Award of public contracts: improving the effectiveness of review procedures

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In adopting the report drafted by Mr Jean-Claude **FRUTEAU** (PES, FR), the Committee on the Internal Market and Consumer Protection amended in first reading the proposal for a directive 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.

The main amendments were as follows:

- **Scope**: the Committee wishes to clarify that the contracts within the meaning of this Directive include public contracts, framework agreements, public works concessions and dynamic purchasing systems;

- **Automatic suspension**: when a body of first instance, which is independent of the contracting authority, has to review a contract award decision, the Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period provided for in the directive;

- **Standstill period:**Member States should ensure that the persons seeking redress have sufficient time for effective review of the contract awarddecisions taken by contracting authorities, by adopting the necessary provisions which respect certain minimum conditions. The Commission's proposal contains a provision to institute a standstill period of 10 days between the decision to award a contract to one of the tenderers and the signature of the contract, to allow candidates who consider their interests to have been damaged time to seek a review. The Parliament's Committee, however, proposes a standstill period which is based on the form of communication used:

- at least 12 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used,

- at least 17 calendar dayswith effect from the day after the date on which the contractingauthority's decision is sent to the tenderer or candidate.

In the latter case Member States may also provide that the time period shall end on the expiry of a period of at least 12 calendar days with effect from the day following the date of the receipt of the contracting authority's decision, as evidenced by an acknowledgement of receipt.

The Committee proposes that the derogations from standstill periods should be limited to cases where there is only one tenderer, and that tenderer has received the contract and prior publication of a contract notice is not required. Such cases include cases of overriding urgency. The derogations do not concern contracts based on a framework agreement with further competition.

- Illegal direct awards: the Committee proposesthat a contract should be considered ineffective by a review body independent of the contracting authority if the contracting authority has awarded a contract without prior publication of a contract notice in the Official Journal of the European Union without this being permissible in accordance with Directive 2004/18/EC. The consequences of a contract being considered ineffective should be provided for by national legal systems. According to the Committee, the

derogations from the ineffectiveness of contracts are limited to cases in which overriding reasons relating to a general interest of a non-economic nature so require.

In the interests of transparency in relation to direct contract awards, members of the Committee have stipulated that the derogation from ineffectiveness rule could not apply if a) the contracting authority considers that the award of a contract without prior publication of a contract notice in the Official Journal of the European Union is permissible in accordance with Directive 2004/18/EC, b) the contracting authority has published a notice of intention to conclude the contract in the Official Journal of the European Union, and c) the contract has not been concluded before the expiry of a period of at least 12 calendar days with effect from the day following the date of publication of the notice **.**

- **Penalties**: minor breaches, relating to mere violations of the formal rules laid down by this directive – particularly failure to observe standstill periods, the Committee considers that a set of appropriate penalties could be considered, provided that they remain effective, proportionate and dissuasive. For example, these penalties might consist of fines or reductions in the term of a contract, and could not involve payment of damages and interest. They may also render the contract ineffective. On the other hand, the most serious violations should render the contract ineffective, without the option of alternative penalties. This category concerns, in particular, cases in which breaches of the formal rules laid down by this directive are accompanied by serious violations of Community law on public contracts (particularly violation of the fundamental principles relating to the award of contracts);

- Information to be provided by the awarding authority: when the awarding authority communicates the decision to award the contract, this must be accompanied by a summary of the reasons for the decision. As many of the contracts in question are of a cross-border nature and the standstill periods will vary depending on the decisions of the individual Member States, the Committee proposes that, in each case, the information forwarded by the awarding authority should also state the period available to the candidate in which to seek a review.