

Event. No: 186123
Case. No: 47644 (ex SAM020.500.043)
Dec. No.: 16/03/COL

EFTA SURVEILLANCE AUTHORITY DECISION
OF 18 FEBRUARY 2004
ON THE SALE OF THE PUBLICLY OWNED LAND “TJUVHOLMEN” IN OSLO
(NORWAY)

THE EFTA SURVEILLANCE AUTHORITY,

HAVING REGARD TO the Agreement on the European Economic Area¹, in particular to Articles 61 to 63 thereof,

HAVING REGARD TO the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice², in particular to Article 24 and Article 1 in Part I of Protocol 3³ thereof,

HAVING REGARD TO the Procedural and Substantive Rules in the Field of State Aid, in particular Chapter 18B thereof⁴,

WHEREAS:

I. FACTS

1. Procedure

By letter from the Ministry of Trade and Industry dated 3 July 2003, forwarded by the Mission of Norway to the European Union on 7 July 2003, received and registered by the Authority on 8 July 2003 (Doc. No. 03-4519-A), the Norwegian Government notified to the Authority the sale of ”Tjuvholmen” by the City of Oslo, represented by the Oslo Port Authority, to Selvaag Gruppen AS and Aspelin-Ramm Gruppen AS. By

¹ Hereinafter referred to as the ‘EEA Agreement’.

² Hereinafter referred to as the ‘Surveillance and Court Agreement’.

³ Protocol 3 to the Surveillance and Court Agreement as amended by the EFTA States on 10 December 2001. The amendments entered into force on 28 August 2003.

⁴ Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in OJ 1994 L 231, EEA Supplements 03.09.94 No. 32, last amended by the Authority’s Decision No 198/03/COL of 5 November 2003, not yet published, hereinafter referred to as the Authority’s ‘State Aid Guidelines’.

fax transmission from the Ministry of Trade and Industry dated 14 July 2003, received and registered by the Authority on 14 July 2003 (Doc. No. 03-4676-A), the Authority received additional information that was not included in the original notification.

By letter dated 23 July 2003, the Authority requested an extension of the period for taking a decision in this case until 19 November 2003. The Authority underlined that it still might need to ask for additional information.

By letter from the Ministry of Trade and Industry dated 21 August 2003, forwarded by the Mission of Norway to the European Union on 27 August, received and registered by the Authority on 28 August (Doc. No 03-5840-A), the Norwegian authorities agreed to an extension of the time limit until 19 November 2003.

By letter dated 19 November 2003, the Authority requested further information regarding the notification.

By letter from the Oslo Port Authority dated 11 December 2003, forwarded by the Ministry of Trade and Industry on 19 December 2003 and subsequently forwarded by the Mission of Norway to the European Union on the same date, received and registered by the Authority on 23 December 2003 (Doc. No. 03-9050-A), the Norwegian authorities submitted additional information.

2. The Oslo Port Authority (The vendor)

The Oslo Port Authority is part of the Municipality of Oslo. The Oslo Port Authority is regulated by Act of 8 June 1984 concerning harbours and fairways⁵ with subsequent amendments and associated regulations. The Board of the Port Authority manages and exercises authority within the port area pursuant to the Harbours and Fairways Act. The activities conducted in the Oslo port area are also subject to the regulations concerning the use of land and maintenance of order in the Oslo port district, adopted by the Board of the Oslo Port Authority on 23 May 1995, as well as bylaws adopted by the Oslo City Council.

Financial conditions governing harbour operations are contained in the Harbours and Fairways Act, which *inter alia* determines that all the funds held by the Port Authority must be used solely for port purposes. The budget of the Port Authority is adopted by the City Council. According to the applicable regulations, any changes occurring during the City Council's review of the budget must be put to the Board of the Port Authority before a final decision is adopted.

3. Description of the sales process

3.1 Introduction

Tjuvholmen is a property located in the harbour area of the City of Oslo. The plot which was sold comprised all of Tjuvholmen, measuring 33,199 square meters. The gross value of the sale was approximately NOK 886 million (some EUR 105 million). The sale of Tjuvholmen is part of a plan to utilize the harbour area of the City of Oslo for housing, business and leisure activities, the so-called Fjord Side Resolution.

⁵ Lov om havner, og farvann mv (Harbours and Fairways Act) of 8 June 1984.

