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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

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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;

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 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

Article 1

1. The Member States shall take the measures necessary to ensure that decisions taken by contracting entities 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 (8), on the grounds that such decisions have infringed Community law in the field of procurement or national rules implementing that law as regards:

- (a) contract award procedures falling within the scope of Council Directive 90/531/EEC; and
- (b) compliance with Article 3 (2) (a) of that Directive in the case of the contracting entities to which that provision applies.

2. Member States shall ensure that there is no discrimination between undertakings likely to make a claim for 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 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 entity 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:

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, 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.

2. The powers referred to 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 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 infringement has in fact taken place.

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. 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 shall be required only to prove an infringement of Community law in the field of procurement or national rules implementing that law and that he would have had a real chance of winning the contract and that, as a consequence of that infringement, that chance was adversely affected.

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

9. Whereas 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 measures 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 Treaty and independent of both the contracting entity and the review body.

The members of the independent body referred to in the first paragraph 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.

CHAPTER 2 Attestation

Article 3

The Member States shall give contracting entities the possibility of having recourse to an attestation system in accordance with Articles 4 to 7.

Article 4

Contracting entities may have their contract award procedures and practices which fall within the scope of Directive 90/531/EEC examined periodically with a view to obtaining an attestation that, at that time, those procedures and practices are in conformity with Community law concerning the award of contracts and the national rules implementing the law.

Article 5

1. Attestors shall report to the contracting entity, in writing, on the results of their examination. They shall satisfy themselves, before delivering to the contracting entity the attestation referred to in Article 4, that any irregularities identified in the contracting entity's award procedures and practices have been corrected and measures have been taken to ensure that those irregularities are not repeated.

2. Contracting entities having obtained that attestation may include the following statement in notice published in the Official Journal of the European Communities pursuant to Articles 16 to 18 of Directive 90/531/EEC:

'The contracting entity has obtained an attestation in accordance with Council Directive 92/13/EEC that, on, its contract award procedures and practices were in conformity with Community law and the national rules implementing that law.'

Article 6

1. Attestors shall be independent of the contracting entities and must be completely objective in carrying out their duties. They shall offer appropriate guarantees of relevant professional qualifications and experience.

2. Member States may identify any persons, professions or institutions whose staff, called upon the act as attestors, they regard as fulfilling the requirements of paragraph 1. For these purposes, Member States may require professional qualifications, at least at the level of a higher education diploma within the meaning of Directive 89/48/EEC(8) , which they regard as relevant, or provide that particular examinations of professional competence organized or recognized by the State offer such guarantees.

Article 7

The provisions of Articles 4, 5 and 6 shall be considered as essential requirements for the development of European standards on attestation.

CHAPTER 3 Corrective mechanism

Article 8

1. The Commission may invoke the procedures 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 procurement has been committed during a contract award procedure falling within the scope of Directive 90/531/EEC or in relation to Article 3 (2) (a) of that Directive in the case of the contracting entities to which that provision applies.

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

3. Within 30 days of receipt of the notification referred to in paragraph 2, the Member States 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 entity 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 review proceedings or of a review as referred to in Article 2 (9). 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 concerned 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 new notification shall confirm that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made.

CHAPTER 4 Conciliation

Article 9

1. Any person having or having had an interest in obtaining a particular contract falling within the scope of Directive 90/531/EEC and who, in relation to the procedure for the award of that contract, considers that he has been or risks being harmed by an alleged infringement of Community law in the field of procurement or national rules implementing that law may request the application of the conciliation procedure provided for in Articles 10 and 11.

2. The request referred to in paragraph 1 shall be addressed in writing to the Commission or to the national authorities listed in the Annex. These authorities shall forward requests to the Commission as quickly as possible.

Article 10

1. Where the Commission considers, on the basis of the request referred to in Article 9, that the dispute concerns the correct application of Community law, it shall ask the contracting entity to state whether it is willing to take part in the conciliation procedure. If the contracting entity declines to take part, the Commission shall inform the person who made the request that the procedure cannot be initiated. If the contracting entity agrees, paragraphs 2 to 7 shall apply.

2. The Commission shall propose, as quickly as possible, a conciliator drawn from a list of independent persons accredited for this purpose. This list shall be drawn up by the Commission, following consultation of the Advisory Committee for Public Contracts or, in the case of contracting entities the activities of which are defined in Article 2 (2) (d) of Directive 90/531/EEC, following consultation of the Advisory Committee on Telecommunications Procurement.

