

PROTOCOL 2

ON THE FUNCTIONS AND POWERS OF THE EFTA SURVEILLANCE AUTHORITY IN THE FIELD OF PROCUREMENT

SECTION 1^{1}

Article 1

1. Without prejudice to Article 31 and 32^{2} of this Agreement, the EFTA Surveillance Authority may invoke the procedure for which the present Article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of the provisions of the EEA Agreement in the field of procurement has been committed during a contract award procedure falling within the scope of the acts referred to in points 2 and 3 of Annex XVI to the EEA Agreement.
2. The EFTA Surveillance Authority shall notify the EFTA State and the contracting authority concerned of the reasons which have led it to conclude that a clear and manifest infringement has been committed and request its correction.
3. Within 21 days of receipt of the notification referred to in paragraph 2, the EFTA State concerned shall communicate to the EFTA Surveillance Authority:
 - (a) its confirmation that the infringement has been corrected; or
 - (b) a reasoned submission as to why no correction has been made; or
 - (c) a notice to the effect that the contract award procedure has been suspended either by the contracting authority on its own initiative or on the basis of the powers specified in Article 2(1)(a) of the act referred to in point 5 of Annex XVI to the EEA Agreement.
4. A reasoned submission in accordance with paragraph 3(b) of this Article may rely among other matters on the fact that the alleged infringement is already the subject of judicial or other review proceedings or of a review as referred to in Article 2(8) of the act referred to in point 5 of Annex XVI to the EEA Agreement. In such a case, the EFTA State shall inform the EFTA Surveillance Authority of the result of those proceedings as soon as it becomes known.
5. Where notice has been given that a contract award procedure has been suspended in accordance with paragraph 3(c) of this Article, the EFTA State shall notify the EFTA Surveillance Authority when the suspension is lifted or another contract procedure relating in whole or in part to the same subject matter is begun. That notification shall confirm that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made.

^{1} Heading inserted by the Agreement amending Protocols 2 and 3 to the Surveillance and Court Agreement of 21 March 1994 (e.i.f. 1.1.1995).

^{2} Words “and 32” inserted by the Agreement amending Protocols 2 and 3 to the Surveillance and Court Agreement of 21 March 1994 (e.i.f. 1.1.1995).

Article 2

1. Not later than 1 January 1996, the EFTA Surveillance Authority shall, together with an advisory committee composed of representatives of the EFTA States, review the manner in which the provisions of this Section^{3} and the provisions of the act referred to in point 5 of Annex XVI of the EEA Agreement have been implemented and, if necessary, make proposals for amendments. The committee shall have as Chairman a representative of the EFTA Surveillance Authority. The committee shall be convened by its Chairman either on his own initiative or at the request of one of its members.
2. By 1 March each year the EFTA States shall communicate to the EFTA Surveillance Authority information on the operation of their national review procedures during the preceding calendar year. The nature of the information shall be determined by the EFTA Surveillance Authority in consultation with the advisory committee.

SECTION 2^{4}

Corrective mechanism

Article 3

1. Without prejudice to Articles 31 and 32 of this Agreement the EFTA Surveillance Authority may invoke the procedures for which this Article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of the provisions of the EEA Agreement in the field of procurement has been committed during a contract award procedure falling within the scope of the act referred to in point 4 of Annex XVI to the EEA Agreement or in relation to Article 3(2)(a) of that act in the case of the contracting entities to which that provision applies.
2. The EFTA Surveillance Authority shall notify the EFTA States and the contracting entity concerned of the reasons which have led it to conclude that a clear and manifest infringement has been committed and request its correction by appropriate means.
3. Within 30 days of receipt of the notification referred to in paragraph 2, the EFTA States concerned shall communicate to the EFTA Surveillance Authority:
 - (a) its confirmation that the infringement has been corrected; or
 - (b) a reasoned submission as to why no correction has been made; or
 - (c) a notice to the effect that the contract award procedure has been suspended either by the contracting entity on its own initiative or on the basis of the powers specified in Article 2(1)(a) of the act referred to in point 5(a) of Annex XVI to the EEA Agreement.
4. A reasoned submission in accordance with paragraph 3(b) of this Article may rely among other matters on the fact that the alleged infringement is already the subject of judicial review proceedings of a review as referred to in Article 2(9) of the act referred to in point 5a of Annex XVI to the EEA Agreement. In such a case, the EFTA State shall inform the EFTA Surveillance Authority of the result of those proceedings as soon as it becomes known.
5. Where notice has been given that a contract award procedure has been suspended in accordance with paragraph 3(c) of this Article, the EFTA State concerned shall notify the EFTA Surveillance Authority when the suspension is lifted or another contract procedure relating in whole or in part to the same subject matter is begun. That new notification shall confirm that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made.

^{3} Word "Section", introduced by the Agreement amending Protocols 2 and 3 to the Surveillance and Court Agreement of 21 March 1994 (e.i.f. 1.1.1995), replaces former word "Protocol".

^{4} Section 2 inserted by the Agreement amending Protocols 2 and 3 to the Surveillance and Court Agreement of 21 March 1994 (e.i.f. 1.1.1995).

