

COUNCIL DIRECTIVE

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

(89/665/EEC)

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 Community Directives on public procurement, in particular Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts ⁽⁴⁾, as last amended by Directive 89/440/EEC ⁽⁵⁾, and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts ⁽⁶⁾, as last amended by Directive 88/295/EEC ⁽⁷⁾, do not contain any specific provisions ensuring their effective application;

Whereas the existing arrangements at both national and Community levels for ensuring their application are not always adequate to ensure compliance with the relevant Community provisions particularly at a stage when infringements can be corrected;

Whereas the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; whereas, for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law;

Whereas in certain Member States the absence of effective remedies or inadequacy of existing remedies deter

Community undertakings from submitting tenders in the Member State in which the contracting authority is established; whereas, therefore, the Member States concerned must remedy this situation;

Whereas, since procedures for the award of public contracts are of such short duration, competent review bodies must, among other things, be authorized to take interim measures aimed at suspending such a procedure or the implementation of any decisions which may be taken by the contracting authority; whereas the short duration of the procedures means that the aforementioned infringements need to be dealt with urgently;

Whereas it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement;

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

Whereas the application in practice of the provisions of this Directive should be re-examined within a period of four years of its implementation on the basis of information to be supplied by the Member States concerning the functioning of the national review procedures,

HAD ADOPTED THIS DIRECTIVE:

Article 1

1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC and 77/62/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2 (7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

⁽¹⁾ OJ No C 230, 28. 8. 1987, p. 6 and OJ No C 15, 19. 1. 1989, p. 8.

⁽²⁾ OJ No C 167, 27. 6. 1988, p. 77 and OJ No C 323, 27. 12. 1989.

⁽³⁾ OJ No C 347, 22. 12. 1987, p. 23.

⁽⁴⁾ OJ No L 185, 16. 8. 1971, p. 5.

⁽⁵⁾ OJ No L 210, 21. 7. 1989, p. 1.

⁽⁶⁾ OJ No L 13, 15. 1. 1977, p. 1.

⁽⁷⁾ OJ No L 127, 20. 5. 1988, p. 1.

2. Member States shall ensure that there is no discrimination between undertakings claiming injury 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. The 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 interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.

Article 2

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

- (a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;
- (b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;
- (c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 may be conferred on separate bodies responsible for different aspects of the review procedure.

3. Review procedures need not in themselves have an automatic suspensive effect on the contract award procedures to which they relate.

4. The Member States may provide that when considering whether to order interim measures the body responsible may take into account the probable consequences of the measures for all interests likely to be harmed, as well as the public interest, and may decide not to

grant such measures where their negative consequences could exceed their benefits. A decision not to grant interim measures shall not prejudice any other claim of the person seeking these measures.

5. The Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

6. The effects of the exercise of the powers referred to in paragraph 1 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 following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

7. The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

8. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the EEC Treaty and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.

Article 3

1. The Commission may invoke the procedure for which this Article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of Community provisions in the field of public procurement has been committed during a contract award procedure falling within the scope of Directives 71/305/EEC and 77/62/EEC.

2. The Commission shall notify the Member State and the contracting authority concerned of the reasons which have led it to conclude that a clear and manifest infringement has been committed and request its correction.

3. Within 21 days of receipt of the notification referred to in paragraph 2, the Member State concerned shall communicate to the Commission:

- (a) its confirmation that the infringement has been corrected; or
- (b) a reasoned submission as to why no correction has been made; or
- (c) a notice to the effect that the contract award procedure has been suspended either by the contracting authority on its own initiative or on the basis of the powers specified in Article 2 (1) (a).

4. A reasoned submission in accordance with paragraph 3 (b) may rely among other matters on the fact that the alleged infringement is already the subject of judicial or other review proceedings or of a review as referred to in Article 2 (8). In such a case, the Member State shall inform the Commission of the result of those proceedings as soon as it becomes known.

5. Where notice has been given that a contract award procedure has been suspended in accordance with paragraph 3 (c), the Member State shall notify the Commission when the suspension is lifted or another contract procedure relating in whole or in part to the same subject matter is begun. That notification shall confirm that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made.

Article 4

1. Not later than four years after the implementation of this Directive, the Commission, in consultation with the

Advisory Committee for Public Contracts, shall review the manner in which the provisions of this Directive have been implemented and, if necessary, make proposals for amendments.

2. By 1 March each year the Member States shall communicate to the Commission information on the operation of their national review procedures during the preceding calendar year. The nature of the information shall be determined by the Commission in consultation with the Advisory Committee for Public Contracts.

Article 5

Member States shall bring into force, before 1 December 1991, the measures necessary to comply with this Directive. They shall communicate to the Commission the texts of the main national laws, regulations and administrative provisions which they adopt in the field governed by this Directive.

Article 6

This Directive is addressed to the Member States.

Done at Brussels, 21 December 1989.

For the Council

The President

É. CRESSON