SUPREME COURT OF NORWAY

J U D G M E N T

given on 27 September 2019 by the Supreme Court composed of

Justice Magnus Matningsdal
Justice Bergljot Webster
Justice Ragnhild Noer
Justice Henrik Bull
Justice Knut H. Kallerud

HR-2019-1801-A, (case no. 18-077187SIV-HRET)
Appeal against Frostating Court of Appeal's judgment 2 March 2018

I.

AtB AS	(Counsel Goud Helge Homme Fjellheim) (Assisting counsel Anne Hesjedal Sending)
v.	
Fosen-Linjen AS	(Counsel Anders Tholfsen Thue) (Assisting counsel Christian Henrik Prahl Reusch)
The Confederation of Norwegian Enterprise (NHO) (third-party intervener)	(Counsel Morten Goller)

II.

Fosen-Linjen AS	(Counsel Anders Tholfsen Thue) (Assisting counsel Christian Henrik Prahl Reusch)
The Confederation of Norwegian Enterprise (NHO) (third-party intervener)	(Counsel Morten Goller)
v.	
AtB AS	(Counsel Goud Helge Homme Fjellheim) (Assisting counsel Anne Hesjedal Sending)

Participating in accordance with section 30-13 of the Dispute Act: The State represented by the Ministry of Justice and Public Security

(The Office of the Attorney General represented by Counsel Helge Røstum

(1) Justice **Webster:** The case concerns a claim for damages after the cancellation of a tender competition subject to public procurement regulations.

(2) AtB AS (AtB) was established in 2009 as a company wholly owned by Sør-Trøndelag County Authority. AtB manages the county's public transport services, and was in charge of the bus services until 2012. The Norwegian Public Roads Administration was responsible for ferry services on the county road net. From 2015, this responsibility was transferred to the respective county authorities, and in 2012 the County Council handed AtB the task of preparing and completing a competition for the procurement of ferry services with start-up in January 2015.

(3) AtB issued a tender competition notice "Route Transport Ferry 2015" on 5 June 2013. Tenderers were invited for two lots, both for a contract period of ten years with a unilateral option for AtB to extend the contract period for up to two years. The first lot, to which the dispute at issue relates, concerned the ferry service between Brekstad and Valset and had a total value of approximately NOK 500 million.

(4) AtB chose to carry out the procurement by way of a "competition with negotiations" in accordance with section 5-1 of the then Regulations on Public Procurement. According to the tender specification, the negotiations would be held in accordance with section 11-8 of the same Regulations, and a final deadline would be set for "supplementing or changing the tender" after the negotiations had ended. The contract would be awarded based on the economically most advantageous tender, see section 13-2 subsection 1 of the Regulations.

(5) Three award criteria were drawn up: quality, price and environment. When evaluating the tenders, each of the criteria would be given a score from 1 to 10. In the final evaluation, the award criterion "price" would be weighted by 50 percent, whereas "environment" and "quality" each would count 25 percent. For the criterion "environment", it was solely stated that "[t]he evaluation includes fuel oil consumption in litres per year". There was no requirement of documentation for the fuel oil consumption.

(6) The deadline for submitting tenders was 30 September 2013.

(7) Before the deadline expired – at a meeting with the tenderers on 18 June 2013 – one of the interested parties asked whether AtB was to require documentation for the estimated fuel oil consumption to ensure verifiability of the criterion "environment".

(8) AtB decided not to require documentation for the criterion "environment", but implemented a contractual sanction for non-compliance with the stated fuel oil consumption during the contract period:

> **"New clause 22 in part A – General contract terms:**
> **Fuel oil consumption**
> **Real fuel oil consumption in litre/year, to be controlled against stated fuel oil consumption in litre/year in the tender. Additional consumption exceeding the tender by more than 10% will be charged by NOK 1 per litre"**

(9) It also appears from a summary of submitted questions and answers of 28 June 2013 that one of the interested parties asked how the contracting authority was to verify the environment criterion:

"How is a tenderer to confirm the fuel consumption to make the weighting between the tenderers verifiable?"

(10) AtB replied that "[i]t is assumed that the Operator has a system for following up the vessel's fuel oil consumption". A reference was also made to the new clause 22 in the general contract terms.

(11) Three interested parties tendered for the first lot: Fosen-Linjen AS (Fosen-Linjen), Norled AS (Norled) and Boreal Transport Nord AS. All three met the qualification criteria in the tender specification. Negotiations were carried out. The tenderers then submitted revised tenders. For the second lot – which concerned local ferry routes – Fosen-Linjen was the only tenderer.

(12) After an overall assessment of the award criteria, AtB ranked Norled's tender first. By a letter of 17 December 2013, AtB informed the interested parties of the intention of awarding Norled the contract. Norled had been given a score of 9.39 points, Fosen-Linjen 9.06 points and the third tenderer 5.73 points. Fosen-Linjen's tender was ranked first in terms of the criterion "price", Fosen-Linjen and Norled were ranked equally in terms of "quality", and Norled was considered the best with regard to "environment".

(13) Fosen-Linjen AS issued a complaint against the evaluation on 30 December 2013.

(14) The complaint was successful, and the tenders were re-evaluated so that Norled was given 9.16 points, Fosen-Linjen 9.06 points and the third tenderer 5.52 points. The interested parties were informed of the re-evaluation by a letter of 15 January 2014.

(15) On 3 January 2014, before the outcome of the complaint was clear, Fosen-Linjen asked Sør-Trøndelag District Court for an interlocutory injunction to stop AtB from entering into the contract with Norled. After an oral hearing, the District Court issued an order on 27 January 2014 prohibiting the signing and imposing Fosen-Linjen to bring a regular action to resolve the dispute. The District Court found that AtB did not have sufficient grounds to evaluate the fuel consumption Norled had stated, and that AtB should have obtained technical assistance to evaluate Norled's tender on this point.

(16) AtB appealed the order to Frostating Court of Appeal, which, on 17 March 2014, dismissed the appeal. The Court of Appeal argued that AtB did not have the possibility to evaluate the tender from Norled. Since the two tenders were quite similar, the fuel oil consumption that Norled had stated should have been verified.

(17) On 27 February 2014, Fosen-Linjen brought an action before Sør-Trøndelag District Court, contending, among other things, that AtB had not evaluated the criterion "environment".

(18) Following the Court of Appeal's order for the interlocutory injunction – and Fosen-Linjen's motion for the District Court – AtB decided to cancel the competition. The participants were notified by a letter of 30 April 2014. AtB referred to the two errors the Court of Appeal had found in AtB's procedures.

"Firstly, the Court of Appeal finds that AtB has failed to establish a reasonable basis for evaluation.

…

Secondly, the Court of Appeal finds that AtB has infringed the procurement rules by failing

to verify the reasonableness of Norled's stated fuel oil consumption.

AtB has assessed whether it is now possible to make up for the errors that the Court of Appeal finds that AtB has committed. AtB has, after thorough evaluation, concluded that this is not possible."

(19) After the cancellation, AtB as a temporary solution entered into a two-year contract with Norled for the operation of the Brekstad-Valset ferry service.

