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Public Procurement

Remedies

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Remedies are legal actions that allow economic operators to request the enforcement of public procurement regulations and their rights under those regulations in cases where contracting authorities, either intentionally or unintentionally, fail to comply with the legal framework for public procurement.

Where to find out about available remedies

Remedies Directives and local law: Remedies are covered by the EU legal framework and by the local laws implementing that framework. The EU legal framework on remedies is found in Directive 89/665/EEC[1], which relates to public sector contract award procedures, and in Directive 92/13/EEC[2], which relates to utilities contract award procedures. Both of these directives were substantially amended by Directive 2007/66/EC[3]. In this Brief, these three directives are referred to collectively as the "Remedies Directives".

Further amendments were introduced by the Concessions Directive 2014/23/EU, which mean that concession contracts subject to the Concessions Directive are also subject to the Remedies Directives.

Certain procedural rules are set out in the Remedies Directives themselves, but most of the details and specific procedural rules are implemented in national law.

Aim of the Remedies Directives

The aim of the Remedies Directives is to ensure that irregularities occurring in contract award procedures are challenged and corrected as soon as they occur. The Remedies Directives should increase the lawfulness and transparency of contract award procedures, build confidence among businesses, and facilitate the opening of local public contract markets to foreign competition.

It is important for economic operators to have mechanisms available that will enable them to enforce procurement rules. These mechanisms encourage them to monitor contract award procedures and to require that procurement rules be followed so that their chances of being awarded a contract are not unlawfully diminished. Thus these mechanisms enhance the lawfulness of procedures and encourage competition.

It follows from the aim of the Remedies Directives that all national remedies procedures must be:

- clear and straightforward, i.e. understandable and easy to use by economic operators;
- available to all economic operators wishing to participate in a specific contract award procedure without discrimination, in particular on the grounds of nationality;
- effective in preventing or correcting instances of unlawfulness on the part of economic operators and/or contracting authorities.

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1 Directive 89/665/EEC on the co-ordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, 21 December 1989, as amended.

2 Directive 92/13/EEC co-ordinating 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, 25 February 1992.

3 Directive 2007/66/EC 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, 11 December 2007.

Who has the right to claim remedies?

The Remedies Directives provide that remedies are available to any economic operator that has, or has had, an interest in obtaining a particular contract and that risks, or has risked, being harmed by an alleged violation of the applicable procurement rules.

This provision means that all economic operators that have expressed an interest in participating in a contract award procedure – or might have done so if the contract had been advertised – have the right to benefit from the available remedies.

Generally, local laws on standing and on representation in legal proceedings are applicable, to the extent that they do not interfere with the requirements of the Remedies Directives.

Which bodies consider complaints and legal cases relating to procurement?

Complaints before the contracting authority or an authority supervising the contracting authority: To encourage the settlement of disputes without recourse to legal action, local law may require or allow the economic operator concerned, before filing a legal action with the competent review body, to first seek review by lodging an "application for review" (i.e. a complaint) with the contracting authority against an alleged infringement in a contract award procedure. Complaints are not legal courses of action as such, as they are submitted to review bodies prior to any legal proceedings. Depending on the specific facts and circumstances, complaints can lead to the enforcement of the law and to the rapid and early resolution of disputes.

Tribunals or courts: Procurement cases are brought before a review body, which may be either a specialised procurement tribunal or a regular court. Member States are free to choose between the two review bodies.

See SIGMA Procurement Brief 25, *Establishing Procurement Review Bodies*, for further information.

What types of remedies are available?

Detailed provisions relating to the types of remedies available are generally subject to local law. The Directives require Member States to ensure that three types of remedies are available: interim measures, set-aside, and damages.

- **Interim measures:** Interim measures are provisional measures taken in relation to the Contract Notice and any contracting decision, including the contract award decision. The aim of interim measures is to prevent the creation of unalterable situations and to avoid the continuation of the contract award procedure without an economic operator that would otherwise have been able to participate and possibly be awarded the contract. These aims may only be achieved if the local legal system provides an effective, simple and speedy possibility of obtaining interim relief and if the competent review body is not reluctant to grant interim relief as a matter of principle.

  The following interim measures can typically be ordered:

  - suspension of the implementation of any decision taken by the contracting authority;
  - suspension of the whole contract award procedure;
  - provisional correction of a breach (this interim measure depends on local law and is rather unusual).

- **Set-aside measures:** The application for the set-aside remedy cancels or renders ineffective a contracting decision taken unlawfully or otherwise corrects an unlawful situation. The aim of set-aside measures is to correct proven irregularities. This aim is only achieved if the local legal system provides an effective possibility of cancelling an unlawful specification or contracting decision and if the competent review body reviews the reasonableness of contracting decisions.

