



**SIGMA**

A joint initiative of the OECD and the EU, principally financed by the EU



Creating Change Together

# **SIGMA**

# **Public Procurement**

# **Training Manual**

## **Update 2015**

## **Module F**

2 Rue André Pascal  
75775 Paris Cedex 16  
France

<mailto:sigmaweb@oecd.org>

Tel: +33 (0) 1 45 24 82 00

Fax: +33 (0) 1 45 24 13 05

[www.sigmaweb.org](http://www.sigmaweb.org)

This document has been produced with the financial assistance of the European Union. It should not be reported as representing the official views of the EU, the OECD or its member countries, or of beneficiaries participating in the SIGMA Programme. The opinions expressed and arguments employed are those of the authors.

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

## Module F1 Review and Remedies; Combating corruption

### Section 1 Introduction

**Localisation: The structure and much of the commentary is generic and there will need to be adaptations for local use. The notes in green highlight areas where particular attention will need to be paid to local requirements. The notes in green are intended only as an aid to localisation and are not intended to be an exhaustive list of procedures to be followed and issues to be provided for.**

#### 1.1. Objectives

The objectives of this chapter are to explore, explain and understand:

1. The remedies available under EU law
2. Methods and principles of dealing with pre-trial complaints and legal action by economic operators at contracting authority level
3. Legal principles and obligations
4. Progress of award procedures during pre-trial complaints as well as during litigation
5. How economic operators view remedies
6. How problems can be avoided

#### 1.2. Important issues

The most important issues in this chapter are concerned with the need to ensure that:

- Pre-trial complaints as well as legal action-related requests are dealt with efficiently and quickly by the contracting authorities
- Sufficient time is allowed for remedies-related delays when planning the procurement process
- The existence, conditions and deadlines of pre-trial complaint procedures as well as of legal actions are fully disclosed to economic operators, so that they know their rights in advance and may make use of them at the appropriate times, within the deadlines and before the designated review bodies

This means that it is critical to understand fully:

- What remedies are available to economic operators
- The implications of remedies sought in the course of an award procedure, including delays and interference with contracting decisions
- The approach of economic operators to remedies

If the above are not properly understood, the procurement process may be unduly delayed or even cancelled.

### 1.3. Links

There is a particularly strong link between this section and the following modules or sections:

- Module B on organisation at the level of contracting authorities
- Module E2 on advertisement of contract notices
- Module E3 on selection (qualification) of economic operators
- Module E5 on contract evaluation and contract award
- Module E6 on transparency, reporting, informing tenderers, communication with participants of the procedure.

### 1.4. Relevance

This information will be of particular relevance to those procurement professionals involved in the procurement planning, as they need to calculate delays related to remedies in their expected date of completion of the award procedure. It will also be of particular relevance to procurement officers who are responsible for receiving and deciding on complaints at any point during the award procedure, as well as officers with the power to make procurement decisions and sign contracts.

### 1.5. Legal information helpful to have at hand

**Adapt for local use using the format below, including listing the relevant national legislation and the key elements of that legislation. This section may need expanding to reflect particular local requirements relating to setting award criteria. That may include adding information relating to sub-threshold and/or low-value contracts.**

#### **1.5 LEGAL INFORMATION HELPFUL TO HAVE AT HAND**

Rules on remedies available to economic operators in the course of public sector contract award procedures are found in **Directive 89/665/EEC**, as amended by **Directive 2007/66/EC** and **Directive 2014/23/EU**.

#### **Utilities**

Rules on remedies available to economic operators in the course of utilities contract award procedures are found in **Directive 92/13/EEC**, as amended by **Directive 2007/66/EC** and **Directive 2014/23/EU**.

You may also find the following SIGMA paper useful:

*Selected Judgements of the Court of Justice of the European Union on Public Procurement (2006-2014), SIGMA, June 2014*

## Section 2 Narrative

Adapt all of this section using relevant local legislation, processes and terminology.

### 1 Overview

#### 2.1. Introduction

Remedies are legal actions available to economic operators participating in contract award procedures, which allow them 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.

The legal framework on remedies is found in the following directives:

Directive 89/665/EEC regulates remedies available to economic operators during public sector contract award procedures.