Each party to the conciliation procedure shall declare whether it accepts the conciliator, and shall designate an additional conciliator. The conciliators may invite not more than two other persons as experts to advise them in their work. The parties to the conciliation procedure and the Commission may reject any expert invited by the conciliators.

3. The conciliators shall give the person requesting the application of the conciliation procedure, the contracting entity and any other candidate or tenderer participating in the relevant contract award procedure the opportunity to make representations on the matter either orally or in writing.
4. The conciliators shall endeavour as quickly as possible to reach an agreement between the parties which is in accordance with Community law.
5. The conciliators shall report to the Commission on their findings and on any result achieved.
6. The person requesting the application of the conciliation procedure and the contracting entity shall have the right to terminate the procedure at any time.
7. Unless the parties decide otherwise, the person requesting the application of the conciliation procedure and the contracting entity shall be responsible for their own costs. In addition, they shall each bear half of the costs of the procedure, excluding the costs of intervening parties.

Article 11

1. Where, in relation to a particular contract award procedure, an interested person within the meaning of Article 9, other than the person requesting the conciliation procedure, is pursuing judicial review proceedings or other proceedings for review within the meaning of this Directive, the contracting entity shall inform the conciliators. These shall inform that person that a request has been made to apply the conciliation procedure and shall invite that person to indicate within a given time limit whether he agrees to participate in that procedure. If that person refuses to participate, the conciliators may decide, acting if necessary by a majority, to terminate the conciliation procedure if they consider that the participation of this person is necessary to resolve the dispute. They shall notify their decision to the Committee and give the reasons for it.

2. Action taken pursuant to this Chapter shall be without prejudice to:

- (a) any action that the Commission or any Member State might take pursuant to Articles 169 or 170 of the Treaty or pursuant to Chapter 3 of this Directive;
- (b) the rights of the persons requesting the conciliation procedure, of the contracting entity or of any other person.

CHAPTER 5 Final provisions

Article 12

1. Not later than four years after the application 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, in particular, the use of the European Standards and, if necessary, make proposals for amendments.
2. Before 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.
3. In the case of matters relating to contracting entities the activities of which are defined in Article 2 (2) (d) of Directive 90/531/EEC, the Commission shall also consult the Advisory Committee on Telecommunications Procurement.

Article 13

1. Member States shall take, before 1 January 1993, the measures necessary to comply with this Directive. The Kingdom of Spain shall take these measures not later than 30 June 1995. The Hellenic Republic and the Portuguese Republic shall take these measures not later than 30 June 1997. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain an reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

2. Member States shall bring into force the measures referred to in paragraph 1 on the same dates as those (laid down in Directive 90/531/EEC).

3. Member States shall communicate to the Commission the texts of the main provisions of domestic law which they adopt in the field governed by this Directive.

Article 14

This Directive is addressed to the Member States.

Done at Brussels, 25 February 1992.

For the Council

The President

Vitor MARTINS

(1) OJ No C 216, 31. 8. 1990, p. 8; and OJ No C 179, 10. 7. 1991, p. 18.

(2) OJ No C 106, 22. 4. 1991, p. 82 and OJ No C 39, 17. 2. 1992.

(3) OJ No C 60, 8. 3. 1991, p. 16.

(4) OJ No L 297, 29. 10. 1990, p. 1.

(5) OJ No L 395, 30. 12. 1989, p. 33.

(6) OJ No L 185, 16. 8. 1971, p. 5.

(7) OJ No L 13, 15. 1. 1977, p. 1.

(8) OJ No L 19, 24. 1. 1989, p. 16.

ANNEX

National authorities to which requests for application of the conciliation procedure referred to in Article 9 may be addressed

Belgium Services du Premier Ministre

Diensten Van de Eerste Minister

Ministère des Affaires économiques

Ministerie van Economische Zaken

Denmark Industri- og Handelsstyrelsen (supply contracts)

Boligsministeriet (works contracts)

Germany Bundesministerium fuer Wirtschaft

Greece Ypoyrgeio Viomichanias, Energeias kai Technologias

Ypoyrgeio Emporiou Ypoyrgeio Perivallontos, Chorotaxias kai Dimosion Ergon

Spain Ministerio de Economía y Hacienda

France Commission centrale des marchés

Ireland Department of Finance

Italy Presidenza del Consiglio dei Ministri Politiche Comunitarie

Luxembourg Ministère des travaux publics

Netherlands Ministerie van Economische Zaken

Portugal Conselho de mercados de obras publicas e particulares

United Kingdom HM Treasury