Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors

COUNCIL DIRECTIVE 92/13/EEC

of 25 February 1992

coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission[(1)],

In cooperation with the European Parliament[(2)],

Having regard to the opinion of the Economic and Social Committee[(3)],

Whereas Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors[(4)] lays down rules for procurement procedures to ensure that potential suppliers and contractors have a fair opportunity to secure the award of contracts, but does not contain any specific provisions ensuring its effective application;

Whereas the existing arrangements at both national and Community levels for ensuring its application are not always adequate;

Whereas the absence of effective remedies or the inadequacy of existing remedies could deter Community undertakings from submitting tenders; whereas, therefore, the Member States must remedy this situation;

Whereas Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts[(5)] is limited to contract award procedures within the scope of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts[(6)], as last amended by Directive 90/531/EEC, and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts[(7)], as last amended by Directive 90/531/EEC;

Whereas the opening-up of procurement in the sectors concerned to Community competition implies that provisions must be adopted to ensure that appropriate review procedures are made available to suppliers or contractors in the event of infringement of the relevant Community law or national rules implementing that law;

Status: *EU Directives are being published on this site to aid cross referencing from UK legislation. After exit day no further amendments will be applied to this version.*

Whereas it is necessary to provide for a substantial increase in the guarantees of transparency and non-discrimination and whereas, for it to have tangible effects, effective and rapid remedies must be available;

Whereas account must be taken of the specific nature of certain legal orders by authorizing the Member States to choose between the introduction of different powers for the review bodies which have equivalent effects;

Whereas one of these options includes the power to intervene directly in the contracting entities' procurement procedures such as by suspending them, or by setting aside decisions or discriminatory clauses in documents or publications;

Whereas the other option provides for the power to exert effective indirect pressure on the contracting entities in order to make them correct any infringements or prevent them from committing infringements, and to prevent injury from occurring;

Whereas claims for damages must always be possible;

Whereas, where a claim is made for damages representing the costs of preparing a bid or of participating in an award procedure, the person making the claim is not be required, in order to obtain the reimbursement of his costs, to prove that the contract would have been awarded to him in the absence of such infringement;

Whereas the contracting entities which comply with the procurement rules may make this known through appropriate means; whereas this requires an examination, by independent persons, of procurement procedures and practices applied by those entities;

Whereas for this purpose an attestation system, allowing for a declaration on the correct application of the procurement rules, to be made in notices published in the *Official Journal of the European Communities*, is appropriate;

Whereas the contracting entities should have the opportunity of having recourse to the attestation system if they so wish; whereas the Member States must offer them the possibility of doing so; whereas they can do so either by setting up the system themselves or by allowing the contracting entities to have recourse to the attestation system established by another Member State; whereas they may confer the task of carrying out the examination under the attestation system to persons, professions or staff of institutions;

Whereas the necessary flexibility in the introduction of such a system is guaranteed by laying down the essential requirements for it in this Directive; whereas operational details should be provided in European Standards to which this Directive refers;

Whereas the Member States may need to determine operational details prior to, or in addition to, the rules contained in European Standards;

Whereas, when undertakings do not seek review, certain infringements may not be corrected unless a specific mechanism is put in place;

Whereas, accordingly, the Commission, when it considers that a clear and manifest infringement has been committed during a contract award procedure, should be able to bring it to the attention

Status: *EU Directives are being published on this site to aid cross referencing from UK legislation. After exit day no further amendments will be applied to this version.*

of the competent authorities of the Member State and of the contracting entity concerned so that appropriate steps are taken for the rapid correction of that infringement;

Whereas it is necessary to provide for the possibility of conciliation at Community level to enable disputes to be settled amicably;

Whereas the application in practice of this Directive should be reviewed at the same time as that of Directive 90/531/EEC on the basis of information to be supplied by the Member States concerning the functioning of the national review procedures;

Whereas this Directive must be brought into effect at the same time as Directive 90/531/EEC;

Whereas it is appropriate that the Kingdom of Spain, the Hellenic Republic and the Portuguese Republic are granted adequate additional periods to transpose this Directive, taking account of the dates of application of Directive 90/531/EEC in those countries,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

Remedies at national level

[F1 Article 1

Scope and availability of review procedures

[F2 1 This Directive applies to contracts referred to in Directive 2014/25/EU of the European Parliament and of the Council[8] unless such contracts are excluded in accordance with Articles 18 to 24, 27 to 30, 34 or 55 of that Directive.