Directive 92/13/EEC regulates remedies available to economic operators during utilities contract award procedures.

Both directives were amended by Directive 2007/66/EC and by the 2014 Concessions Directive (2014/23/EU). Thus any reference in this module to Directive 89/665/EEC (or to Directive 92/13/EEC concerning utilities) means as amended by Directive 2007/66/EC and the 2014 Concessions Directive. These amendments also mean that the Remedies Directives are fully applicable to public and utilities work and service concessions when governed by the 2014 Concessions Directive. Any reference in this module to contracts therefore includes work and service concessions.

All directives must be implemented in national law, which provides for the specific procedural rules applying to remedies. Certain procedural rules are provided by the directives themselves, and these rules will be referred to in relevant sections of this module F1.

The aim of the directives on remedies is to allow irregularities occurring in contract award procedures to be challenged and corrected as soon as they occur, and to thereby increase the lawfulness and transparency of such procedures, build confidence among businesses, and facilitate the opening of local public contract markets to foreign competition. The achievement of these objectives is sought by involving economic operators, as prime beneficiaries, in the enforcement of procurement rules and enabling them to demand the observance of their rights to lawful participation in award procedures.

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

It follows that all national remedies, so as to ensure the enforcement of procurement rules, 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.

It also follows, and is of particular relevance for procurement officers, that contracting authorities should not only allow some time, when planning their procurement procedures, for delays and disruptions resulting from remedies filed by economic operators, but should also assist in the rapid and effective resolution of all possible disputes, both:

- before these disputes reach local review bodies (for example, by correcting the irregularity themselves); and
- during litigation (for example, by providing all requested documents and information in good time, to ensure the effectiveness of the review process).

This section will examine the remedies available, who may use them, what are the types of review bodies before which remedies are sought and, most importantly, what is required of contracting authorities and their procurement officers with regard to remedies. As this issue largely concerns local laws, the focus will be on good practice requirements as well as on interaction between contracting authorities and economic operators.

#### **Sub-threshold / excluded contracts**

**Adapt all of this section for local use – using relevant local legislation, processes and terminology. Briefly set out the requirements of the local legislation for sub-threshold contracts.**

Directive 89/665/EEC does not apply to public procurement procedures relating to contracts that are below certain set financial thresholds ('sub-threshold contracts').

Generally speaking, with regard to all contracts that fall outside Directive 2014/24/EU (the 2014 Directive), including but not limited to sub-threshold contracts, EU Member States are free to introduce their own rules, and thus, if they wish, to make the remedies provided in Directive 89/665/EEC available for all public procurement awards.

In any event, cross-border contracts falling outside Directive 2014/24/EU are covered by general EU law, such as the EC Treaty rules and principles. Therefore, for all legal action in relation to procurement procedures for such contracts, the basic principles of all remedies to enforce EU rules, i.e. the principles of equal treatment, non-discrimination, and effective legal protection of all economic operators, must be respected in all cross-border contracts.

See also module D4 on excluded contracts and module D5 on applicable financial thresholds.

## **2.2. Right to use the remedies**

**Adapt this section for local use – using relevant local legislation, case law and terminology.**

The 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 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.

Only an interest in obtaining a particular contract is required of the economic operator (and not a possibility, probability or likelihood of winning the contract) in order to have the right to use the remedies.

### **Who may be denied the standing to file for remedies (as applicable under local law)?**

The standing required to file for remedies may be denied to any economic operator that cannot establish harm as a result of the breach, i.e.:

- (a) Economic operators that could not possibly have been awarded the contract, for example because they lack the critical technical qualifications, may be denied the right to challenge the contract award.
- (b) Economic operators that have not participated in the contract award procedure may not be allowed to challenge contract award decisions. Such decisions cannot possibly affect outsiders to the contract award procedure.
- (c) Economic operators that have been excluded at earlier stages of the award procedure (for example at the selection stage) may not have the standing required to challenge decisions taken at later stages of the procedure (for example, the award decision). In particular with regard to the right to challenge the contract award decision, according to article 2a(2) of Directive 89/665/EEC the right to remedies may be denied to those tenderers that have been informed by the contracting authority of the (prior) decision concerning their exclusion and that decision has either been challenged and found lawful or the time limit for challenging the decision has passed. The right to challenge the award decision may also be denied to those candidates that were informed by the contracting authority of the rejection of their applications prior to the notification of the contract award decision. The contract award decision cannot affect economic operators that have been previously and definitively excluded from the procurement process.
- (d) Economic operators that remain in the award procedure may not be allowed to challenge at later stages of the procedure any defective decisions that may have been taken at earlier stages of the procedure (for example, at the selection stage), for example by alleging that defects in selection tainted the award decision since the winning tenderer did not actually meet the selection criteria.
- (e) Community groups, contractors' trade associations, subcontractors, environmental associations or other interested bodies may not have access to public procurement remedies.
- (f) Members of consortia may not be allowed to act individually, i.e. local law may provide that only all of the members of a tendering consortium acting together may bring an action and not each member acting on its own. The action can also be dismissed if all members of a tendering consortium act together but the application of one of them is held to be inadmissible. This provision was accepted by the European Court of Justice (ECJ) in case C-129/04 [*Espace Trianon SA and Société wallone de location - financement SA (Sofibail) vs Office communautaire et régional*]

*de la formation professionnelle et de l'emploi (FOREM)*, available at <http://eur-lex.europa.eu.int/>].

Generally, local laws on standing and on representation in legal proceedings are applicable to the extent that they do not interfere with the rule that all economic operators with an interest in obtaining a particular contract and that risk being harmed as a result of a breach of the rules must have access to effective legal remedies.

### 2.3. Types of review bodies

**Adapt all of this section for local use – using relevant local legislation, processes and terminology.**

Procurement cases are brought before a body that may be either a specialised procurement tribunal or a regular court. EU Member States are free to choose between the two. Such a choice is important, since the speed, cost, outcome and frequency of the use of remedies will depend on it. Briefly, the pros and cons of choosing either (a) the courts or (b) a specialised procurement tribunal are as follows:

#### (a) Courts

**Pros:** Courts may have a better knowledge of general law. Also, they are usually better acquainted with methods of interpretation and legal principles and are better able to employ them.

**Cons:** The procedure before the courts tends to take longer, as they also hear other cases and may lack specialized public procurement knowledge. For this reason, they may possibly be more expensive than specialised tribunals.

#### (b) Specialised procurement tribunals

**Pros:** The procedure in specialised procurement tribunals is usually simpler as well as quicker, since they have to deal exclusively with procurement cases. They tend to be more aware of the realities of procurement and more familiar with contract award procedures and related issues.

**Cons:** The specialised tribunals may not be very familiar with general law or legal principles.

If a specialised procurement review body is chosen, then there should be a right to appeal its decisions to a different independent body, with properly qualified members and at least some procedural rules. Article 2(9) of Directive 89/665/EEC sets out the requirements that such an independent body must meet (refer to 'The Law' section).

Article 2(2) of Directive 89/665/EEC allows for different review bodies to be responsible for different aspects of review. If this is indeed the local choice, usually it is the case that a specialised procurement tribunal hears applications for interim relief and set-asides, and the regular courts hear actions on damages.

## 2.4. Types of remedies

**Adapt this section for local use – using relevant local legislation, remedies and terminology.**

In this section we will look at the available remedies. What contracting authorities (and their procurement officers) should do with regard to remedies is dealt with separately in section 2.6 below. In all of the sub-sections to this section, we will examine each type of remedy, addressing the following points:

- (a) What does the remedy consist of?;
- (b) Where is the remedy brought?;
- (c) Procedure;
- (d) Measures that can be ordered;
- (e) Aim;
- (f) Use (from the point of view of the contracting authority and of the procurement procedure).

### 2.4.1. 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. 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 prior to the proceedings before review bodies. Depending on the specific facts and circumstances, complaints can lead to enforcement of the law and to quick and early resolution of disputes.

#### **(a) What does the complaint consist of?**

A complaint is an application addressed to the contracting authority, containing the economic operator’s allegation of an infringement occurring in the course of the contract award procedure and a request for the situation to be reviewed and corrected. Complaints are lodged prior to legal proceedings before local review bodies. The complaint may also refer to the economic operator’s right or intention to seek review before the competent review bodies.