The Oslo Port Authority compiled a prospectus for the sale and urban development of Tjuvholmen. A competition was organized whereby bidders submitted concepts for the development of Tjuvholmen. The plans presented by the bidders had to include a so-called “gift to Oslo”. This could be a landmark building, parks, sea front areas, e.g. The gross value of the purchasers bid was the price paid for Tjuvholmen including the costs of the “gift to Oslo”. The primary goal of the competition was to find solutions that would fulfil the urban development objectives of the local authority, and to ensure that the Oslo Port Authority obtained a market price for the site to be sold.

Tjuvholmen was sold subject to re-zoning, a process that will be initiated by the winning purchaser and decided upon by the City Authorities.

3.2 The announcements

The announcements were made in two stages. The first stage was a letter advertised in the following publications:

- Eiendomnytt, January 2002
- Næringseiendom, January, February and March 2002
- Dagens Næringsliv, January 2002
- World Architecture, March 2002
- Bauwelt, February 2002
- Building Design, February 2002
- Architects Journal, February 2002
- Dagens Industri, February 2002
- Berlingske Tiedende, February 2002
- Finansavisen, January and February 2002
- Norsk Lysningsblad, January 2002
- TED, January 2002

This was followed by advertisements of the prospectus in the following publications:

- Aftenposten, May 2002
- Finansavisen, May 2002
- Dagens Næringsliv, May 2002
- Eiendom på internet, May 2002
- Norsk Lysningsblad, May and June 2002
- TED, May and June 2002

3.3 The Prospectus

In collaboration with the Planning and Building Authority of the City of Oslo, the Oslo Port Authority drew up a “Framework Programme for Competition on Urban Development”. The framework programme was attached to the prospectus and contained the goals and conditions of the competition. Amongst the objectives for Tjuvholmen was the construction of premises for housing, attractions, businesses, services, public spaces etc. A balanced interplay between the various functions was sought. The site was to contain a landmark building. Provided that this did not conflict

with the perception of the landscape space, adjustments could be made to the quay fronts.

The prospectus contained detailed information as regards infrastructure, the bidding and sales process, payments and transfer of deeds, progress and time schedules etc. The Oslo Port Authority's chosen estate agents, Realia AS and CBridge Richard Ellis, sent prospectuses to more than 750 interested parties.

3.4 Election of purchaser

The Oslo Port Authority wished to sell to the purchaser who submitted the best urban planning for Tjuvholmen. The intention was to sell Tjuvholmen to a single purchaser. The sales price was only one of the elements to be focused on in the bidding. The inclusion of buildings of public interest, a landmark building, attractions and/or other developments not paying market dividends, was given added value. The eight projects were presented by way of public exhibition to the citizens of Oslo, who again were invited to vote over the internet. The eight projects were also presented to a jury who was to select a winning project amongst the bidders. The project chosen by the jury and the runner up were presented to the Oslo City Council for final decision.

The jury's conditions for selecting the winner were to be based on the following criteria from the prospectus weighed as indicated:

- 30% - Price.
- 30% – Compliance with city planners aims for Tjuvholmen.
 - a) Open the center of Oslo to the sea.
 - b) Be a living and vibrant part of Oslo.
 - c) Meet city requirements on balanced interplay between housing and business areas.
 - d) Be easily accessible to the general public, including the seafront areas.
 - e) Variation of building structures and volumes, taking into consideration a city-like role, including a landmark building.
 - f) If possible, function of national or international character placed on Tjuvholmen.
- 40% - Compliance with fixed conditions.
 - a. Maritime character and impression of peninsula maintained.
 - b. Not compromise the Fjord look of Pipervika, and maintain bay west of Tjuvholmen.
 - c. Seafront available to general public.
 - d. Available to the general public around the clock.
 - e. Landmark building.
 - f. Part of Tjuvholmen for housing purposes.
 - g. Areas including sea front adapted to pedestrians.
 - h. High aesthetical standards.
 - i. Service functions mainly integrated on existing site.
 - j. Parking according to norms for combined business and housing areas.

The winner elected by the jury was put forward to the Oslo Port Authority. The Oslo Port Authority then put forward a proposition to the Oslo City Council that took the

final decision. The sales contract was thus tied to the final approval by the City Council.

3.5 The submitted offers

The competition period was between 20 May 2002 and 30 August 2002. By the end of the submission period, nine proposals, of which eight fulfilled the requirements defined in the prospectus, had been received.