Contracts within the meaning of this Directive include supply, works and service contracts, works and services concessions, framework agreements and dynamic purchasing systems.

This Directive also applies to concessions awarded by contracting entities, referred to in Directive 2014/23/EU of the European Parliament and of the Council[9] unless such contracts are excluded in accordance with Articles 10, 12, 13, 14, 16, 17 and 25 of that Directive.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2014/25/EU or Directive 2014/23/EU, decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of procurement or national rules transposing that law.**]**

2 Member States shall ensure that there is no discrimination between undertakings likely to make a claim in respect of harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3 Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an

Status: *EU Directives are being published on this site to aid cross referencing from UK legislation. After exit day no further amendments will be applied to this version.*

interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

4 Member States may require that the person wishing to use a review procedure has notified the contracting entity of the alleged infringement and of his intention to seek review, provided that this does not affect the standstill period in accordance with Article 2a(2) or any other time limits for applying for review in accordance with Article 2c.

5 Member States may require that the person concerned first seek review with the contracting entity. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract.

Member States shall decide on the appropriate means of communication, including fax or electronic means, to be used for the application for review provided for in the first subparagraph.

The suspension referred to in the first subparagraph shall not end before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contracting entity has sent a reply if fax or electronic means are used, or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contracting entity has sent a reply or at least 10 calendar days with effect from the day following the date of the receipt of a reply.**]**

Textual Amendments

F1 Substituted by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 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 (Text with EEA relevance).

F2 Substituted by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (Text with EEA relevance).

Article 2

[F3Requirements for review procedures]

1 The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers:

either

(a) to take, at the earliest opportunity and by way of interlocutory procedure, interim measures with the aim of correcting the alleged infringement or preventing further injury to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a contract or the implementation of any decision taken by the contracting entity; and

(b) to set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the notice of contract, the periodic indicative notice, the notice on the existence of a system of qualification, the invitation to tender,

Status: *EU Directives are being published on this site to aid cross referencing from UK legislation. After exit day no further amendments will be applied to this version.*

the contract documents or in any other document relating to the contract award procedure in question;

or

(c) to take, at the earliest opportunity, if possible by way of interlocutory procedures and if necessary by a final procedure on the substance, measures other than those provided for in points (a) and (b) with the aim of correcting any identified infringement and preventing injury to the interests concerned; in particular, making an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented.

Member States may take this choice either for all contracting entities or for categories of entities defined on the basis of objective criteria, in any event preserving the effectiveness of the measures laid down in order to prevent injury being caused to the interests concerned;

(d) and, in both the above cases, to award damages to persons injured by the infringement.

Where damages are claimed on the grounds that a decision has been taken unlawfully, Member States may, where their system of internal law so requires and provides bodies having the necessary powers for that purpose, provide that the contested decision must first be set aside or declared illegal.

[[F1]2 The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.

3 When a body of first instance, which is independent of the contracting entity, reviews a contract award decision, Member States shall ensure that the contracting entity 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 referred to in Article 2a(2) and Article 2d(4) and (5).

3a Except where provided for in paragraph 3 and Article 1(5), review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.

4 Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits.

A decision not to grant interim measures shall not prejudice any other claim of the person seeking such measures.**]**

5 The sum to be paid in accordance with paragraph 1 (c) must be set at a level high enough to dissuade the contracting entity from committing or persisting in an infringement. The payment of that sum may be made to depend upon a final decision that the infringenemt has in fact taken place.

[[F1]6 Except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body