Depending on local legislation, complaints may be:

- **optional**, i.e. the economic operator may file a complaint, if it wishes, but no consequences are attached to not filing; or
- **compulsory**, i.e. the economic operator must file a complaint if it wishes to then proceed with legal action before local review bodies. In such cases, legal action will be dismissed if a

complaint has not been filed first, and the procedure and deadlines for such filing are provided for in local law.

According to article 1(5) of Directive 89/665/EEC, if the complaint is compulsory, then its submission results in immediate suspension of the possibility to conclude the contract. Local law may provide that this suspensive effect also applies to optional complaints. The suspension allows the award procedure to go ahead, although the contract cannot be concluded. It is up to the contracting authority to assess whether it is safe to go ahead with the procedure pending review of a complaint or, inversely, whether this may cause future actions or decisions of the contracting authority to be tainted by the unlawfulness of the challenged contracting decision, if it is found to be unlawful. This would also be a matter of local law. It is suggested that it is best, if possible, to wait – see also section 2.6.7 below.

The suspension of the procedure cannot end until 10 calendar days have passed from the day following the date of the contracting authority's reply concerning the complaint, if fax or e-mail was used for this purpose by the contracting authority. If other means of communication were used, the suspension cannot end until 15 calendar days have passed from the day following the date of the contracting authority's reply concerning the complaint or at least 10 calendar days from the day following the date of receipt by the complainant of the contracting authority's reply with regard to the complaint. The same deadlines apply if the contracting authority did not reply to the complaint, and the period of suspension begins on the day following the deadline date by which the contracting authority should have replied but did not.

**(b) Where is the complaint brought?**

This depends on local legislation. Complaints are generally submitted to the contracting authority, and possibly to a special review panel within the contracting authority that has been designated for this purpose.

**(c) Procedure**

The complaints procedure depends on local legislation. It can have an informal or formal character (with specific rules applying). If the complaint is a compulsory prerequisite for legal action, then local law will provide for at least some filing requirements and deadlines.

**(d) Measures that can be ordered**

If the complaint is accepted, the contracting authority will try to correct the breach by undertaking all due actions, for example by allowing an economic operator that fulfils the set selection criteria to remain in the procedure (and thereby correcting an unlawful exclusion decision).

**(e) Aim**

The aim of pre-trial complaints is to give the economic operator the opportunity to explain its case and to allow the contracting authority the possibility – if it has accepted the complaint – of either convincing the economic operator that no breach has occurred or, alternatively, correcting the breach before the matter reaches the courts.

**(f) Use**

Complaints can prove to be very useful because they can lead to quick and inexpensive resolution of disputes. In particular where breaches are caused by negligence, the contracting authority usually tries to correct the breach, and thus disputes are resolved quickly and inexpensively for both sides. Alternatively, if no breach has occurred, the contracting authority is given the opportunity to explain this situation to the affected economic operator, presenting the arguments for its position. An adequate explanation may convince the economic operator and prevent further legal action.

There may also be drawbacks to the availability of complaint procedures which in some member states can be time-consuming and not very effective.

## **2.4.2. Interim measures**

### **(a) What do the interim measures consist of?**

Interim measures are provisional measures taken against the contract notice and any contracting decision, including the contract award decision.

Article 2(3) of Directive 89/665/EEC provides that while an application for interim measures is pending against the *contract award decision*, the contract cannot be concluded until the review body has decided either to authorise or not the application of interim measures (including the further suspension of the conclusion of the contract) or to judge the merits of the case (i.e. whether or not to set aside the contract award decision). The suspension is to last at least until the expiry of the standstill period applicable to contract award decisions, examined below under 2.4.4. Applications for interim measures against other contracting decisions do not necessarily, in themselves, have an automatic suspensive effect.

### **(b) Where are the interim measures brought?**

An application for interim measures is brought before the competent local court or procurement tribunal.

### **(c) Procedure**

The procedure for interim measures depends on local legislation, which sets out the filing rules, deadlines, and notifications to other candidates or tenderers. Since the aim of interim measures is to provide a quick provisional resolution to a dispute, the time limits are usually tight. For the same reason, procedural rules (for example, concerning evidence) should be light. Local law must allow for the application for interim relief to be made without requiring a prior application to set aside the contracting decision (C-236/95 *Commission v Greece* available at <http://eur-lex.europa.eu.int>).

