contracting authority guarantees the contractor the right to provide parking services in return for remuneration in form of fees to be paid by the users of the underground car park. In other words, the contractor has been conferred the right to economically exploit the work within the meaning of Article 1(3) of the Directive.

6.1.1.3 Transfer of the financial risk

The concept of “public works concession” implies that the concessionaire shall bear the main, or at least the substantial financial risk of operation.²⁰ The Authority notes at the outset that the contract awarded by the contracting authority foresees that the financial risk resulting from the construction and the operation of the underground car park will be

¹⁵ See letter of the Municipality of Kristiansand of 22 September 2015, page 3 (Doc. No. 774107).

¹⁶ See Case C-458/03, *Parking Brixen*, ECLI:EU:C:2005:605, para. 22-27.

¹⁷ Instead, the Court of Justice was called upon to clarify whether the award at issue constituted a “public service contract” or a “public service concession”. The Court of Justice concluded on the latter.

¹⁸ Case C-458/03, *Parking Brixen*, cited above, para. 40. The “*Commission interpretative communication on concessions under Community law*” (2000/C 121/02) of 29/4/2000, point 2.3, explains that a concession contract in which the construction work is incidental or which only involves operating an existing structure must be regarded as a service concession.

¹⁹ See KOFA-2005-24 and KOFA-2005-86.

²⁰ Case C-206/08, *Eurawasser*, ECLI:EU:C:2009:540, para. 59 and 77; Case C-451/08, *Helmut Müller*, ECLI:EU:C:2010:168, para. 75.

borne entirely be the operator.²¹ The fact that the contracting authority erroneously concluded that the subject-matter of the contract in question qualifies as a “service concession” does not affect this assessment – it in fact reinforces it, as this legal requirement is equivalent for both categories of concessions.²²

The Authority further notes that, according to the information provided by the contracting authority, the financial risk inherent in the exploitation of the construction has not been eliminated²³ by the contracting authority’s payment of an amount of 16 Million NOK meant to cover the costs for the construction of corridors connecting the underground car park with the town hall and the library.²⁴ Consequently, the Authority must conclude that this legal criterion for the classification of the public contract as a “public works concession” is met.

6.1.2 *Estimated value of the public contracts exceeds the applicable threshold*

For the rules of the Directive governing “public works concessions” to be applicable, it is necessary that the value of the contract be equal or greater than the value specified in Article 56 of the Directive. The threshold for “public works concessions” at the time the contracting authority commenced the contract awarding procedure was 39.266.836 NOK (5.186.000 EUR).²⁵ According to the contract notice published in *Doffin*, the contract value was estimated to be between 24.000.000 NOK and 100.000.000 NOK.

As the contracting authority has explained, this value includes the projected costs for the construction and is therefore in line with the method of calculation set out in Article 58(4) in conjunction with Article 9(4) of the Directive, which requires that the estimated value take account of both the cost of the works and the total estimated value of the supplies necessary for executing the works and placed at the contractor’s disposal by the contracting authorities.

Furthermore, the approach taken by the contracting authority is in line with Article 9(7) of the Directive, which prescribes that the choice of the method used to calculate the estimated value of a public contract may not be made with the intention of excluding it from the scope of the Directive. The Authority interprets this provision as imposing an obligation on contracting authorities to specify a realistic and truthful value, which would take all costs to be reasonably included into account. The Authority notes in this context that the contracting entity has set the estimated maximum value at 100.000.000 NOK in order to take due account of the possible costs related to the construction works. Consequently, as it is envisaged that the contract could realistically have that value, and in order to prevent that a public contract be removed from the scope of application of the Directive due to an inaccuracy in the contracting authority’s calculation, it should be the value used for the purposes of this assessment.

²¹ See Point II.2.1 of the contract notice (Doc. No. 787493) and Point 2, last paragraph of the concession contract (Doc. No. 774109).

²² Case C-437/07, *Commission v Italy*, ECLI:EU:C:2008:624, para. 31.

²³ According to the “*Commission interpretative communication on concessions under Community law*” (2000/C 121/02) of 29/4/2000, the definition of a concession allows the State to make a payment in return for work carried out, provided that this does not eliminate a significant element of the risk inherent in the exploitation of the construction.

²⁴ See follow-up letters to the package meeting of 12-13 November 2015 (Doc. No. 781498).

²⁵ *EFTA Surveillance Authority – Thresholds referred to in Directive 2004/17 and Directive 2004/18, as amended by Regulation (EU) No. 1336/2013, expressed in the national currencies of the EFTA States*, OJEU C 227, 17 July 2014 (published in Norwegian in the EEA Supplement to the OJEU No. 41, 17 July 2014).

