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on the proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC CEE with regard to improving the effectiveness of review procedures concerning the award of public contracts

Committee on the Internal Market and Consumer Protection

Rapporteur: Jean-Claude Fruteau

At the beginning of May the European Commission adopted a proposal for a directive intended to amend existing European legislation on the possibilities for precontractual review offered to businesses that consider their interests to have been harmed during the award of a public contract (directives 89/665/EEC in the case of standard public contracts and 92/13/EEC in the case of special public contracts).

The draft directive is intended to be applied in cases of formal public tendering procedures (directives 2004/18/EC et 2004/17/EC) as well as in the context of directly concluded contracts (above the thresholds).

Against this background, it aims to fulfil two main objectives: to maintain the possibilities for review open to candidates for public contracts by providing for signing of the contract in question to be suspended in good time; to propose measures to combat the illegal conclusion of direct contracts (direct award).

A. CONTENT OF THE REFORM

In view of the fact that tenderers prefer to obtain a contract rather than financial reparation, the Commission proposes to counteract the practice of racing to sign contracts, which has the effect of preventing any challenging of the procedures followed once the contract has been signed and of restricting the sanctions incurred to damages only.

In order to do this, the Commission proposes introducing a **standstill period of 10 days** between the decision to award the contract to one of the tenderers and the signing of the contract, in order to leave enough time for candidates who consider themselves to have been adversely affected to seek review.

However, this period is not intended to be applied either to cases of extreme urgency within the meaning of directives 2004/17/EC and 2004/18/EC or to contracts explicitly excluded by those directives. In restricted negotiated procedures with publication of a notice of contract, where urgency makes the minimum periods impracticable, the period is reduced to 7 days.

In practice, the application of these types of measures already exists in a number of Member States of the Union. Germany, Austria and the Netherlands provide in their national legislation for a period of suspension of 14/15 days, while France and the United Kingdom have adopted a 10-day period.

Sanctions

Any contract concluded before the expiration of the 10-day standstill would be considered invalid, with the national authority responsible for review procedures administering any consequences of this with regard to the illegal contract, such as those concerning the recovery of any sums paid by the awarding authority.

Where ‘respect for certain overriding reasons based on a general interest of a non-economic

nature' requires, particularly where social consequences are concerned, the Member States nevertheless have the option of giving the body responsible for review the power not to challenge the contract.

Three scenarios

1. *If no enterprise disputes the award of the contract*, the public authority has legal security within which to fulfil its contract.
2. *If the public authority does not observe the standstill and concludes a public contract*, the contract is considered invalid. It is then up to the competent authority in the Member State concerned to take the necessary steps resulting from the illegality of the contract before the expiry of a limitation period of six months.
3. *If an economic operator challenges the award of a contract within ten days*, it must do so in accordance with the national procedures in force. In most cases, it will go through the relevant national courts or independent administrative authorities. If the body responsible for review procedures establishes that there has been an irregularity, it can impose penalties, which may include recovery of sums already paid and challenging of the contract.

In order to allow the time necessary to act, the draft directive introduces an independent minimum standstill period (i.e. additional, but contingent), initiated by the very fact of referral to the body responsible for review procedures and allowing, in any case, the latter 'a short but reasonable' time to act.

Direct contracts

This set of measures also applies to direct contracts, in order to prevent illegal awarding of contracts without competitive tendering. In order to do this, the draft directive presented by the Commission proposes also to introduce new obligations, inter alia in terms of provision of information for candidates by the adjudicating bodies with a view to greater transparency in the awarding of contracts.

Additional measures

The draft directive proposes a streamlining of the measures contained in the two previous review directives. Notably, repeal of two mechanisms currently applicable in the special sectors (water, energy, transport, postal services) which are rarely or never used: *attestation by contracting entities* (possibility for the public authorities to have the conformity of their contract award procedures confirmed by regular examination); *the conciliation mechanism* (Community procedure for resolving disputes amicably).

B.

C. POINTS FOR REFLECTION

The rapporteur entirely shares the Commission's desire to improve the review procedures in order to give greater transparency to contract award procedures and to provide economic operators with the conditions for better access to public contracts.

However, some issues remain unresolved with regard to certain points in the text, which he believes deserve special attention, and on which Members of the European Parliament are invited to reflect.

1. Standstill

1.1 10-DAY PERIOD

As regards the standstill, does the minimum period provided for in the Commission proposal between the decision of the contracting authority and the conclusion of the contract leave operators who feel their interests have been adversely affected, including small and medium-sized enterprises, time to assemble the resources needed to evaluate the situation and draw up a complete dossier for their defence? On the other hand, would prolonging this period, which is after all already in force in many Member States, where it has proved its effectiveness, not risk holding up seriously the implementation of projects? Do the derogations to the period of suspension provided for in the text represent a necessary adjustment of the 10-day period, or are they a threat to the right of tenderers?

1.2 THE CASE OF PRIOR RECOURSE

The new text provides for the possibility of direct *prior (amicable) recourse* to contracting authorities by candidates. While the use of this type of procedure, which is specific to certain Member States, is rare in the Union, it does have an effect on lengths of procedures, possibly prolonging the period during which signature of contracts is suspended. Parliament must therefore deliver an opinion on this mechanism and its implications.