  The following set-aside measures can typically be ordered:

  - removal of discriminatory technical, economic or financial specifications in the Contract Notice, tender documents or any other document relating to the contract award procedure;
  - annulment of an unlawful contracting decision;
  - positive correction of any unlawful document or contracting decision, for example an order of the contracting authority to amend or delete an unlawful clause in the tender documents or to reinstate an economic operator that had been unlawfully excluded.

Where legal proceedings have commenced claiming interim measures or set-aside measures, can the contracting authority still go ahead and award the contract? The Remedies Directives provide that where an application for interim measures or an application to set aside the contract award decision is implemented by way of legal proceedings, then the contracting authority may not conclude the contract until the review body has issued a decision.

- **Damages:** Damages are the compensation paid to economic operators harmed by an infringement of the public procurement rules. The procedure and venue for bringing claims for damages depends on local legislation, which sets the filing rules, deadlines, requirements of proof, and extent of compensation (for example, the conditions under which tendering costs can be recovered). This remedy aims to compensate harmed economic operators.

The measure applied if a claim for damages is successful is the compensation of all harms suffered by the economic operator, which usually includes actual costs incurred and, exceptionally, lost profits. The compensation must be full –however, it is often very difficult to establish the extent of the damage suffered in a competitive process. This remedy does not interfere with the contract award procedure, its progress or conclusion.

What is the "standstill period"?

Contracting authorities are required to wait for a certain number of days between the contract award decision and the conclusion of the contract with the successful tenderer. This "standstill period" allows rejected tenderers to challenge the contracting authority's decision not to award the contract to them, if they think that such a decision was unlawful, and therefore to prevent the contract from being concluded on the basis of an improper award decision.

What are the standstill notification requirements? As soon as contracting authorities have made an award decision, they must notify all tenderers or candidates, including unsuccessful ones, of this decision and then allow a certain number of days to pass before they conclude the contract. The notification must include a summary of the reasons for this decision, as set out in the Remedies Directives, and in particular the name of the successful tenderer and the characteristics and relative advantages of the tender selected; certain information may be withheld. The exact duration of the standstill period must also be mentioned in the notification so that tenderers/candidates know how much time they have to challenge the award decision, if they wish to do so.

How long is the standstill period? The standstill period must last at least 10 days, starting from the day following the date on which the contracting authority sends the notification of the contract award decision to tenderers or candidates, if a fax or electronic means is used. The standstill period may be longer if the contracting authority uses other means of communication, such as the postal service, to send the notification of the contract award decision. These standstill periods are only the minimum requirements: local law may provide for longer periods, but they may not provide for shorter periods.

During this standstill period, rejected tenderers can apply for the review of the award decision, either by the contracting authority, using a complaints procedure, and/or directly before the review body, asking for interim measures or for the setting-aside of the award decision. This choice depends on whether pre-trial complaints are provided for under local law and whether these complaints are optional or compulsory prior to the use of other remedies.

Do the standstill notification requirements apply to all contract award decisions? The requirements for a standstill period apply to most contract award decisions. A few exceptions are provided for in the Remedies Directives:

- The decision concerns the award of specific contracts under a framework agreement or a dynamic purchasing system.
- There is no obligation under Directive 2014/24/EU[4] to publish a Contract Notice.
- Only one tenderer/candidate is left at the award stage of the procedure; in that case, no other persons remaining in the award procedure have an interest or right to challenge the contract award decision and to benefit from the standstill period.

Ineffectiveness of concluded contracts

The Remedies Directives require Member States to ensure that local review bodies set aside or otherwise render ineffective a concluded contract where specific conditions are met, such as failure to publish a Contract Notice and to carry out an award procedure, non-compliance with the rules applying to the award of contracts under a framework agreement, or breach of standstill requirements that harm the tenderer and deprive them of the opportunity to claim interim measures or set-aside measures.

The ineffectiveness sanction was adopted to prevent contracting authorities from hastening to conclude contracts, even in violation of the standstill or suspension periods or of basic procurement rules, assuming that they would be immune to any sanctions following the conclusion of these contracts. The sanction was intended to incite procurement officials to be very careful when applying the procurement rules. The risk of termination of unlawfully concluded contracts is a serious one. Another serious risk is that the successful tenderer, whose contract has been terminated in this way, would seek damages under local contract law.

The legal action to set aside a signed contract is instituted by a tenderer claiming to be harmed as a consequence. The Directive requires Member States to allow for minimum and specified time periods for making such a claim, but these periods are only minimum requirements, and therefore detailed deadlines and procedures for such a claim are governed by local law.

Member States have the option of allowing contracts to be declared ineffective either retrospectively or prospectively. Local law will therefore specify whether the declaration of ineffectiveness is:

4 Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EU, 26 February 2014.