According to article 2c of Directive 89/665/EEC, the deadline for submitting an application for review (therefore also for interim measures) must be at least 10 days from the day following the date on which the contracting authority sent the contracting decision to tenderers or candidates, if fax or e-mail was used. If the contracting authority used other means of communication (such as post) to transmit the contracting decision, the deadline date must be at least 15 days from the day following the date of dispatch of this decision or at least 10 days from the day following the date of receipt of this decision by the tenderers

or candidates. If no notification is required (for example, if the dispute concerned specifications set in the contract notice), then the deadline is at least 10 days from the date of publication of the contract notice.

Days are calendar days, not working (business) days. Local law may allow for longer deadline periods.

#### **(d) Measures that can be ordered**

The following interim measures can be ordered:

- Suspension of the implementation of any decision taken by the contracting authority
- Suspension of the whole contract award procedure
- Provisional correction of the breach (this depends on local law and is rather unusual)

#### **(e) Aim**

Interim measures aim to prevent the creation of unalterable situations and, before a final decision is reached on whether a contracting decision is unlawful and must be set aside, 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. (The amending Directive 2007/66/EC provides for automatic suspension of the contract award where legal proceedings are brought.) These aims may only be achieved if the local legal system provides an effective possibility of obtaining interim relief (therefore relevant procedures are neither too complex nor too slow) and if the competent review body is not reluctant to grant interim relief as a matter of principle.

#### **(f) Use**

The fact that legal action has been instituted means that the matter is out of the hands of the contracting authority, which can only try to argue its case. It is therefore best that matters are resolved, to the extent that they can be, during pre-trial complaints brought by economic operators. However, applications for interim measures are by far the most useful legal remedy because decisions on such measures are taken rapidly, and therefore economic operators as well as procurement officers may continue relatively quickly with the award procedure.

### **2.4.3. Setting aside of contracting decisions**

#### **(a) What does the set-aside remedy consist of?**

The application for the set-aside remedy cancels or renders ineffective a contracting decision taken unlawfully or otherwise corrects an unlawful situation. In particular with regard to the award decision, see below section 2.4.4.

Article 2(3) of Directive 89/665/EEC provides that, while the application for a set-aside remedy is pending against the *contract award decision*, the contract cannot be concluded until either the review body has taken a decision on interim measures or on the merits of the case (i.e. on whether or not to set aside the contract award decision). The suspension is

to last at least until the expiry of the standstill period applicable to award decisions, examined under 2.4.4 below. Applications for the setting aside of other contracting decisions may not necessarily, in themselves, have an automatic suspensive effect (although interim measures may of course always be applied for and granted).

**(b) Where is the application for a set-aside remedy brought?**

An application for a set-aside remedy is brought before the competent local court or procurement tribunal.

**(c) Procedure**

The procedure for a set-aside remedy depends on local legislation, which sets the filing rules, deadlines, and notifications to other candidates or tenderers.

According to article 2c of Directive 89/665/EEC, deadlines to apply for a set-aside must be at least 10 days from the day following the date on which the contracting authority sent the contracting decision to tenderers or candidates, if fax or electronic means was used. If the contracting authority used other means of communication (such as post) to transmit the contracting decision, the deadline date must be at least 15 days from the day following the date of dispatch of this decision, or at least 10 days from the day following the date of receipt of this decision by the tenderers or candidates. If no notification is required (for example, if the dispute concerns specifications set in the contract notice), then the deadline date must be at least 10 days from the date of publication of the contract notice.

Days are calendar, not working (business), days. Local law may allow for longer deadline periods.

**(d) Measures that can be ordered**

For a set-aside remedy, the following measures can 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.