The eight proposals considered were:

1. Barnas øy, (The Children’s Island) submitted by Tscudi & Malling, Nielsen Prosjekt AS, Hvoslef-Eide Arkitekter AS and Riseng & Kiel Arkitekter AS.
2. Skanskas Tjuvholmen, submitted by Skanska Eiendomsutvikling AS, Selmer Skanska Bolig AS and Arkitekt Gert Wingårdh.
3. Utsyn, (Views) submitted by Selvaag Gruppen AS, Aspelin Ramm AS and Niels Torp Arkitekter.
4. Kongens Utsikt, (The Royal View) submitted by Byggholt AS JM AB and LPO arkitektur og design as.
5. Sjøen for alle, (The Sea for Everyone) submitted by Selvaag Gruppen AS, Aspelin Ramm AS and Narud Stokke Wiig Arkitekter og Planleggere AS.
6. Vindu mot Oslo, (A Window Towards Oslo) submitted by Scandinavian Development AS, Hammer Larssen Arkitekter, Arcasa Arkitekter and ABG Sundal Collier ASA.
7. Fjordparken, (The Fjord Park) submitted by Linstow AS and Snøhetta AS.
8. Pir 20 (Pier 20), submitted by Attivo AS, Sjølyst Utvikling AS and Base Arkitekter.

The original offers as presented in the notification:

	Barnas øy	Skanska Tjuvholmen	Utsyn	Kongens Utsikt	Sjøen for alle	Vindu mot Oslo	Fjordparken	Pir 20
Gross value*	695 065 (4)	470 838 (8)	826 028 (3)	474 778 (7)	919 563 (1)	626 551 (6)	895 765 (2)	694 000 (5)
Sum contrib.**	407 000	91 100	395 000	75 000	406 000	272 000	418 700	349 000
Net price to Port***	288 065	379 738	431 028	399 778	513 563	354 551	477 065	345 000
NPV as of 01.01.03****	287 058	319 995	405 635	389 851	480 328	336 425	406 918	322 828

All values are in Norwegian Kroner 1000,-.

* Gross bid from developer. Land cost calculated in relation to proposed development.

** Costs to be undertaken by the bidder for public buildings, development of public areas, landmark building, attractions etc. also called the gift to Oslo.

*** Gross bid minus “Gift to Oslo”.

**** Bids recalculated using net present value calculations and adjustments for different payment dates to make the bids comparable.

3.6 The selection of the winner

Negotiations were held with the 8 bidders. All eight bidder groups were allowed to present their proposals to the jury. The jury was to attach weight to the conditions outlined in the “Framework Programme for Competition on Urban Development” (ref chapter 3.3 above). The jury found that four projects distinguished themselves: “Utsyn”, ”Sjøen for alle”, ”Vindu mot Oslo” and ”Fjordparken”. A second negotiation round was held with four bidders. The bidders were asked to adjust their bids to give approximate cash payment of NOK 450,000,000 to the Oslo Port Authority⁶. The table below shows the offers after the second negotiation round:

	Utsyn	Sjøen for alle	Vindu mot Oslo	Fjordparken
Gross value	886 240	872 463	666 551	868 500
Sum contributions	430 000	406 000	272 000	418 700
Net price to Port	456 240	466 463	394 551	449 800

The jury’s final choice was to recommend that “Utsyn” and “Fjordparken” should take part in the further process.

The jury proclaimed “Fjordparken” as winner, but agreed to recommend both “Fjordparken” and “Utsyn” to the Oslo City Council for further processing. The City Council dealt with the two recommended projects and in a resolution dated 18 December 2002 decided that it would continue on the basis of the project “Utsyn”(Selvaag Gruppen AS – Aspelin-Ramm Gruppen AS). The sales contract between the Oslo Port Authority and Selvaag Gruppen AS – Aspelin-Ramm Gruppen AS was approved in the City Council by resolution dated 27 May 2003.

3.7 Arguments from the Norwegian authorities

In the notification, the Norwegian authorities argued that: *“The sale of Tjuvholmen has been conducted according to a well publicized and unconditional bidding procedure, accepting the best bid based on the conditions set out in the prospectus. Thus, the sale does not contain any element of State aid within the meaning of Article 61 of the EEA Agreement”*.