Conciliation

Article 4

1. Any person having or having had an interest in obtaining a particular contract falling within the scope of the act referred to in point 4 of Annex XVI to the EEA Agreement and who, in relation to the procedure for the award of that contract, considers that he has been or risks being harmed by an alleged infringement of the provisions of the EEA Agreement in the field of procurement or national rules implementing those provisions may request the application of the conciliation procedure provided for in Article 5 and 6 of the present Protocol.
2. The request referred to in paragraph 1 shall be addressed in writing to the EFTA Surveillance Authority or to the national authorities listed in the Appendix to the present Protocol. These authorities shall forward requests to the EFTA Surveillance Authority as quickly as possible.

Article 5

1. Where the EFTA Surveillance Authority considers, on the basis of the request referred to in Article 4, that the dispute concerns the correct application of the provisions of the EEA Agreement, it shall ask the contracting entity to state whether it is willing to take part in the conciliation procedure. If the contracting entity declines to take part, the EFTA Surveillance Authority shall inform the person who made the request that the procedure cannot be initiated. If the contracting entity agrees, paragraphs 2 to 7 shall apply.
2. The EFTA Surveillance Authority shall propose, as quickly as possible, a conciliator drawn from a list of independent persons accredited for this purpose. This list shall be drawn up by the EFTA Surveillance Authority, following consultation of an advisory committee composed of representatives of the EFTA States or, in the case of contracting entities the activities of which are defined in Article 2(2)(d) of the act referred to in point 4 of Annex XVI to the EEA Agreement, following consultation of such an advisory committee enforced with expertise on telecommunications procurement. Each party to the conciliation procedure shall declare whether it accepts the conciliator, and shall designate an additional conciliator. The conciliators may invite not more than two other persons as experts to advise them in their work. The parties to the conciliation procedure and the EFTA Surveillance Authority may reject any expert invited by the conciliators.
3. The conciliators shall give the person requesting the application of the conciliation procedure, the contracting entity and any other candidate or tenderer participating in the relevant contract award procedure the opportunity to make representations on the matter either orally or in writing.
4. The conciliators shall endeavour as quickly as possible to reach an agreement between the parties which is in accordance with the provisions of the EEA Agreement.
5. The conciliators shall report to the EFTA Surveillance Authority on their findings and on any result achieved.
6. The person requesting the application of the conciliation procedure and the contracting entity shall have the right to terminate the procedure at any time.
7. Unless the parties decide otherwise, the person requesting the application of the conciliation procedure and the contracting entity shall be responsible for their own costs. In addition, they shall each bear half of the costs of the procedure, excluding the costs of intervening parties.

Article 6

1. Where, in relation to a particular contract award procedure, an interested person within the meaning of Article 4, other than the person requesting the conciliation procedure, is pursuing judicial review proceedings or other proceedings for review within the meaning of the act referred to in point 5a of Annex XVI to the EEA Agreement, the contracting entity shall inform the conciliators. These shall inform that person that a request has been made to apply the conciliation procedure and shall invite that person to indicate within a given time limit whether he agrees to participate in that procedure. If that person refuses to participate, the conciliators may decide, acting if necessary by a majority, to terminate the conciliation procedure if they consider that the participation of this person is necessary to resolve the dispute. They shall notify their decision to the EFTA Surveillance Authority and give their reasons for it.

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2. Action taken pursuant to Article 4 to 6 shall be without prejudice to:
- (a) any action that the EFTA Surveillance Authority or any EFTA State might take pursuant to Articles 31 and 32 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice or pursuant to Article 3 of the present Protocol;
 - (b) the rights of the persons requesting the conciliation procedure, of the contracting entity or of any other person.

Article 7

1. Not later than 1 January 1996, the EFTA Surveillance Authority, in consultation with the advisory committee composed of representatives of the EFTA States, shall review the manner in which the provisions of this Section and the provisions of the act referred to in point 5a of Annex XVI to the EEA Agreement have been implemented and, in particular, the use of the European Standards and, if necessary, make proposals for amendments.
2. Before 1 March each year the EFTA States shall communicate to the EFTA Surveillance Authority information on the operation of their national review procedures during the preceding calendar year. The nature of the information shall be determined by the EFTA Surveillance Authority in consultation with the advisory committee.
3. In the case of matters relating to contracting entities the activities of which are defined in Article 2(2)(d) of the act referred to in point 4 of Annex XVI to the EEA Agreement, the EFTA Surveillance Authority shall also consult such an advisory committee enforced with expertise on telecommunications procurement.

APPENDIX^{5}

Austria

Bundesministerium für wirtschaftliche Angelegenheiten (Federal Ministry of Economic Affairs)

Finland

Kauppa- ja teollisuusministeriö, Handels- och industriministeriet
(Ministry of Trade and Finance)

Iceland

Fjármálaráðuneytið
(Ministry of Finance)

Norway

Nærings- og energidepartementet
(Ministry of Industry and Energy)

^{5} Appendix added by the Agreement amending Protocols 2 and 3 to the Surveillance and Court Agreement of 21 March 1994 (e.i.f. 1.1.1995).

Sweden

Nämnden för offentlig upphandling

(The Swedish National Board for Public Procurement)