Local review bodies usually do not review the soundness of the contracting authority's decisions or the way in which the contracting authority reached such decisions. They only examine whether the contracting decision was reasonable or whether the contracting authority committed a serious error (especially whether it obviously misused its discretion in setting a specification, selecting a candidate or awarding a contract). This role is consistent with the aim of Directive 89/665/EEC, which is to allow review bodies to check whether contracting decisions are well-founded and supported by evidence, but not to 're-decide' a contracting decision, which is within the scope of the contracting authority's discretion. The review of reasonableness is particularly important in the context of procedures where the contract is awarded to the most economically advantageous tender that is assessed on the

basis of the best price-quality ratio (and not on the basis of price only), as in that case the discretion of the contracting authority is wide, since it decides and applies a number of criteria, and an abuse of discretion is therefore a probability. However, such a review must be limited to a 'reasonableness' test, as otherwise it might lead to speculative litigation aimed at convincing the review body to second-guess the decision of the contracting authority. **Localisation required**

#### **(e) Aim**

The aim of set-asides is to correct proven irregularities. It goes without saying that 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 (but not the choices made by) contracting decisions.

#### **(f) Use**

For set-asides, as for interim measures, the fact that legal action has been instituted means that the matter is out of the hands of the contracting authority, which can only try to argue its case. The whole procedure, up to and including a decision to set (or not to) aside a contracting decision, can be time-consuming. From the point of view of contracting authorities, therefore, this remedy can cause long delays in their award procedures, which is why it is best if matters can be resolved, to the extent that they can, during the review of pre-trial complaints brought by economic operators. From the point of view of the lawfulness of the award procedure, the set-aside is a useful remedy, as it can correct an infringement, provided that review bodies use their powers reasonably.

Directive 89/665/EEC allows local legislation to stipulate that public procurement contracts that have been concluded may not be set aside in certain cases where an alternative sanction is applied. In that case, the rights of economic operators and the powers of the local review body are limited to asking for, and awarding, compensation to economic operators for any harm caused to them by infringements of the public procurement rules. This provision makes sure that concluded contracts are not affected and that performance can take place immediately following conclusion, notwithstanding any defects of the procedure leading up to the conclusion. However, there have been many instances of abuse of this option by contracting authorities. In particular, contracting authorities have been quick to conclude contracts, knowing that, as soon as they were concluded, such contracts would be allowed to stand, even if the award procedure was unlawful. It was therefore important to provide for the challenging of contract award decisions, so as to ensure that contracts would ultimately be awarded to the tenderer that had made the best offer.

#### ***Alcatel* case - Judgment of the ECJ on the distinction between award decision and conclusion of contract and on challenging an award decision**

(C-81/98, *Alcatel Austria AG and Others, Siemens AG Österreich, Sag-Schrack Anlagen Technik AG v. Bundesministerium für Wissenschaft und Verkehr*, available at <http://curia.europa.eu/jcms/jcms/>)

#### **Facts**

In 1996 the Austrian Federal Ministry of Science and Transport ran an open procedure for the supply, installation and demonstration of hardware and software components of an electronic system for automatic data transmission on Austrian motorways.

Under Austrian law, the contract between the contracting authority and the tenderer was concluded when the tenderer received notification by the contracting authority of the acceptance of its offer. The contracting authority did not have the obligation to notify the other tenderers of its intention to award the contract before it notified the successful tenderer. Therefore other tenderers did not have the opportunity to challenge the award decision before the contract was concluded. Also, in Austria concluded procurement contracts could not be reversed. Unsuccessful tenderers in award procedures in which the award decision was taken unlawfully could only seek compensation.

On 5 September 1996 the contract in question was awarded to one of the tenderers and was signed on the same day. The other tenderers learned of the contract through the press. They then applied to the Austrian *Bundesvergabeamt* (the Austrian Federal Procurement Office, competent for hearing applications for set-aside and interim measures) to review the award. The Federal Procurement Office requested the ECJ to give a preliminary ruling on several issues concerning the interpretation of Directive 89/665/EC.

The first preliminary question was whether EU Member States were obliged, under Directive 89/665/EC, to provide for the remedies of set-aside and interim measures against the award decision, notwithstanding the possibility provided for in the Directive of limiting the available remedies to compensation for damages after a contract was concluded.

**Decision:**

The ECJ ruled that Directive 89/665/EC should be interpreted to mean that EU Member States had to ensure that the remedies of set-aside and interim relief could be used against an award decision. According to the ECJ, Directive 89/665/EC sought to reinforce the effective enforcement of the procurement rules, in particular at a stage where infringements could still be rectified. The award decision was the most important contracting decision, and it had to be possible to have it suspended or set aside. Therefore, the award decision and the conclusion of contract had to be distinct, and the award decision had to be open to challenge, notwithstanding any local rules to the effect that concluded contracts could not be reversed.

