

ESA closes procurement case on regional air tenders

The EFTA Surveillance Authority (ESA)

- Ensures that Norway, Iceland and Liechtenstein respect the EEA Agreement.
- Protects the rights of individuals and market participants.
- Ensures timely implementation of EEA law.
- Pursues breaches of EEA law.
- Enforces the rules concerning state aid
- Takes action against breaches of the EEA competition rules.

The EEA public procurement rules

The EEA procurement rules organise the way public authorities and certain public utility operators purchase goods, works and services with a value exceeding given thresholds. The main objective of the public procurement provisions in the EEA Agreement is to oblige contracting authorities and entities within the EEA to apply certain procedures when procuring supplies, services and works. This is in order to secure equal treatment of all suppliers, service providers and contractors established within the EEA.

Background

Norway conducts regular public tenders to award public service obligation (PSO) contracts to private air operators for the exclusive right to operate on certain regional air routes in Norway. In 2012, ESA received a complaint regarding public tenders for PSO routes in Norway for the period 2012–2016. The complainant argued that certain operational requirements in the tender documents favoured Widerøe's Flyveselskap AS ("Widerøe") and were impossible for any other air operator to meet. One such requirement was to have the necessary instruments for a satellite-based approach system (the so-called "SCAT-1") installed in the aircraft. During the relevant period, Widerøe was the only operator with the necessary equipment to use the SCAT-1 approach system at the PSO airports in question.

ESA's assessment under the EEA public procurement rules

The Authority has examined the complaint, taking into account the information obtained in the course of the investigation. The Authority takes the view that while the technical requirement to have the SCAT-1 ground-based augmentation system installed did in fact favour Widerøe, that requirement is nevertheless compatible with the EEA public procurement rules, as the Norwegian authorities have shown that it was necessary for safety reasons and there were no

alternative ways of reaching the same safety level at the airports in question at the time of the tender.

Public authorities have broad discretion under the EEA public procurement rules to define their needs and establish technical or performance requirements that services must meet to satisfy those needs. According to the Norwegian authorities, due to the circumstances of the airports in question – where there is mountainous terrain coupled with short runways – there is a need to have satellite-based approach systems, such as SCAT-1 or equivalent systems, installed for safety reasons. At the time of the tender publication, SCAT-1 was the only satellite-based approach system that met the necessary safety standards at those airports. Furthermore, Widerøe was the only operator with the relevant equipment to use the SCAT-1 system in Norway at the time of the tenders.

While the EEA public procurement rules generally stipulate that technical specifications must afford equal access and should not refer to particular processes which favour certain undertakings, the rules also accept that reference to a particular process may be permitted on an exceptional basis where this is justified by the subject matter of the contract. The requirement for SCAT-1 was indispensable for safety reasons and there were no alternative ways of reaching the same safety level at those airports where such procedures were in operation. The requirement was therefore appropriate and proportionate in order to meet the needs identified by the Norwegian authorities, i.e. guaranteeing the necessary level of safety. On that basis, ESA has closed its complaint case relating to the compatibility of the technical requirement for satellite-based approach systems with the EEA public procurement rules.

ESA's investigation under the EEA competition rules

ESA will, however, continue its investigation into whether Norway has enacted certain State measures related to the SCAT-1 system on PSO routes in Norway contrary to the EEA competition rules. A State measure will be in breach of Article 59 EEA in conjunction with Article 54 EEA where it can be shown that it would result in actual or potential anti-competitive effects or consequences.

Today's decision to close ESA's complaint case under the EEA procurement rules is therefore without prejudice to its ongoing investigation under the EEA competition rules.