Award of public contracts: improving the effectiveness of review procedures

2006/0066(COD) - 11/12/2007 - Final act

PURPOSE: to improve the effectiveness of review procedures concerning the award of public contracts.

LEGISLATIVE ACT : Directive 2007/66/EC of the European Parliament and of the Council 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.

CONTENT: the Council adopted at first reading, further to agreement reached with the European Parliament, a Directive amending Council Directives 89/665/EEC and 92/13/EEC (the “Remedies Directives”) with regard to improving the effectiveness of review procedures concerning the award of public contracts. Directives 89/665/EEC and 92/13/EEC are intended to ensure the effective application of Directives 2004/18/EC and 2004/17/EC. As a result of weaknesses revealed by the case law of the Court of Justice, the mechanisms established by Directives 89/665/EEC and 92/13/EEC did not always make it possible to ensure compliance with Community law, especially at a time when infringements could still be corrected. Consequently, the provisions of this Directive are intended to ensure that the Community as a whole fully benefit from the positive effects of the modernisation and simplification of the rules on public procurement achieved by Directives 2004/18/EC and 2004/17/EC. The weaknesses noted included in particular the absence of a period allowing an effective review between the decision to award a contract and the conclusion of the contract in question. This sometimes resulted in contracting authorities which wished to make irreversible the consequences of the disputed award decision proceeding very quickly to the signature of the contract. In order to remedy this weakness, which is a serious obstacle to effective judicial protection for tenderers who had not been definitively excluded, the Directive provides for a minimum standstill period.

The main points are as follows:

-Minimum standstill periods: the Directive provides a minimum standstill period during which the conclusion of the contract in question is suspended, irrespective of whether conclusion occurs at the time of signature of the contract or not. The standstill period will give the tenderers concerned sufficient time to examine the contract award decision and to assess whether it is appropriate to initiate a review procedure. 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. If this standstill period has not been respected, the Directive requires national courts under certain conditions to set aside a signed contract, by rendering the contract 'ineffective'.

-Illegal direct awards of public contracts: this has been called the most serious infringement of EU procurement law. National courts will also be able to render these public contracts ineffective if they have been illegally awarded without transparency and prior to competitive tendering. In these cases the contract will need to be tendered again, this time according to the appropriate rules.

National courts may decide that these contracts remain in force only if required by overriding reasons relating to a general interest. In those cases, alternative penalties must be applied instead. These alternative penalties must be effective, proportionate and dissuasive, and may entail the shortening of the duration of the contract or the imposition of fines on the contracting authority.

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 urgency. 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 other candidates. 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.

Sanctions: 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. 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.

Review: no later than 20 December 2012, the Commission shall review the implementation of the Directive and report in particular on the effectiveness of the alternative penalties and time limits.

TRANSPOSITION: 20 December 2009.

ENTRY INTO FORCE: 09/01/2008.