(20) The action brought in the main case ended primarily by Sør-Trøndelag District Court issuing a judgment in default as AtB failed to submit its response in time. AtB appealed the judgment in default. By order of 20 November 2014, Frostating Court of Appeal set the judgment aside and gave AtB a new deadline for submitting its response. The case was then heard in the District Court. As AtB had cancelled the competition by this time, the court case was limited to the claim for damages. On 2 October 2015, Sør-Trøndelag District Court handed down a judgment with the following conclusion:

> **"1. Judgment is given in favour of AtB AS.**
>
> **2. Fosen-Linjen AS will pay costs of NOK 1,000,000 – one million - to Atb AS within 2 – two – weeks of the service of this judgment."**

(21) The District Court found in favour of AtB, both with regard to Fosen-Linjen's claim for damages for loss of profit – the positive contract interest – and Fosen-Linjen's claim for the costs of participating in the competition – the negative contract interest.

(22) Fosen-Linjen appealed the District Court's judgment to Frostating Court of Appeal.

(23) During the preparation of the case, the Court of Appeal decided to ask the EFTA Court for an advisory opinion. Six questions were referred regarding the EEA law requirements for the national rules on awarding damages. The first two questions related to the basis of liability:

> **"1. Do Article 1(1) and Article 2(1)(c) of Directive 89/665/EEC, or other provisions of that Directive, preclude national rules on awarding damages, where the award of damages due to the contracting authority having set aside EEA law provisions concerning public contracts, is conditional on**
>
> **(a) the existence of culpability and a requirement that the contracting authority's conduct must deviate markedly from a justifiable course of action?**
>
> **(b) the existence of a material fault where culpability on the part of the contracting authority is part of a more comprehensive overall assessment?**
>
> **(c) the contracting authority having committed a material, gross and obvious fault?**
>
> **2. Should Article 1(1) and Article 2(1)(c) of Directive 89/665/EEC, or other provisions of that Directive, be interpreted to mean that a breach of an EEA procurement law provision under which the contracting authority is not free to exercise discretion, constitutes in itself a sufficiently qualified breach that may trigger a right to damages on certain conditions?"**

(24) Questions three and four concerned possible requirements of causation under EEA law, whereas questions five and six related to evaluation of award criteria.

(25) The EFTA Court gave its advisory opinion on 31 October 2017 – hereafter referred to as

Fosen I. Here, the EFTA Court established that a simple breach of public procurement law may be enough to trigger liability, and that it is not a requirement that the breach is qualified. I will come back to the answers given in the advisory opinion.

(26) On 2 March 2018, Frostating Court of Appeal then handed down a judgment with the following conclusion:

> **"1. AtB AS is to pay damages to Fosen-Linjen AS of NOK 1 500 000 – onemillionfivehundredthousand – within 2 – two – weeks of the service of this judgment.**
>
> **2. Costs are not awarded, neither in the District Court nor in the Court of Appeal."**

(27) The Court of Appeal found in favour of AtB with regard to liability for loss of profit – the positive contract interest – but ordered AtB to indemnify Fosen-Linjen for the costs of participating – the negative contract interest. The Court of Appeal did not follow the EFTA Court's opinion in Fosen I that a simple breach of public procurement law could be sufficient to trigger liability.

(28) Both Fosen-Linjen and AtB have appealed to the Supreme Court. Fosen-Linjen has in addition submitted a derivative appeal against AtB's appeal.

(29) On 19 June 2018, the Supreme Court's Appeal Selection Committee agreed to hear the appeals, but decided to limit the proceedings:

> **"The Supreme Court agrees to hear the appeals. The Court will also hear the derivative appeal from Fosen-Linjen AS.**
>
> **The hearing in the Supreme Court will be limited so that with regard to the positive contract interest, the questions of causal link and measurement of loss will be left out."**

(30) At a preparatory meeting with both parties, the scope of the hearing was discussed. Following an exchange of pleadings in that regard, the Appeals Selection Committee decided on 15 October 2018 to alter the original leave to appeal:

> **"Leave to appeal is granted to AtB.**
>
> **The Supreme Court will not hear the part of Fosen-Linjen AS's appeal concerning basis of liability for positive contract interest due to the contention that the tender from Norled AS should have been rejected. Otherwise, leave to appeal is granted. The Supreme Court also agrees to hear the derivative appeal from Fosen-Linjen AS.**
>
> **The hearing in the Supreme Court will be limited such that the question of causality and calculation of loss with regard to positive contract interest will not be heard for the time being. Furthermore, with regard to the question of liability for the negative contract interest, the hearing will be limited such that the Court will only consider whether an unlawful award criterion was used in the tender competition, as well as the other criteria for awarding damages provided such basis of liability exists."**

(31) The Confederation of Norwegian Enterprise – NHO – has declared third-party intervention in benefit of Fosen-Linjen before the Supreme Court.

(32) The State participates in accordance with section 30-13 of the Dispute Act to safeguard the interests of the public.

(33) Because, among other things, the Court of Appeal did not follow the EFTA Court's opinion in Fosen I on the issue of basis of liability, the Supreme Court asked on 19 November 2018 for clarification and amplification, or possibly a reconsideration, from the EFTA Court. The referred question read as follows:

> **"Does Article 2(1)(c) of the Remedies Directive require that any breach of the rules governing public procurement in itself is sufficient for there to be a basis of liability for positive contract interest?"**

(34) The EFTA Court issued a second advisory opinion on 1 August 2019 – hereafter Fosen II – that elaborate the EEA law on this point. The EFTA Court stated that EEA law does not require that any breach of public procurement law imply a basis of liability for the loss of profit. Such liability necessitates a sufficiently qualified breach. I will also come back to the content of this opinion.

(35) *The appellant – Fosen-Linjen AS* – contends:

(36) The cancellation of the competition was unlawful. The fault affected the outcome of the procurement process directly and was sufficiently qualified to form a basis for awarding damages to Fosen-Linjen for loss of profit. The fact that AtB was not well acquainted with the rules – and acted in ignorance of the law – does not discharge AtB from liability.

(37) AtB cannot be heard with its contention that it was free to cancel the competition because the documentation for the award criterion environment could not be verified. The tender specification included a request for general arrangement drawings – GA drawings – and if AtB had obtained expert assistance, the tenders could have been evaluated based on the information provided. The failure by Norled to provide the necessary information had to result in rejection of Nordled's tender, and does not justify cancellation of the entire competition.

(38) In the alternative, it is contended that the conditions for awarding damages for Fosen-Linjen's costs of bidding – the negative contract interest – are met. According to the EFTA Court in Fosen I, strict liability should be imposed for this type of loss. This view has not been altered in Fosen II, since the Supreme Court's question, there, only related to basis of liability for loss of profit. That liability is not conditional on culpability is also evident from the ruling of the Court of Justice of the European Union (CJEU) in Case C-314/09 *Strabag*.

(39) There is a causal link to the loss, as the Court of Appeal has concluded. However, the loss exceeds what the Court of Appeal estimated.