II. APPRECIATION

1. Procedural requirements and presence of State aid

Chapter 18B of the State Aid Guidelines, entitled “State aid elements in sales of land and buildings by public Authorities”, sets out two procedures that allow EFTA States to handle sales of land and buildings in a way that automatically precludes the existence of State aid. The first method is a sale through an unconditional bidding

⁶Net Present Value as of 1 January 2003.

procedure (Chapter 18B.2.1), while the other method is a sale, without an unconditional bidding procedure, by way of an independent expert evaluation (Chapter 18B.2.2.). If none of these methods are complied with, the EFTA States should notify the Authority of such transactions (Chapter 18B.2.3.).

In the notification, the Norwegian authorities argued that the sale of Tjuvholmen was conducted according to a well publicised and unconditional bidding procedure. Therefore, since the procedure laid down in Chapter 18B.2.2, is not relevant to the case at hand, the Authority assessed whether the Norwegian authorities have complied with the procedure provided for in Chapter 18B.2.1 of the State Aid Guidelines.

In Chapter 18B.2.1(1) of the State Aid Guidelines it is stated that: "*A sale of land and buildings following a sufficiently well-publicized, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid, is by definition at market value and consequently does not contain State Aid*".

The sale of Tjuvholmen and the prospectus were made public in Norwegian and international newspapers and magazines in the period from January 2002 to June 2002. It was therefore well-publicised in the meaning of the Guidelines.

The vendor of Tjuvholmen imposed city planning and other fixed conditions on the potential buyers (see point I.3 above). These constitute special obligations in the meaning of Chapter 18B.2.1.(1)(c) of the State Aid Guidelines. The existence of special obligations was known to all buyers and all buyers were able to fulfil the special obligations. Therefore, the offers can be regarded as "unconditional" for the purpose of the bidding procedure, in line with Chapter 18B.2.1.(1)(c) of the State Aid Guidelines.

However, Chapter 18.B.2.1.(1) also requires that the bidding procedure should be comparable to an auction. The sale of Tjuvholmen was organized as a competition for the best urban development of the land. A jury was to recommend to the Oslo City Council a winner of the competition based on the following criteria: Price (30%), fulfilment of the city planning objectives (30%), fulfilment of fixed conditions (40%).

The winner of the competition could, according to the criteria, be different from the bidder giving the highest bid. When this is the case, it cannot automatically be concluded that the sale would be carried out at market value, because the sales object would not be sufficiently precisely defined, when the bidding was launched. The sales object emerged rather as a result of the bidding procedure. Whether the sales price in such a situation could be considered to reflect market value, could not be established on the basis of Chapter 18B.2.1.(1) of the State Aid Guidelines alone. The Authority therefore considers that the sales process does not establish that the sale of Tjuvholmen was carried out according to the procedure as defined in Chapter 18.B.2.1 of the State Aid Guidelines.

If a sale is not concluded, *inter alia*, on the basis of an open and unconditional bidding procedure, as required by Chapter 18B.2.1(1) of the State Aid Guidelines, then the EFTA State concerned should notify the Authority of the transaction to allow it to establish whether State aid exists (Chapter 18B.2.3. of the State Aid Guidelines). By submitting the notification on the sale of Tjuvholmen by letters (and fax) of 3 July

2003, 14 July 2003 and 11 December 2003, the Norwegian authorities have decided to follow the notification procedure.

It now remains for the Authority to assess whether the sale of Tjuvholmen, although not following the procedure established in the State Aid Guidelines, does involve State aid.

The sale of Tjuvholmen was organized as an open competition. All buyers had to comply with the criteria outlined in the sales prospectus. Two negotiation rounds took place. Finally, the vendor chose the highest bid in gross value terms. The final price paid for Tjuvholmen (gross value) comprised of the price for the site and of the “gift to Oslo” (sum of contributions). These two elements constitute the total costs for the purchaser in relation to the proposed development. Under the circumstances of the present case, the Authority concludes that the sale does not favor the final winner of the competition in a way required for a measure to fall under Article 61(1) of the EEA Agreement. Consequently, the Authority concludes that the sale does not entail State aid.

2. Conclusion

The Authority concludes that the terms and conditions of the sale of Tjuvholmen do not constitute State aid.

HAS ADOPTED THIS DECISION:

1. The Tjuvholmen sale by the Oslo Port Authority to Selvaag Gruppen AS and to Aspelin-Ramm Gruppen AS does not contain State aid.
2. This decision is addressed to Norway.
3. The decision is authentic in the English language.

Done at Brussels, 18 February 2004

For the EFTA Surveillance Authority

Hannes Hafstein
President

Bernd Hammermann
College Member