
Eastern High Court reverses decision in cartel case

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The Eastern High Court has reversed the judgment given by the Court of Odense, acquitting the contractors Jorton A/S and H. Skjøde Knudsen A/S of charges of breach of the cartel rules in the Danish Competition Act by exchanging information about prices and terms when they tendered for three contracts in a so-called “price lending” arrangement.

Judgment of 7 January 2019 by the Eastern High Court - the prosecution vs H. Skjøde Knudsen A/S and Jorton A/S
By assistant attorney Maria Gartenmann

Judgment by the Court of Odense

In December 2018, the Court of Odense acquitted the contractors H. Skjøde Knudsen A/S and Jorton A/S and two of their senior employees who had been charged with violation of the Competition Act i.a. by exchanging tender prices - an thus engaging in bid rigging - in connection with three tender calls.

The Court of Odense noted that the prosecution had not produced sufficient evidence to prove that the exchange of prices - which was a price lending arrangement - had as its object or effect to restrict competition.

For a more detailed review of the case, [read our previous news article](#).

Appeal to the Eastern High Court

The decision was appealed to the Eastern High Court, which has now delivered its judgment. Unlike the Court of Odense, the Eastern High Court found that the contractors, by exchanging information about prices and certain terms and by rigging their bids for these contracts in accordance with this information, had violated the Competition Act.

Exchange of emails

In its decision, the High Court gave particular weight to the contents of the emails that had been exchanged between senior employees of the two contractors. It appeared from the emails that the parties had exchanged price schedules for the purpose of tendering for the relevant contracts. Unlike the Court of Odense, the High Court did not find it important that the information had been exchanged a couple of hours before expiry of the tendering deadline, or that the tender prices submitted were in all cases higher than the prices that had been exchanged between the two firms.

The practice had as its object to restrict competition

The High Court found that the contractors’ practice had as its direct or indirect object to restrict competition, having effectively caused one of the contractors to refrain from bidding. This contractor had merely submitted a bid with a high total price to ensure that it would not be the lowest price, but would still appear realistic.

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Accordingly, the High Court concluded that the contracting authority had been misled, being confident that a competitive bidding process had taken place between a large number of bidders.

Fines - but no imprisonment

The High Court fined H. Skjøde and Jorton DKK 2 million and DKK 3 million, respectively. The two senior employees were fined DKK 75,000 and DKK 50,000, respectively.

With the High Court judgment, the first example of a court granting the Prosecution's request for imprisonment for violation of the cartel prohibition is still to be seen.