(40) As a result of the proceedings relating to the question of damages for the positive contract interest being limited to the basis of liability, Fosen-Linjen invites the Supreme Court to pronounce the following judgment:

> **"1. AtB AS's cancellation of the procurement competition on 30 April 2014 constitutes a basis for awarding Fosen-Linjen AS damages for the positive contract interest.**
> **2. Fosen-Linjen AS is awarded costs."**

(41) In relation to the court proceedings as such, Fosen-Linjen invites the Supreme Court to pronounce the following judgment:

"Principally:

1. **Fosen-Linjen AS is awarded damages estimated in the Court's discretion, limited upwards to NOK 83 448 368 with the addition of default interest on NOK 7 400 000 from 1 January 2016, on NOK 7 400 000 from 1 January 2017, on NOK 7 400 000 from 1 January 2018 and otherwise from 4 April 2015 until payment is made.**
2. **Fosen-Linjen AS is awarded costs in the District Court, the Court of Appeal and in the Supreme Court.**

Alternatively:

1. **The Court of Appeal's judgment is set aside to the extent it is appealed.**
2. **Fosen-Linjen AS is awarded costs."**

(42) As for the appeal from AtB with regard to damages for costs of bidding – the negative contract interest –Fosen-Linjen AS invites the Supreme Court to pronounce the following judgment:

> **"Principally: AtB AS will within two weeks pay damages of NOK 2 000 000 to Fosen-Linjen AS for the negative contract interest with the addition of default interest on NOK 1.555.819 from 3 April 2015 and with the addition of default interest on NOK 444 181 from 30 August 2015.**
>
> **Alternatively: The appeal is dismissed.**
>
> **In both cases: Fosen-Linjen AS is awarded costs in all instances."**

(43) *Third-party intervener for Fosen-Linjen AS – The Confederation of Norwegian Enterprise NHO* – endorses Fosen-Linjen's submissions and emphasises that the objective of the rules on public procurement and the consideration of effectiveness are key when interpreting the rules. Liability is crucial to prevent infringement of the rules. Despite the high number of public procurements carried out annually in Norway, there are few cases resulting in awarding of damages to the tenderers for loss of profit. This suggests that the threshold in Norway is too high.

(44) In Fosen II, the EFTA Court refers to the doctrine of State liability that has developed under EEA law. This doctrine cannot be applied directly, but must be established in light of the context of procurement law. Culpability cannot be a condition for damages to be awarded. Ignorance of the law is not in itself sufficient to evade liability. The threshold for liability will however vary with the freedom of discretion in the particular field and the clarity of the rules. After the rule has been completed, there is little room for discretion, and the threshold for liability is lowered.

(45) AtB's cancellation of the competition was unlawful. The rules do not leave room for discretion, and a basis of liability exists.

(46) In any case, the conditions for awarding damages for Fosen-Linjen's costs incurred in the competition are met.

(47) The Confederation of Norwegian Enterprise invites the Supreme Court to pronounce the following judgment:

> **"The Confederation of Norwegian Enterprise is awarded costs in the Supreme Court."**

(48) *The appellant – AtB* – contends:

(49) AtB's cancellation of the competition was lawful. The threshold for cancelling is low. Norwegian law requires justifiable grounds only. Under EEA law, the threshold is even lower. Errors were made in the competition – as an unlawful award criterion was used – which could be rectified by cancellation only. There were thus justifiable grounds for cancelling. In any case, the Court of Appeal's issue of the interim measure created, in itself, so much uncertainty with regard to the lawfulness of the competition that it constituted justifiable grounds for cancelling.

(50) There is a high threshold for establishing a basis of liability for loss of profit. This applies both under Norwegian internal law and under EEA law. A more extensive exposure for liability than that to which contracting authorities are already subject, may result in irrational use of resources because of the contracting authorities' fear of liability.

(51) The doctrine of State liability under EEA law – as presented in Fosen II – satisfies the principle of effectiveness. The precontractual enforcement mechanisms are essential in procurement law; tort law is of secondary importance, and there is no need to present a strict standard. In any case, there is no basis for awarding damages for loss of profit in the case at hand.

(52) There is also no basis for awarding damages for Fosen-Linjen's costs of participating in the competition. Fosen-Linjen was familiar with the content of the award criterion "environment", including the fact that no documentation had been requested that could enable verification of the stated oil consumption. This implies that there is no causal link between the fault committed and the loss sustained by Fosen-Linjen.

(53) Fosen-Linjen should nonetheless have understood that the lack of a documentation requirement could impede verification of the tenders, and that this was contrary to the public procurement rules.

(54) It would have a deterrent effect if the tenderers were "forced" to point out any errors they detect during the course of the competition. They should not be allowed to wait until the end of the competition and then object to its outcome by referring to the error.

(55) The basis of liability for costs incurred is negligence, which is compatible with EEA law. Fosen-Linjen's alleged loss is in any case unforeseeably high and partially undocumented.

(56) AtB AS invites the Supreme Court to pronounce the following judgment:

> **"1. The appeal from Fosen-Linjen AS is dismissed.**
> **2. The Court of Appeal's judgment is set aside with regard to damages for the negative contract interest.**
> **3. AtB AS is awarded costs in the District Court, Court of Appeal and in the Supreme Court."**

(57) *The State* – participating in the case in accordance with section 30-13 – contends:

(58) The interest of the public in the case relates to which standard of liability applies, and what influence EEA law has on Norwegian law.

(59) EEA law does not require strict liability in public procurement matters; it is the general

liability under EEA law that counts. Basis for such liability exists when an infringement of the rules is "sufficiently qualified". This threshold for liability is not higher than that provided by Norwegian law; hence, there is no conflict between Norwegian law and EEA law on this point.

(60) The State has not requested any relief.

(61) *I have concluded* that the appeals should be dismissed.

(62) The case raises several issues. Firstly, the Supreme Court must establish whether there is a *basis of liability* in order to award Fosen-Linjen damages for the profit it would have earned if it had won the tender competition. However, the Supreme Court is not to consider whether there is a causal link – i.e. whether Fosen-Linjen would have won the contract. Nor is the Supreme Court to consider whether Fosen-Linjen has sustained a loss by not winning the tender competition – in other words, whether Fosen-Linjen would have profited from the contract.

(63) If no basis of liability exists with regard to the loss of profit, the question is whether Fosen-Linjen should be awarded damages for the costs of participation. Here, the Supreme Court must assess all conditions for receiving damages, both whether there is a *basis of liability* and whether there is *a causal link to the loss.*

(64) Before I go more into detail about the issues of the case, I will briefly discuss the relevant procurement – the ferry services – and place the issues in a legal context.

(65) *Liability under EEA law for breach of the rules on public procurement of ferry services*

(66) At the time of this public procurement, Directive 2004/18/EC applied – also referred to as the "Procurement Directive" – regulating the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. There was also Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. Water transport services, however, were not covered by the latter, but by the Procurement Directive.

(67) Under Article 21 of the Procurement Directive, cf. Annex II B, water transport services are a so-called "non-priority service" and subject solely to Articles 23 and 35 (4) of the Directive. Article 23 regulates the use of technical specifications, while Article 35 (4) regulates notices of the results of a tender competition. None of these provisions is relevant to the case at hand.

