Award of public contracts: improving the effectiveness of review procedures

2006/0066(COD) - 04/05/2006 - Legislative proposal

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

PROPOSED ACT: Directive of the European Parliament and of the Council.

CONTENT: in presenting this proposal to amend the "Remedies Directives", the European Commission is seeking to improve economic operators' recourse to effective and harmonised procedures in cases of illegally awarded public procurement award contracts.

The Remedies Directives refer to Directive 89/665/EC, which applies to contracts for works, services and supplies and Directive 92/13/EC which applies to water, energy, transport and the postal services sectors. Procedures for the correction of infringements are foreseen in the Directives. Those that do exist, however, have varying time limits applicable to pre-contractual reviews, leading to a situation whereby most Member States retain national arrangements. These national arrangements result in contracts being signed irreversibly – even in cases where they have been awarded illegally. Indeed, the continuing lack of co-ordinated review procedures for the awarding of public contracts, has been described by the European Court of Justice as "the most serious breach of Community law in the field of public procurement on the part of an awarding authority". Hence the need to remedy the current lack of effective procedures and introduce measures which allow for simple, though effective, review procedures.

A further impetus behind presenting harmonised and uniform review procedures is the logic that such a move would encourage economic operators to pursue public award contracts in other EU Member States, confident that where a contract has been awarded illegally, they can have recourse to simple and effective procedures. Thus, this proposal is fully in line with the EU's commitment to opening up the internal market as well as being fully in line with the EU's overall policy on targeting corruption.

Prior to presenting this proposal, the European Commission held a public consultation exercise, which was open to economic operators, professional associations and lawyers, European and national professional associations as well as non-governmental experts and the awarding authorities themselves. The Commission also prepared an impact assessment (see below) in which a number of options for future actions were considered. Based on the results of the impact assessment and taking account of views expressed during the public consultation exercise, the European Commission decided to present a "standstill" procedure.

Put concretely, this measure states that:

- awarding authorities, upon completion of a formal procedure for awarding a contract, must suspend the conclusion of the contract until the end of a minimum period of ten calendar days from the date on which the economic operators involved in the award procedure are given a reasoned notification of the award decision.

- When an awarding authority considers that it has the right to directly award a contract with a value above the thresholds fixed by the Directives on public procurement it must (except in cases of extreme urgency) suspend the conclusion of the contract for a minimum period of ten calendar days, following sufficient publicity in the form of a simplified award notice.

- If a contract is concluded illegally during the standstill period, such an action is considered invalid. A competent review body will be responsible for stating what the consequences of an illegal action should be. Economic operators must refer the matter to the body within six months with effect from the date of conclusion.

- The unused attestation and conciliation mechanisms are repealed.

The proposal is fully in line with the both the subsidiarity and proportionality principle. Significant disparities among the Member States, in terms of the public procurement review procedures, has resulted in ineffective remedies as well as discouraging Community enterprises from tendering outside their country of origin. Experience shows that this legal uncertainty can not be removed by isolated and separate Member State action. In this respect, the EU is well positioned to propose uniform reviews procedures. Further, most Member States accept the seriousness of the problem – such as the race to sign contracts in the case of formal award procedures. Member States retain their power to appoint the bodies responsible for the review procedures and to maintain the national procedural rules applicable to such reviews. As regards the proportionality principle, the proposal is limited to providing some improvement to existing provisions where the amounts are higher than the thresholds fixed by Directives 2004/18/EC and 2004/17/EC. It does not demand any changes to existing administrative or judicial systems.

Lastly, the proposal will be extended to the European Economic Area. It has no implications for the Community budget.