2. Direct contracts

2.1 THE CONCEPT OF A 'DIRECT CONTRACT'

This concept, which is mentioned in the draft directive, is not explicitly defined in the 'award procedure' directives (2004/18/EC and 2004/17/EC), which could put the text in a position of legal uncertainty. While it seems necessary to clarify this point, does Parliament wish to do this by means of a precise definition to be inserted, or via a reference to the articles in the 'award procedure' directives relating to the negotiated procedure without prior publication of a notice of contract? Should any definition be mentioned only in the form of clarification in the recitals, or should it be incorporated in the body of the legislative text (articles)?

2.2 INFORMATION PROCEDURES

Is the information required from the contracting authorities (annexes to the draft directive) necessary at this stage of the procedure? Does it involve a negligible administrative burden when set against protection of candidates, or does it, on the contrary, represent a danger for contracting authorities, inter alia by being too binding upon them vis-à-vis tenderers in the event of disputes?

What position does Parliament wish to adopt on this point? Maintain the proposal as it stands? Lessen the obligations placed on contracting authorities? Should methods of providing information be defined at Community level or left for Member States to decide?

3. Scope

3.1 SECTORS CONCERNED

The diversity of the sectors makes one wonder whether the new text should not be tightened up in some respects. It is worth considering, for example, the possibility of providing for exceptions as regards the scope of the draft review directive. We should point out in this connection that Articles 10 to 18 of Directive 2004/18 (and the corresponding articles in Directive 2004/17) already exclude certain contracts such as secret contracts and contracts requiring particular security measures. These cases which are already excluded from the 'award procedure' directives are also excluded, in theory, from the 'review' directive. Nonetheless, given their 'sensitivity', it might be necessary to mention them again in the body of the new legislative text, or even, if appropriate, to add to the list of these exclusions.

3.2 IN-HOUSE

Given the absence of a definition of in-house in the 'award procedure' directive 2004/18/EC, which serves here as the legal point of reference, two approaches could be envisaged. The first consists in taking the view that since 'in-house' was absent from the scope of the 'award procedure' directive, the 'review' directive should not apply to these procedures. This is the first conclusion that one should draw from a reading of Article 1 of the 'review' directive, which makes its scope coincide with that of the 'award procedure' directives.

The second approach takes account of existing case-law, which attempts to clarify the concept of in-house, which implies applicability of the new review procedures to cases wrongly presented as in-house by contracting authorities in the light of the definition given by this case-law. Parliament should deliver an opinion on this matter and decide between these two approaches to the problem.

4. The concept of 'invalid'

4.1 DEFINITION

In terms of sanctions, the Commission draft provides for contracts concluded outside the

proposed rules to be considered 'invalid'. Given the different meanings this concept could assume in the many language versions of the draft directive, clarification seems to be called for with a view to defining whether the fact of being 'invalid' means that the contract is null and void (with or without retroactive effect) or that it is not enforceable.

4.2 PROPORTIONALITY OF THE PENALTY

The draft directive provides for two precise situations in which a contract could be declared to be invalid: failure to respect the standstill period in formal contract award procedures, and failure to respect the transparency and standstill requirements in direct procedures.

Within this context, several issues remain unresolved: If the concept of 'invalid' should be synonymous with being null and void, what would the consequences be? Should a minor failure to observe the procedural rules (for example, an administrative problem causing premature conclusion of the contract) automatically cause the contract to become invalid? Will the whole contract lapse? Will the candidate selection procedure have to be restarted from scratch or at a more advanced stage? In general terms, could the concept of 'invalid' not lead to penalties that were disproportionate and out of keeping with the proportionality principle?

Pending possible clarification from the Commission, MEPs are invited to state their position on the possible need to make the text more flexible, inter alia by leaving more space for national judges or by providing for several types of penalty depending on the problems encountered.

5. Conciliation and amicable settlements

The draft directive does away with the Community mechanism of *conciliation* in the special sectors. Even though this has never demonstrated its effectiveness (having in fact never been used), one may legitimately wonder about the thinking behind the new review system, which seems to give precedence to dissuasion by imposing penalties over amicable conflict resolution.

The text nevertheless provides the possibility of *prior notification* of contracting authorities by candidates who wish to challenge the award of a public contract. This measure could be a source of prior conciliation and might avoid the implementation of a complete review procedure. This being the case, the rapporteur invites Members of the European Parliament to state their views on the relevance of this mechanism, or even the need to reinforce it.

6. Practicalities of providing candidates with information

6.1 METHODS OF COMMUNICATION

The 10-day standstill period was introduced on the following assumption: the contracting authority will inform the candidates of its choice about the award of the contract by electronic means (fax or email). Information would thus be forwarded immediately.

However, in the event of a dispute, there is a question mark over the value (as evidence) of these means of electronic communication. With this in mind, the rapporteur wonders whether the possible means of informing candidates should not include notification by normal mail. If this were the case, would it be necessary to provide for two types of standstill period (10 days in the case of electronic notification / 20 days – for example – in the case of notification by letter)? Should this question be decided at Community level or should the Union leave Member States the option of choosing the means of communication and any specific standstill periods pertaining to it, at the risk of creating distortions between Member States in terms of possibilities for useful and effective review?

6.2 TYPES OF STANDSTILL

The draft directive proposed by the Commission sometimes makes reference to calendar days, sometimes to working days. The reference to working days is introduced where periods are extremely short (in this case, a delay of suspension of 5 working days), so that a review body that is only operational on working days has enough time to give its ruling.

It must nevertheless be decided whether these two methods of measuring standstills (in calendar days and in working days) could be a source of confusion. If so, how does Parliament suggest the situation be improved?