(68) However, the CJEU has stated that competitions for non-priority services with a cross-frontier element are "subject to the fundamental rules of the European Union, in particular to the principles laid down by the Treaty on the Functioning of the European Union (TFEU) on the right of establishment and the freedom to provide services", see Case C-226/09 *The European Commission v. Ireland* paragraph 29. One of the implications thereof is that the principle of equal treatment and consequent obligation of transparency apply to the non-priority services, see paragraph 34 of the ruling.

(69) AtB contends that there was no cross-frontier element in the procurement in our case. I disagree. The contract value of NOK 500 million alone suggests that the contract was interesting to tenderers also outside of Norway.

(70) The "Remedies Directive" – Directive 89/665/EEC – lays down obligations to ensure compliance with the rules on public procurement in Directive 2004/18/EC. Since water transport is a non-priority service, the Procurement Directive – and thus also the Remedies Directive – will have a limited effect on these services, see Norwegian Official Report 2010: 2 Enforcement public procurements, item 11.2.1. However, the Committee has pointed out in item 11.2.2 of the report that, under Norwegian law, the non-priority services were already comprised by rules as the ones set out in the general provisions in the Remedies Directive:

> **"The starting point must be that the general provisions in Articles 1 and 2 of the Remedies Directive, for instance that the review procedures must be effective and rapid and that it should be possible to seek compensation, are applicable to non-priority services. These provisions are already implemented into the current set of rules."**

(71) I thus conclude that the fundamental rules in the Remedies Directive – including those regulating damages – also apply to the relevant non-priority service. It is thus unnecessary to elaborate further on which other parts of the Remedies Directive are applicable as the procurement concerned a non-priority service with a cross-frontier element.

(72) The mechanisms of the Remedies Directive are to ensure transparency and equal treatment and provide access to effective and rapid remedies, see recital 7 in the preamble. Furthermore, recital 10 sets out that persons harmed by any infringement of the public procurement rules will be entitled to compensation. Article 2(1) provides the requirements for domestic law:

> **"Requirements for review procedures**
> **1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:**
>
> **a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;**
>
> **b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;**
>
> **c) award damages to persons harmed by an infringement."**

(73) A crucial matter in the case at hand is what requirements Article 2(1)(c) places on Norwegian tort law. At the outset, the Directive's provisions on damages are not harmonised, see for instance Fosen I paragraph 69. It is emphasised that Article 2(1)(c) requires EEA States to take the measures necessary to ensure that persons harmed by an infringement may be awarded damages, but that no conditions for the award of damages are laid down. The same is expressed in Fosen II paragraph 111:

> **"… neither Article 2(1)(c) nor any other provision of the Remedies Directive lays down specific conditions for the award of damages, which encompass specific heads of damage and the standard of liability in particular."**

(74) As a consequence, it is up to each EEA State to determine the content of the rules on awarding damages, see Fosen I paragraph 70:

> **"Therefore, in the absence of EEA rules on this matter it is for the legal order of each EEA State, in principle, to determine the criteria on the basis of which harm caused by an infringement of EEA law on the award of public contracts must be assessed. The national rules laying down these conditions must nevertheless comply with the principles of equivalence and effectiveness."**

(75) The principles of "equivalence and effectiveness" to which the EFTA Court refers, has resulted in certain minimum conditions to be met by domestic tort law in order to comply with EEA law. The requirement of equivalence implies that the rules on awarding damages for infringement must not be less favourable than those governing similar domestic actions, and they must not render it practically impossible or excessively difficult to submit the claim, see Fosen II paragraph 114. One of the implications is that a person harmed by an infringement of public procurement law should "in principle" be able to seek compensation for loss of profit, see Fosen I paragraph 90 and Fosen II paragraphs 115 and 116.

(76) With reference to, inter alia, the principle of effectiveness, the CJEU and the EFTA Court have also laid down minimum conditions to be met for rules on awarding damages where an EEA State has breached its obligations under EEA law, see the combined cases C-6/90 and C-9/90 *Francovich* paragraphs 32-33. Compliance with the public procurement rules is part of the legal obligations of the EEA States. This means that the States' responsibility in the event of non-compliance with community rules in general is the same in the event of non-compliance with the public procurement rules. This is how I interpret Fosen II paragraph 117, which states:

> **"However, according to the principle of State liability, an EEA State may be held responsible for breaches of its obligations under EEA law when three conditions are met: firstly, the rule of law infringed must be intended to confer rights on individuals and economic operators; secondly, the breach must be sufficiently serious; and, thirdly, there must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured party."**

(77) It is clear that the public procurement rules relevant in the case at hand are rules "intended to confer rights on individuals and economic operators". The question here is whether these rules have been *infringed*, and if so, whether such infringement is *sufficiently qualified* – and with regard to the claim for damages for costs of bidding – whether there is a *causal link.* When it comes to liability for loss of profit, as already mentioned, the two latter issues will not be considered by the Supreme Court for the time being, see the Appeals Selection Committee's decision 15 October 2018.

(78) After now having placed the case in the context of EEA law, I will turn to the parties' contentions. I start with Fosen-Linjen's claim for damages for loss of profit – the positive contract interest.

(79) *Fosen-Linjen's claim for damages for loss of profit*

(80) Fosen-Linjen contends that the cancellation of the competition was an infringement of the relevant set of rules, forming a basis of liability for the positive contract interest. I will first assess whether an infringement actually took place.

(81) *Did AtB infringe the rules on public procurement when cancelling the competition?*

(82) According to section 13-1 subsection 1 of the then applicable Regulations on public procurement of 2006, the contracting authority could cancel a competition if such an act was committed on "justifiable grounds". The provision is maintained in section 10-4 subsection 1 of the current Regulations and must be considered in context with the fact that a duty to contract is normally not present, see Norwegian Official Report 1997: 21 Public procurement page 139. This implies that the consequence of cancellation on unjustifiable grounds can normally only be compensation. Tenderers cannot force the contracting authorities to enter into a contract.

(83) I mention that the right to cancel a tender procedure under EEA law appears more extensive than that under Norwegian internal law, see for instance C-27/98 *Fracasso* paragraphs 23 and 25 and C-440/13 *Croce Amica* paragraphs 31, 35 and 36. EEA law therefore offers no guidelines for the interpretation of section 13-1 subsection 1 of the Regulations.

(84) As for the further content of the criterion "justifiable grounds", it is set out in Norwegian Official Report 2014: Simpler rules – better procurement, item 26.2.1, that two conditions must be met: the very cause of the cancellation must be objective – the "objective condition" – and the contracting authority must not be to blame for not having predicted the relevant cause – the "subjective condition". If these conditions are met, the contracting authority will be free to cancel the competition without incurring liability.