In view of the above considerations, the Authority concludes that the estimated value of the contract in question must be taken to exceed the applicable threshold. The cross-border relevance of the project must therefore be presumed, irrespective of the doubts expressed by the contracting authority as regards any potential interest by economic operators based in other EEA States. The Authority recalls that the rationale behind the financial thresholds is to identify contracts for which there is likely to be competition from firms operating across borders.²⁶ Accordingly, the public procurement directives apply only to those contracts considered to be of interest to providers in other EEA States.

The Directive must therefore be held applicable to the award in question.

6.2 The contracting authority has used the incorrect CPV code to describe the subject matter of the contract

In the Authority's view, the contracting authority has failed to publish a notice using the correct CPV code to describe the subject matter of the contract.

It follows from Article 1(14) of the Directive that the CPV shall designate the reference nomenclature applicable to public contracts. The purpose of the CPV codes is to accurately describe the services or products required by the contracting authority. As noted in recital 4 of the Regulation, the CPV was introduced to provide a *“single reference system which uses the same description of goods in the official languages of the Community and the same corresponding alphanumeric code, thus making it possible to overcome the language barriers”*. The CPV codes allow bidders to identify the subject of the tender without having to resort to a translation, because the list of descriptions associated with each CPV code exists in all official languages. Consequently, the accurate use of CPV codes is of particular relevance in circumstances in which the full description of the tender or the individual lots involved is not available in a language spoken by the potential bidder.

In order to make the CPV codes work effectively, the contracting authority must endeavour to be as accurate as possible, to reflect the procurement needs which it seeks to meet by issuing the invitation to tender. This approach is reflected in the Commission guidance paper, the *“Guide to the CPV”*,²⁷ which indicates how to choose a code in practice.²⁸ The Guide to the CPV states that *“the awarding entity should try to find a code that suits its needs as accurately as possible”*.

In this context, the code chosen by the Municipality of Kristiansand corresponded to “parking services” (CPV code: 63712400). This code appears to be exclusively related to the provision of services in the transport sector. According to the explanatory notes issued by the European Commission, the “Group 637” of CPV codes concerns “support services for land, water and air transport”, which include *inter alia* highway operation/toll services, bridge and tunnel toll/operation services. None of the services listed in this group suggests that the contract being awarded involves the construction of significant infrastructure.

²⁶ As the Court of Justice has explained in Case C-220/05, *Jean Auroux and Others v Commune de Roanne*, ECLI:EU:C:2007:31, para. 52, the thresholds laid down in the Directive serve to ensure that public contracts with a sufficiently high value to justify intra-EEA participation are notified to potential tenderers.

²⁷ *European Commission: “Guide to the Common Procurement Vocabulary (CPV)”*, available under: http://simap.ted.europa.eu/documents/10184/36234/cpv_2008_guide_en.pdf

²⁸ Point 6.2 (“How to choose a code”) of the Guide to the Common Procurement Vocabulary.

However, the worded description contained in the contract notice reveals that the project which was the subject of the invitation to tender is also a type of construction work project. The Authority therefore takes the view that a CPV code related to “underground car park construction work” (CPV code: 45223310-2) should have been added as well with a view to allow potential tenderers to have a correct understanding of the scope of the project. The use of incorrect CPV codes is liable to have the effect of misleading potential bidders, ultimately preventing them from participating in tender procedures.²⁹ The Authority is of the opinion that economic operators potentially interested in the construction part of the contract in question would not have been in the position to identify the nature of the contract correctly on the sole basis of the CPV code used.

The Commission’s Guide to the CPV envisages that up to 20 codes can be used in a single contract notice. According to the recommendations stated therein, *“the first one will be considered the title. Therefore, it may be a little more general than the others, for instance if no accurate code is suitable”*. The Authority considers that more specific codes *must* be used if only these codes, taken together, give an accurate description of the entirety of the goods or services which the contracting authority is seeking to procure. In a situation such as the case at hand, the works aspect clearly predominates over the parking services aspect. But in any event, even where a public contract encompasses various different elements, such as performance of works and the provision of services, and none of them can reasonably be regarded as predominant, the Authority considers the use of several CPV codes to be indispensable.³⁰

In view of the above, the Authority concludes that the Municipality of Kristiansand failed to specify the subject of the tender by referring to the correct CPV code and, by doing so, incorrectly applied the relevant provisions of the CPV Regulation.

6.3 The contracting authority has failed to publish a contract notice EEA-wide

The Authority takes the view that the contracting authority has failed to publish a contract notice EEA-wide. The applicability of the Directive to a public contract qualifying as a “public works concession” entails the obligation to observe a number of procedural requirements when organising a tender procedure, *inter alia* the duty to publish a contract notice in accordance with the provisions set out in Article 58 (1) to (3) of the Directive.