- retrospective: so that all contractual obligations, including those already performed, are to be cancelled, and the tenderer and contracting authority must settle their relationship under local rules; or
- prospective: so only future and unperformed contractual obligations may be annulled. Where the Member State opts for prospective cancellation, the Directive requires that other penalties must also be available. These additional penalties are (1) fines imposed on the contracting authority, which must be adequately high in order to punish the unlawfulness; and (2) contract shortening.

The Directive does allow for discretion to be granted to review bodies if they find that there are overriding reasons related to a general interest in maintaining the contract. This discretion must be used with care, as it is allowed as an exception to the general rule that unlawfully concluded contracts must not be maintained.

Ineffectiveness and the Voluntary *ex ante* Transparency Notice (VEAT notice): When a contracting authority considers that it has the right to directly award a contract without publication of a Contract Notice, then according to Article 2d(4) of Directive 89/665/EEC it may publish a VEAT notice in the *Official Journal of the European Union*. The VEAT notice publicises the contracting authority's intention to award the contract. Where the contracting authority publishes a VEAT notice and observes a standstill period of at least 10 days, starting from the day following the date of publication of the notice before concluding the contract, the contract may then be concluded without any risk of ineffectiveness, unless a legal challenge has been made during the standstill period. The Court of Justice of the European Union considered the correct use of the VEAT notice in the *Fastweb* case C-19/13.

Good practice note

It is useful to include in the notification material all documents supporting the award decision, such as opinions or recommendations by the tender evaluation panel. Requests for disclosure of supporting documents, as applicable under local law, may lead to an extension of the standstill period.

General principles to be observed by review bodies and contracting authorities with regard to remedies

Member States, as well as local review bodies and contracting authorities, must observe in their procurement procedures the general principles below in the implementation of the Remedies Directives:

- **Non-discrimination:** Access to remedies should be open to all economic operators without discrimination, especially on grounds of nationality. Remedies to enforce EU public procurement rules and their conditions (procedural rules, such as deadlines and filing requirements) should be at least as favourable as those available to enforce domestic procurement rules.
- **Effectiveness:** Remedies must have sufficient power to ensure observance of EU public procurement rules, and review must be as rapid as possible. This principle means that contracting authorities should try to facilitate the proper conduct of all legal procedures and should always comply with decisions concerning remedies. Legal procedures and the conduct of review bodies must ensure rapid consideration and resolution.
- **Transparency:** Contracting authorities must ensure that, through the tender documents themselves as well as in the notifications of contracting decisions, maximum information is provided to economic operators on the following:

- rights to remedies under the law, in particular remedies concerning the conduct of the award procedure, i.e. interim measures and set-aside measures;
- relevant procedural rules, in particular deadlines and names of persons/ committees receiving pre-trial complaints within the contracting authority;
- how contracting decisions were reached, to the extent that this information is relevant to economic operators.

Review bodies must operate in accordance with the requirements of the Remedies Directives and local legislation, and their conduct and decision making must be open and transparent.

See SIGMA Procurement Brief 25, *Establishing Procurement Review Bodies*, for further information.

Utilities

Directive 92/13/EEC (amended by Directive 2007/66/EC) also provides for the three remedies of interim measures, set-aside and damages.

Directive 92/13/EEC gives Member States the option, instead of interim measures and the setting-aside of unlawful decisions, of providing for the payment of a sum (such as a fine) when a breach of procurement rules occurs. This sum must be sufficiently high to dissuade contracting entities from committing (or assisting) a breach.

The standstill period, the obligation to notify concerning direct awards, and the sanction for ineffectiveness of contracts, which apply to contracting authorities, also apply to contracting entities.

Further information

Publications

SIGMA (2015), *Public Procurement Training Manual* – Module F1, OECD Publishing, Paris, http://www.sigmaweb.org/publications/public-procurement-training-manual.htm

SIGMA (2014), *Selected Judgements of the Court of Justice of the European Union on Public Procurement (2006-2014)*, OECD Publishing, Paris, http://www.sigmaweb.org/publications/Judgements-CourtJustice-31July2014-Eng.pdf

SIGMA (2007), *Public Procurement Review and Remedies Systems in the European Union*, SIGMA Paper No. 41, OECD Publishing, Paris, http://www.oecd-ilibrary.org/governance/public-procurement-review-and-remedies-systems-in-the-european-union_5kml60q9vklt-en

Public Procurement Briefs

http://www.sigmaweb.org/publications/key-public-procurement-publications.htm

SIGMA (2016), *Establishing Procurement Review Bodies,* Brief 25, OECD Publishing, Paris

SIGMA (2016), *Public Procurement in the EU: Legislative Framework, Basic Principles and Institutions*, Brief 1, OECD Publishing, Paris