(85) However, a distinction must be made between the right to cancel the award procedure under section 13-1 subsection 1 of the Regulations and the obligation to pay damages. There may be "justifiable grounds" for cancelling the tender procedure even if the contracting authority has made an error. As the EFTA Court emphasises in Fosen I paragraph 106, situations may arise where cancellation appears to be the only reasonable solution:

> **"There may be instances, for example, in which a procedural defect may only reasonably be remedied by cancelling the tender competition and conducting it anew, in order to comply with the principles of equal treatment, transparency and open competition…**"

(86) According to Supreme Court case law, the decisive factor in the overall assessment that must be carried out, is whether there were justifiable grounds for the cancelling of the tender procedure, see the judgment Rt-2007-983 *SB Transport* paragraph 91, which, in turn, refers to the Appeals Selection Committee's decision in Rt-2001-473 *Concordia*. In my view, an overall assessment means that both subjective and objective factors may be considered – to use the terminology of the Norwegian Official Report – as long as they are justifiable. Disloyal intentions, such as inviting to a competition only to test the market and without the intention of awarding any contract, will not constitute justifiable grounds for cancelling.

(87) The overall assessment of the situation in the case at hand shows, in my view, that AtB had justifiable grounds for cancelling the competition.

(88) When AtB cancelled the tender procedure, the Court of Appeal had, during the interim measure process, pointed out two errors in the competition. Although AtB did not agree with the Court of Appeal's ruling, it created legal uncertainty nonetheless with regard to the lawfulness of the process. That uncertainty alone, on such a major issue, must be considered to constitute justifiable grounds for cancelling a competition.

(89) In addition, I consider it to be an error that the award criterion "environment" was not

accompanied by adequate documentation requirements. That error also gave AtB justifiable grounds for cancelling the tender procedure, which means that AtB had a double reason for cancelling.

(90) The contracting authority may require that the service have certain environmental qualities, see for instance section 13-2 subsection 2 of Regulations on public procurement. Any award criterion must, however, be objectively verifiable. Relevant case law includes Case C-448/01 *Wienstrom*. Here, the CJEU establishes that the principle of equal treatment, and thus the requirements of objectivity and transparency, depends on the contracting authority's ability to verify whether the award criteria are met based on the information provided, see paragraphs 49–50. An award criterion that does not contain requirements which permit efficient verification of the information provided, is contrary to EEA law, see paragraph 52.

(91) This documentation requirement had not been directly expressed in the written set of rules, neither in the Directives nor in the Norwegian Regulations. However, a handbook on public procurement rules issued by the Ministry of Renewal and Administration on 30 November 2006 item 15.1, presented the requirement set out in *Wienstrom* under the heading "Documentation requirements for award criteria":

> **"The CJEU has expressed that the contracting authority cannot use award criteria containing documentation requirements that cannot be verified. The award criteria must render it possible for the contracting authority to assess the tender thoroughly and appropriately…"**

(92) In my view, it is clear that the award criterion "environment", as it was presented in AtB's tender specification, did not meet the requirements set out in *Wienstrom*. As mentioned, it contained no requirement of documentation for the fuel oil consumption.

(93) Admittedly, it follows from Fosen I paragraph 123 that a tender must be viewed as a whole, and that a contracting authority may take into account any documentation in a tender, not only information provided as documentation for an award criterion. However, the assumption is that all tenderers are given equal treatment. I add that, in order to avoid misunderstandings and maintain predictability for the tenderers, caution should be exercised when it comes to using information provided with one purpose only, when evaluating a different point in the tender. I find nonetheless that the tender must be viewed as a whole.

(94) The parties agree that the most crucial parameters for the fuel oil consumption are hull resistance, propulsion effect level, choice of motor, electrical and mechanical transfer loss, hotel load – i.e. the power consumption of the help systems such as ventilation, cooling, heating, pumps etc. – and weather and wind conditions on the relevant sea route. Fosen-Linjen has argued that the tender provided various information that could form the basis for evaluating the fuel oil consumption.

(95) In my view, the information requested was not adequate to form a basis for objective and appropriate verification. The experts that have assisted the parties in the proceedings have had to estimate the energy demand based on, inter alia, information in the tender provided for other purposes. For example, conclusions have been drawn on fuel oil consumption based on GA drawings requested in the tender specification to enable the contracting authority to assess to which extent the requirements of a universal design would be met. Furthermore, the experts have based themselves on what is standard for this type of vessels, and not on the specific information regarding the vessels offered.

(96) Fosen-Linjen has referred to the testimony of its managing director in the Court of Appeal explaining how Fosen-Linjen estimated the stated fuel oil consumption. It is clear that a number of factors were considered. However, these considerations and estimates were not requested in the tender specification, and could therefore not form a basis for objective and appropriate verification.

(97) AtB's response to the tenderers' request for a documentation requirement was to include a remedy for breach in the contract, see my introduction. AtB acknowledges that the penalty charge was too low to constitute an efficient remedy for the lacking documentation requirement. A powerful contractual sanction for breach would have given the tenderers an incentive to provide correct estimates, since they would be exposed to that penalty if they won the contract. Penalties may thus be a more appropriate tool to obtain trustworthy information from the tenderers. However, the purpose of a procurement process is to identify the best tender. The purpose of penalties, on the other hand, is to avoid the consequences of breach, and will only have indirect – and uncertain – effects on the tender.

(98) The EFTA Court's response in Fosen I to Frostating Court of Appeal's question on whether a contractual penalty may substitute the requirement of effective verification, does not suggest that a penalty will be satisfactory, see paragraphs 111 and 120-123. Since the sanction for breach in this case was in any case inadequate, I will not elaborate further on this issue.

(99) Fosen-Linjen has stated that in order to provide objective and transparent information, the vessel would have had to be projected before the tender was submitted. This would have demanded considerable efforts and interfered with the principle of proportionality. I agree that the contracting authority must chose reasonable award criteria. It is possible that the criterion "environment" in this competition should have been linked to other parameters than fuel oil consumption. However, this contention does not contribute to making the relevant criterion valid.

(100) In light of the situation at the time of cancellation, I cannot see that AtB had other means of correcting the error in the tender specification than cancelling. Cancellation gives an opportunity to start all over again, and thus to mitigate the error to some extent. It is not necessary for me to consider whether AtB, here, had an obligation to cancel the tender. It is sufficient to establish that there were clearly justifiable grounds for doing so.

(101) However, Fosen-Linjen argues that the lawfulness of the cancellation must be assessed based on the reasons given by AtB for cancelling the tender. Rather than stating in the letter notifying the participants of the cancellation that the award criterion "environment" had been unlawfully formulated, AtB merely referred to the errors that the Court of Appeal found that AtB had committed in the interim measure case.

(102) I do not agree that the assessment of justifiable grounds can only be based on the arguments given by the contracting authority at the time of cancellation. In any case, I find that the errors found by the Court of Appeal were closely linked to the unlawful formulation of the award criterion "environment". The lack of a proper basis for evaluating the documentation – an objective and appropriate verification – constitutes the heart of both errors detected by the Court of Appeal. In addition, and as already mentioned, I find that the legal uncertainty created by the interim measure case *alone* justified the cancellation.

(103) However, the fact that the cancellation in this case was justifiable does not mean that the errors leading to the cancellation cannot form a basis of liability. However, it means that neither of the tenderers may seek compensation for loss of profit. Fosen-linjen's appeal against the Court of Appeal's ruling with regard to damages for the positive contract interest should thus be dismissed.

