Award of public contracts: improving the effectiveness of review procedures

2006/0066(COD) - 21/06/2007 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted the resolution drafted by Jean-Claude **FRUTEAU** (PES, FR), and made some amendments to the proposal amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts. Parliament reached agreement with the Council before the first-reading vote in plenary.

The main points are as follows:

Standstill period: the Commission had proposed that, under the "standstill" clause, authorities must suspend the conclusion of an awarded public contract for at least 10 days from the date when the contract award decision is sent to relevant tenderers. MEPs voted to retain this minimum period in cases where such notification is made by fax or electronic means. In instances where notification is made by other means, however, it extended it to 15 days. Accordingly, the text now states that a contract may not be concluded following the decision to award a contract before the expiry of a period of at least 10 calendar days with effect from the day after the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of at least 15 calendar days with effect from the day after the date on which the contract award decision is sent to the tenderers and candidates concerned. In the latter case, Member States may also provide that a contract shall not be concluded before the expiry of at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Derogations: the standstill period is not intended to apply if Directive 2004/17/EC or Directive 2004/18 /EC do not require prior publication of a contract notice in the OJ, in particular in all cases of extreme urgenc. In those cases it is sufficient to provide for effective review procedures after the conclusion of the contract. Similarly, a standstill period is not necessary if the only tenderer concerned is the one who is awarded the contract and there are no candidates concerned. Finally, in cases of contracts based on a framework agreement or a dynamic purchasing system, Member States may, instead of introducing a mandatory standstill period, provide for ineffectiveness as an effective sanction in accordance with certain provisions of the legislation. In certain cases, contracts based on a framework agreement do not require prior publication of a contract notice in the OJ, and in those cases a standstill period is not mandatory.

Ineffectiveness: in order to prevent the serious infringements of the standstill obligation and the automatic suspension, which are prerequisites for effective review, effective sanctions must apply. Contracts that are concluded in breach of the standstill period or the automatic suspension will therefore be considered ineffective in principle if they are combined with infringements of Directive 2004/18/EC or Directive 2004 /17/EC to the extent that these infringements have affected the chances of the tenderer applying for a review to obtain the contract. In the case of other infringements of formal requirements Member States might consider the principle of ineffectiveness to be inappropriate. In those cases Member States will have the flexibility to provide for alternative penalties. The latter will be the imposition of fines which should be paid to a body independent of the contracting authority or a shortening of the duration of the contract. It is for Member States to determine the details of alternative penalties and the rules of their application. The Directive does not exclude the application of stricter sanctions according to national law.

The consequences resulting from a contract being considered ineffective will be determined by national law.

In order to ensure the proportionality of the sanctions applied, Member States may give the body responsible for review procedures the possibility of not jeopardising the contract or of recognising some or all of its temporal effects, when the exceptional circumstances of the case concerned require certain overriding reasons relating to a general interest to be respected. In those cases alternative penalties should be applied instead. The independent review body should examine all relevant aspects in order to establish whether overriding reasons relating to a general interest require that the effects of the contract should be maintained. In exceptional cases the use of the negotiated procedure without publication of a contract notice within the meaning of Directive 2004/18/EC or Directive 2004/17/EC would be permitted immediately after the cancellation of the contract. If in those cases, for technical or other compelling reasons, the remaining contractual obligations can, at that stage, only be performed by the economic operator which has been awarded the contract, the application of overriding reasons might be justified. Economic interests in the effectiveness of a contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences. However, economic interests directly linked to the contract concerned should not constitute overriding reasons. Furthermore, the need to ensure over time the legal certainty of the decisions taken by contracting authorities and contracting entities requires the establishment of a reasonable minimum period of limitation on reviews seeking to establish that the contract is ineffective and to ensure that consequences follow from that.

Illegal direct awards of public contracts: this is the most serious infringement of EU procurement law. Therefore a contract resulting from an illegal direct award should be considered ineffective in principle. The ineffectiveness should not be automatic but should be ascertained by a decision by an independent review body. Ineffectiveness is the most effective way to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunities to compete.

Implementation of the Directive: The Commission may request the Member States, in consultation with the Committee, to provide it with information on the operation of the national review procedures. The Member States shall communicate to the Commission on a yearly basis the text of all decisions, together with their reasoning, taken by their review bodies

Review: No later than three years after implementation of this Directive the Commission shall review its implementation and report to the European Parliament and to the Council on its effectiveness, in particular on the effectiveness of the alternative penalties and the time limits.