Article 58(2) of the Directive states that notices of “public works concessions” shall contain the information referred to in Annex VII C and, where appropriate, any other information deemed useful by the contracting authority, in accordance with the standard forms adopted by the Commission. In order to ensure that the objectives pursued by the Directive and the CPV Regulation in particular – consisting in removing restrictions on the access of economic operators to public contracts and ultimately opening up public

²⁹ See, as an analogy, the case-law of the Court of Justice, which requires contracting authorities to formulate award criteria in the contract documents or the contract notice in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way. Incomprehensible or unclear award criteria may therefore constitute an infringement of Directive 2004/18 (Case C-583/13, *eVigilo*, ECLI:EU:C:2015:166, para. 53-54)

³⁰ The Authority refers to the Decision of the European Ombudsman of 11 October 2010 closing his inquiry into complaint 333/2009/(BEH)KM against the European Aviation Safety Agency (EASA). That case also concerns the correct use of CPV codes in procurement procedures. In paragraph 34 of his Decision, the European Ombudsman interprets the Commission’s guidelines as meaning that more specific codes should be used in addition to a general one if these codes, taken together, cover the entirety of the goods or services concerned.

procurement to competition³¹ – be achieved, the useful information referred to in this provision must necessarily include the CPV codes applicable to the categories of contracts covered by the scope of the Directive. The Authority refers in this context to its observations set out above.

Article 58(3) refers to Article 36(2) to (8) of the Directive, which define form and manner of the publication of notices, which entails *inter alia* the obligation upon the contracting entity to send these notices to the European Commission for publication in the *Official Journal of the European Union* and the *Tenders Electronic Daily* (“TED”) database.

The contracting authority does not dispute the fact that it failed to publish a contract notice in line with the above requirements. The Authority must therefore conclude that the requirements of the Directive have been breached. The publication of a contract notice in *Doffin* cannot remedy a breach of this essential procedural requirement, as a publication only at national level precisely does not take into account the need to guarantee the necessary degree of transparency in an award procedure having cross-border relevance.³² In the Authority's view, the case-law of the Court of Justice must be construed as meaning that the degree of publicity must always be commensurate with the cross-border interest in the object of the concession. Accordingly, the higher the potential interest of economic operators based in other EEA States is, the stricter the requirements as regards transparency, including publicity requirements. In the case of works concessions, which are regulated by Directive 2004/18, the cross-border interest is automatically inferred by the fact that estimated value of the award is equal to or greater than the applicable threshold. Accordingly, Article 58(3) in conjunction with Article 36(2) to (8) of the Directive prescribe a publication EEA-wide in the *Official Journal of the European Union*.

6.4 The contracting authority did not respect the minimum time limit for the submission of applications in an award procedure

The Authority takes the view that the contracting authority did not respect the minimum time limit for the submission of applications in an award procedure. It follows from Article 59 of the Directive that when contracting authorities award a public works concession, the time limit for the presentation of applications for the concession shall be not less than 52 days from the date of dispatch of the notice. However, it follows from the information provided that a deadline for the submission of tenders of 26 days was set. Consequently, irrespective of the already established breach for failure to publish a contract notice EEA-wide, it must be concluded that the contracting authority did not respect the minimum time limit laid down in Article 59 of the Directive.

7 Conclusion

In the light of the above, and on the basis of the information presently available to it, the Authority must conclude that, by incorrectly classifying a public contract having as its subject matter the construction of an underground car park and the management of parking services as a “service concession” rather than as a “works concession”, and by carrying

³¹ See Recital 2 of the Directive and Recital 1, 4 of the CPV Regulation.

³² See by analogy the case-law concerning service concessions, according to which the obligation of transparency requires there to be a degree of publicity sufficient to enable, on the one hand, competition to be opened up and, on the other, the impartiality of the award procedure to be reviewed (see Case C-64/08, *Engelmann*, cited above, para. 50; Joined Cases C-25/14 and C-26/14, *UNIS and Others*, ECLI:EU:C:2015:821, para. 39).

out a tender procedure, which is not in line with the requirements under the EEA rules on public procurement, Norway has breached several provisions of the Act referred to at point 2 of Annex XVI to the EEA Agreement (*Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts*). More concretely, Norway has:

- failed to publish a contract notice EEA-wide in the *Official Journal of the European Union* and the *TED* database in accordance with the legal requirements laid down in Articles 56, 58(1) of the Directive;
- not respected the minimum time limit for the submission of applications in an award procedure, as prescribed by Article 59 of the Directive;
- incorrectly described the subject matter of the public contract by failing to use the correct, or at any rate a complete and sufficiently precise set of CPV codes, in breach of Articles 1(14), 58(2) of the Directive, in conjunction with the Act referred to at point 6a of Annex XVI to the EEA Agreement (*Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the CPV*).

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 requests that the Norwegian Government submits its observations on the content of this letter *within two months* of its receipt.

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

Helga Jónsdóttir
College Member

This document has been electronically signed by Helga Jonsdottir on 09/02/2016