(104) *Is there a basis of liability for the costs of bidding – the negative contract interest?*

(105) As I have demonstrated, AtB committed an error by not specifying requirements of documentation in the award criterion "environment". The question is whether this may constitute a basis of liability for Fosen-Linjen's costs of bidding.

(106) I will first consider which standard of liability applies.

(107) The Act applicable at the time of the competition – the Public Procurement Act of 16 July 1999 no. 69 – contains provisions on damages in section 11:

> **"In the event of breach of this Act or Regulations issued in accordance therewith, the claimant is entitled to damages for the loss he has suffered because of the breach."**

(108) The wording does not indicate which standard of liability applies. However, according to Proposition to the Odelsting no. 71 (1997–1998) chapter 13, the starting point is general, non-statutory tort law. Strict liability for "any fault committed" is rejected.

(109) According to case law, there are different standards of liability for loss of profit and costs of bidding. When it comes to damages for the latter, which is the issue here, a reference is made in the Supreme Court judgment in Rt-1997-574 *Firesafe* page 577 to the "general principles of tort law". I take the starting point to be the general basis for non-contractual liability, i.e. the duty of care.

(110) As I have already accounted for, domestic law must meet the minimum requirements that follow from EEA law. When it comes to the substance of the standard of liability under EEA law, the EFTA Court seems, in Fosen I paragraph 82, to lay down strict liability by stating that a simple breach of public procurement law in itself is sufficient to trigger the liability of the contracting authority. However, this is nuanced in Fosen II paragraph 120, where it is set out that a standard that requires a "sufficiently qualified breach" is considered compatible with EEA law.

(111) Fosen-Linjen contends that the EFTA Court in Fosen I finds that strict liability exists, and that Fosen II does not change the standard of liability for the costs of bidding. It is argued that the Supreme Court's question to the EFTA Court – constituting the background for Fosen II – related to the basis of liability for the positive contract interest. Against this background, Fosen-Linjen holds that the EFTA Court, in Fosen II, only responded to the issue of damages for loss of profit. AtB, in turn, holds that Fosen I has been abandoned in Fosen II, also with regard to the standard of liability for to the costs of bidding.

(112) Fosen I distinguishes, as far as I can see, between damages for costs of bidding and damages for loss of profit in two contexts: Firstly, in the discussion of causation and the standard of proof for causation, where the standard of liability is not mentioned, and secondly, in the discussion of the types of loss for which compensation may be sought. The requirement of

effectiveness implies that it "in principle" must be possible to seek compensation for loss of profit, see Fosen I paragraph 90. Also here, the standard of liability is left out. In the discussions of the requirement of a basis of liability, no distinction is made between loss of profit and costs incurred.

(113) The response from the EFTA Court in Fosen II also emphasises that the requirement of effectiveness means that it must "in principle" be possible to seek compensation for loss of profit – i.e. that this type of loss cannot be completely excluded, see paragraphs 115 and 116. Apart from that, Fosen II does not seem to distinguish between the two types of loss. The assessment of the basis of liability is general and refers to the same sources of law as those referred to by the EFTA Court in Fosen I. Like in Fosen I, the type of loss does not appear to have had an effect on the minimum requirements for the standard of liability.

(114) When considering relevant CJEU case law on which Fosen II is based, including Case C-314/09 *Strabag* and C-568/08 *Combinatie*, the requirements presented for basis of liability seem to apply irrespective of which loss is demanded compensated. *Combinatie* in particular is discussed more thoroughly in Fosen II than in Fosen I. The lack of a distinction in *Combinatie* between the types of loss implies that Fosen II lays down a different standard of liability than Fosen I, and differs from Fosen I not only with regard to loss of profit. My conclusion is therefore that the standard of liability deriving from Fosen II applies as a general minimum – also with regard to the standard of liability in connection with claims for damages for costs of bidding.

(115) The principle of effectiveness under EEA law implies that the basis of liability cannot be conditional on a finding and proof of fault or fraud, see Fosen I paragraph 75 and Fosen II paragraph 118. But as emphasised in Fosen II paragraph 119 with a reference to the CJEU ruling in Joint Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* paragraphs 78 and 79, this does not mean that certain factors that are relevant in the assessment of fault under a national legal system cannot also be relevant in the assessment of whether a "sufficiently qualified breach" has occurred:

> **"This does not mean that certain objective and subjective factors connected with the concept of fault under a national legal system cannot be relevant in the assessment of whether a particular breach is sufficiently serious. However, the obligation to make reparation for loss or damage caused to individuals cannot depend on a condition based on any concept of fault going beyond that of a sufficiently serious breach of EEA law."**

(116) In the further assessment of the Norwegian standard of liability, the minimum requirements under EEA law must be met. Since EEA law requires that award of damages cannot be subject to establishing fault, the traditional view that a claim for damages for costs must be based on liability for negligence, cannot be fully upheld, see Fosen I paragraph 77, Fosen II paragraph 118 and Case C-314/09 *Strabag* paragraph 39. I cannot see that Norwegian law may be interpreted to contain a more far-reaching responsibility for the contracting authority than that set out in EEA law. In my view, the consequence must be that the minimum requirement under EEA law – the requirement of a "sufficiently qualified breach" – replaces the traditional concept of duty of care.

(117) As pointed out in Fosen II paragraph 119, subjective and objective factors connected with the concept of fault under our national legal system may nonetheless be relevant, but the standard of liability must not go beyond that of a "sufficiently serious breach". This does not imply that the standard can be characterised as stricter or milder than what follows from the duty of care

under Norwegian law, but that the assessment may differ to some extent.

(118) As for the content of the standard of liability, AtB and the State contend that a "sufficiently qualified breach" implies that the breach must be manifest and grave with reference to the Supreme Court judgment Rt-2008-1705 *Traffic and Construction* paragraphs 54-56. Fosen-Linjen, in turn, contends that the liability under EEA law in a case like ours, where the contracting authority is not free to exercise discretion, is essentially strict.

(119) The following is stated in the CJEU judgment in Joint Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* about the standard of liability in paragraph 55:

> **"... the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion."**

(120) Where public authorities may exercise discretion, a breach will be sufficiently qualified only when it is manifest and grave. As pointed out by Halvard Haukeland Fredriksen in *Offentligrettslig erstatningsansvar ved brudd på EEA avtalen* [Liability of public authorities in connection with breach of the EEA Agreement], pages 239–242 and 273–277, the CJEU seems to practice "manifest and grave" as the ultimate subject criterion in cases where a member state has wide discretion, and particularly in a field in which it has wide discretion to make legislative choices. He is therefore of the opinion that one should be careful about using "manifest and grave" as the general criterion for establishing whether a breach of EEA law is "sufficiently qualified".

(121) I concur with these views, but find that the factors listed in *Brasserie du Pêcheur* in paragraph 56 are nonetheless relevant:

> **"The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any fault of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law."**

(122) This quote, as well as the subsequent CJEU and EFTA Court case law, does not provide a basis for establishing two separate standards of liability. Halvard Haukeland Fredriksen emphasises the following in *Offentligrettslig erstatningsansvar ved brudd på EEA avtalen*, page 242:

> **"On the contrary, it is a question of placing the public authorities' leeway in the individual case on 'sliding scale' from wide to no discretion."**

(123) There is no sharp distinction between rules allowing discretion and rules with unclear limits. In the assessment of liability, it is relevant whether the rule in question was clear and precise. It is also worth noting that the factors emphasised in the quote from *Brasserie du Pêcheur* are largely relevant in the assessment for establishing negligence under Norwegian internal law.

(124) I base my assessment of whether AtB's infringement was "sufficiently qualified" on the view that the rule in question was clear. Following *Wienstrom*, there was no doubt that appropriate documentation requirements had to be included in the award criteria. However, this was not directly laid down in Norwegian written rules or in the directives. CJEU case law is not easily

accessible to ordinary contracting authorities without special expertise in the field. On the other hand, it is clear that a contracting authority cannot be excused due to its lack of knowledge, see Case C-424/97 *Haim* paragraph 28:

> **"Member States cannot, therefore, escape that liability either by pleading the internal distribution of powers and responsibilities as between the bodies which exist within their national legal order or by claiming that the public authority responsible for the breach of Community law did not have the necessary powers, knowledge, means or resources."**

(125) As already mentioned, the rule was stated in the handbook from the Ministry of Renewal and Administration of 30 November 2006, and was to some extent mentioned in legal theory at the time the competition was announced. Yet, the complexity of the set of rules suggests that one should be careful about imposing liability for error of this kind.

(126) When I find that liability may be imposed for the costs of bidding in the present case, it is because AtB on two occasions during the course of the competition received questions creating doubt as to the lawfulness of the award criterion. The questions should have made AtB contemplate on how to make an objective and verifiable evaluation of the fuel oil consumption. The penalty charge stipulated was not adequate for the purpose. This, together with the consequences the error had for the competition, makes me conclude that a "sufficiently qualified breach" has been committed. Thus, there is a basis of liability in the claim for damages for the costs of bidding.

(127) The next question is thus whether there is a causal link between AtB's infringement and Fosen-Linjen's costs of bidding.

(128) *The requirement of a causal link with regard to negative contract interest*

(129) When a tenderer starts preparing its bid, it is generally uncertain whether the work will pay off – in the sense that it may not be awarded the contract. Only the tenderer that wins will be rewarded for its efforts – the costs will be wasted for everyone else. The contracting authority's omissions during the process will normally not change this. If the contracting authority could succeed with arguing that the tenderers must anticipate that the costs of bidding are wasted and that there is no causal link, it would imply that the contracting is liable for such costs only exceptionally.

(130) Norwegian Official Report 1997: 21 Public procurement item 11.4.3, describes two ways of formulating the requirement of a causal link:

> **"Not any infringement of the tender rules can trigger liability. Relevant causation must be a requirement. A possibility is to lay down a requirement of causation between the error and the participation in the competition. The question is then whether the tenderer would have participated in the competition if he had known about the future procedural error. Another possibility is to look at the general rules on award of damages for procedural errors. These general rules have been expressed in section 41 of the Public Administration Act and section 384 of the former Dispute Act, among other places. The crucial factor is whether the error has affected the outcome of tender. The principles may probably be applied cumulatively."**

(131) The first approach is the one used in the Supreme Court judgment in Rt-1997-574 *Firesafe*. Here, the question of a causal link was formulated as a question of whether the tenderer would have submitted its bid if it had known about the error of the contracting authority. AtB argues that the statements in *Firesafe* are exclusively linked to the situation at issue. I disagree. I read

the statements as a concrete expression of the requirements of a causal link as set out in the Norwegian Official Report, and believe that the same approach would be correct in the present case.

(132) To me, it is clear that Fosen-Linjen would not have participated in the competition if it had known that it would be cancelled due to an error in the tender specification.

(133) However, AtB contends that the error in our case was apparent, and that Fosen-Linjen as a result is not entitled to damages; they chose to submit an offer despite being aware that no documentation was required in the environment criterion. Reference is made to Sweden and Denmark, where damages will not be awarded in such cases. When it comes to Danish law, the review by Jesper Fabricius of case law from the Danish appeal system in *Offentlige indkjøb i praksis* [public procurement in practice] fourth edition, shows that damages are rarely awarded for errors in the tender specification. He summarises the status of the law as follows on pages 832–833:

> **"The general rule is that if the tender specification is in conflict with the tender rules with the consequence that a contract based on the tender specification cannot be lawfully awarded, a tenderer will as an overriding general rule not be entitled to compensation for its loss."**

(134) It is further specified that this at least applies to damages for loss of profit. However, the discussion of compensation for costs of bidding on page 841 displays a more nuanced approach:

> **"There are also cases where a tenderer has been awarded damages for negative contract interest, despite the breach being detectable from the tender criteria, provided however that the breach was not easily detectable…"**

(135) Also under Norwegian law, it must be so that if tenders are submitted despite the fact that the tenderers have – or ought to have – detected error in the tender specification, there is normally no causal link to the loss. Limitation of liability may also be laid down based on considerations of contribution.

(136) In a case such as the one at hand, where AtB itself considered the tender specification to be adequate – although the error was pointed out twice during the competition – I find it difficult to exclude a causal link.

(137) AtB has pointed out, as a policy consideration, the highly unfortunate consequences if a tenderer detecting an error chooses not to address it with the contracting authority, but instead awaits the outcome of the competition. If the contract is lost, the tenderer might use the error as an objection to the competition, for instance as a basis for claiming damages. I agree that this will be unfortunate. AtB has mentioned that other countries have preclusion rules to avoid this type of situations. In my opinion, it would be the legislature's task to introduce similar rules in Norway.

(138) *Calculation of loss – to which extent the costs of bidding may be compensated*

(139) Fosen-Linjen has claimed damages of a total of NOK 2 million, primarily for work related to class drawings and a model tank. The amount is documented in an invoice from Sawicon AS. The payment amounts to NOK 785 919. AtB contends that the amount is unforeseeably high.

(140) The amount is indeed high, but considering the fact that AtB asked for fuel oil consumption numbers, it had to be expected that Fosen-Linjen would incur this type of costs. I do not see any reason to reduce this amount.

(141) Fosen-Linjen has also claimed payment of an invoice from Lighthouse Finance AS of NOK 100 000. The amount is not disputed.

(142) Costs are also claimed for legal advice. The costs are documented in invoices and amount to NOK 455 049. AtB contends that this amount, too, is unforeseeably high. However, the proceedings in the Supreme Court have not given me sufficient grounds to assess the validity of this objection, and I therefore assume, like the Court of Appeal, that the amount is fully recoverable.

(143) Fosen-Linjen also claims payment of invoices from Grøntvedt Invest AS for the hiring of Bjørnar Grøntvedt during the period January 2013 to April 2014. The invoices amount to NOK 240 000. In addition, Fosen-Linjen claims an estimated mark-up of NOK 419 032 for Grøntvedt's work. The mark-up is not further documented. The Court of Appeal reduced the documented costs by 50 percent, since Grøntvedt had performed other tasks apart from preparing the tender to AtB, and awarded NOK 120 000 for this item. The Court of Appeal also considered it substantiated that Fosen-Linjen had incurred extra costs of NOK 39 082. I find no reason to conclude otherwise.

(144) Overall, I find – like the Court of Appeal, that Fosen-Linjen should be awarded damages of NOK 1.5 million.

(145) Fosen-Linjen has claimed interest from 30 days after the claim was submitted, see section 2 of the Default Interest Act. On 4 March 2015, Fosen-Linjen demanded payment of the full costs to Sawicon AS and Lighthouse Finance AS, in total NOK 885 819, in addition to legal fees of NOK 170 000. These amounts are awarded in full with interest from 3 April 2015. Payment of NOK 500 000 for administrative work is also claimed. Out of this, NOK 159 082 is awarded with interest from 3 April 2015. This constitutes a total of NOK 1 214 901 of the awarded damages.

(146) In a pleading 31 July 2015, it was announced that the costs of bidding amounted to approximately NOK 2 million. This amount is not further specified. Interest is calculated on the remaining amount of NOK 285 099 from 30 days after this date.

(147) *Costs*

(148) In an overall perspective, the case is partially won and partially lost by both parties, see section 20-2 subsection 2 second sentence of the Dispute Act. Admittedly, Fosen-Linjen has lost on a point where the disputed amount is much larger than the amount awarded, but when considering on which issues the case has been most legally significant, the parties have succeeded in equally large parts. Costs will therefore not be awarded.

(149) I vote for this

J U D G M E N T :

1. In the Court of Appeal's judgment, item 1 of its conclusion, the change is made that AtB AS pays damages to Fosen-Linjen AS of NOK 1 500 000 – onemillionfivehundredthousand – with the addition of default interest from 3 April 2015 on NOK 1 214 901 – onemilliontwohundredandforteenthousandninehundredandone – and default interest from 30 August 2015 on NOK 285 099 – twohundredandeightyfivethousandandninetynine – until payment is made. Performance is to take place within 2 – two – weeks of the service of this judgment.

2. Costs in the Supreme Court are not awarded.

(150) Justice **Noer**: I have arrived at the same result as Justice Webster, but my view differs to some extent with regard to the requirement of a causal link in the claim for damages for the costs of bidding – i.e. the negative contract interest.

(151) The starting point is that there is a causal link between an error and a loss if the loss would not have occurred if the error had not been committed.

(152) This starting point implies that it is normally only the tenderer that would have had a realistic chance of winning the contract if the error had not been committed, that may claim damages. For other tenderers, the costs of participating would in any case have been wasted. However, these tenderers, too, may seek compensation if it is substantiated that they would not have participated in the competition if they had been aware of the situation that constituted the error. Reference is made to the Supreme Court judgment in Rt-1997-574 *Firesafe*, where this issue was dealt with.

(153) Sometimes, the error itself is of such a nature that all tenderers are entitled to damages. An example of that are fictitious tender invitations, see *Firesafe* page 578. One may hold that the error here is that a competition was announced in the first place. Without the error, there would have been no tender procedure, and no costs of bidding would have been incurred. Hence, there is also a causal link.

(154) The case at hand does not deal with a situation like that. As mentioned, in a situation like ours, there is normally only a causal link between the error and the loss for the tenderer that otherwise had a realistic chance of winning the contract. I refer to Norwegian Official Report 1997: 21 quoted by Justice Webster in paragraph 130, which establishes that the causal link assessment may also be based on whether "the error has affected the choice of tenderer". The same considerations are relevant under Swedish law. Damages for costs of bidding may here only be awarded when "a breach of the provisions of this Act has adversely affected the tenderer's ability to be awarded the contract", see section 20 subsection 2 of Act (2016:1145) on public procurement.

(155) However, it is not necessary for me to further discuss what is required under Norwegian law for a tenderer that would not in any case have succeeded in the competition to be entitled to damages for costs of bidding following a cancellation.

(156) As for the general conditions for awarding damages for costs of bidding following a cancellation, Justice Webster states that there will not be a causal link if the tenderer detects, or ought to have detected, an error in the tender specification and submits a tender

nonetheless. I agree, but I believe that this demarcation should be clarified in two respects. First, I believe that the assessment must start with the tenderer's knowledge of *the facts that constitute the error*, and second, that the assessment depends on how a *normally diligent tenderer* would have acted.

(157) The outcome of the assessment must depend on a balancing of interests. The tenderer must as a starting point be able to trust that the information in the tender specification is correct. The tenderer should not be the one to suffer from errors committed by the contracting authority. On the other hand, it is a fundamental consideration in procurement law that possible errors must be addressed and corrected as soon as possible. No one should benefit from being silent about irregularities and submitting a claim for damages after the competition has ended.

(158) In our case, no requirements were made for documentation for the fuel oil consumption. This was visible to the tenderers. In my view, an objective assessment of causation must then be made. The question remains whether a reasonably diligent tenderer should have reacted, either by ensuring clarification of the tender specification or by refraining from the competition. If the answer is yes, the tenderer that nonetheless chooses to participate has no reason to claim full damages.

(159) I find that my view is supported in Fosen I paragraph 103:

> **"Other factors may, however, be relevant for the assessment of a claim for compensation for the costs of bidding, such as whether a reasonably well-informed tenderer of normal diligence showed ordinary care in the preparation of the bid, or whether the tender was submitted in good faith. However, these factors must not make it impossible or excessively difficult for a claimant to obtain compensation for the costs of bidding."**

(160) In my view, also *Firesafe* shows that in the assessment of causation, one must first determine whether the tenderer was aware of the facts that constituted the error. On page 578 of the judgment, the Supreme Court asked whether the tenderers would have submitted their tenders "if they knew that they had to compete with Firesafe". The crucial point was thus not whether the tenderers would have participated if they had known that the contract would be awarded on an incorrect basis.

(161) Finally, I mention that the subject of review would be different if the issue constituting the error was not detectable at the time the tender specification was prepared. However, that is not the case here, so I will leave it at that.

(162) As for the result in the case at hand – namely Fosen-Linjen's claim for damages for the negative contract interest – I agree with Justice Webster.

(163) Justice **Kallerud**: I agree with Justice Webster in all material respects and with her conclusion.

(164) Justice **Bull**: Likewise.

(165) Justice **Matningsdal**: Likewise.

(166) Following the voting, the Supreme Court gave this

J U D G M E N T :

1. In the Court of Appeal's judgment, item 1 of its conclusion, the change is made that AtB AS pays damages to Fosen-Linjen AS of NOK 1 500 000 – onemillionfivehundredthousand – with the addition of default interest from 3 April 2015 on NOK 1 214 901 – onemilliontwohundredandforteenthousandninehundredandone – and default interest from 30 August 2015 on NOK 285 099 – twohundredandeightyfivethousandandninetynine – until payment is made. Performance is to take place within 2 – two – weeks of the service of this judgment.

2. Costs in the Supreme Court are not awarded.