The ECJ was silent on the way in which EU Member States should fulfil this obligation and whether there should be a delay between the award decision and the conclusion of the contract or the length of such a delay. Instances of contracts being concluded without any possibility of challenging the award decision beforehand, continued to occur. For this reason, in late 2007, Directive 2007/66/EC was adopted to amend Directive 89/665/EEC (as well as Directive 92/13/EEC on remedies in utilities award procedures). Among other provisions, the new Directive 2007/66/EC set out the requirement for a standstill period between the contract award decision and the conclusion of the contract with the successful tenderer and established the right to challenge the award decision.

**2.4.4. Directive 2007/66/EC and the standstill period**

**Adapt all of this section for local use – using relevant local legislation, processes and terminology.**

Directive 2007/66/EC requires public authorities 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.

Not only during the standstill period but also *during legal proceedings*, instituted by means of either an application for interim measures or an application to set aside the contract award decision, *and until the review body has issued a decision*, the contracting authority may not conclude the contract, according to article 2(3) of Directive 89/665/EEC.

#### **Concluded vs signed contracts**

It is important for contracting authorities to remember that what is required is to allow for a standstill period before the contract is concluded, i.e. before the contract is performed. Signature of the contract is immaterial, especially taking into account that under several legal systems a contract is concluded before it is actually signed, for example when the award decision is notified to the successful tenderer.

According to article 2b of Directive 89/665/EEC, local law may provide that **contracting authorities do not have to observe the standstill period (or notify the award decision) where:**

- the decision is for the award of specific contracts under a framework agreement or a dynamic purchasing system;
- there is no obligation under Directive 2014/24/EU to publish a contract notice;
- there is only one tenderer/candidate left at the award stage of the procedure; in that case, there are no other persons remaining in the award procedure with an interest or right to challenge the contract award decision and to benefit from the standstill period.

If subsequently the derogation from the standstill period is found to be faulty, because either the specific contracts under a framework agreement or dynamic purchasing system have been awarded in violation of the applicable rules or a contract notice should have been published (but was not), the concluded contract is not protected, and review bodies are required to render it ineffective – see below under (d).

#### **(a) Notification requirement**

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 actually conclude the contract. The notification must include a summary of the reasons for this decision, as set out in article 55(2) of Directive 2014/24/EU, and in particular the name of the successful tenderer and the characteristics and relative advantages of the tender selected; certain information may be withheld. For the applicable information requirements under article 55 of Directive 2014/24/EU, see below in section 2.6.3.

. 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.

Tenderers or candidates that were duly excluded or rejected previously do not have legal standing to challenge the award decision, and there is no requirement to notify them of the award decision. On this issue, see section 2.2. above.

### **(b) Length of standstill period**

According to article 2a(2) of Directive 89/665/EEC, 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 fax or electronic means is used. If the contracting authority uses other means of communication (such as post) to send the notification of the contract award decision, then the standstill period must last at least 15 days, starting from the day following the date of dispatch of the notification of the contract award decision, or at least 10 calendar days starting from the day following the date of receipt by tenderers or candidates of the notification of the contract award decision.

These standstill periods are only the minimum requirements: local law may provide for longer (but not shorter) periods.

The shorter the standstill period, the more quickly the contract will be concluded, and so contracting authorities may opt to use fax or electronic means such as e-mail to take advantage of the shorter standstill period.

Days are calendar days, not business (working) days.

During this standstill period, rejected tenderers can apply for the review of the award decision, either first by the contracting authority (i.e. 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 there are pre-trial complaints under local law and whether these complaints are optional or compulsory prior to the use of other remedies.

#### **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.

### **(c) Direct awards**

When a contracting authority considers that it has the right to directly award a contract without publication of a contract notice, then under article 2d(4) of Directive 89/665/EEC, it may publish a simplified notice (*voluntary ex ante transparency notice*) in the *Official Journal of the European Union (OJEU)* of its intention to award the contract and may also observe a standstill period of at least 10 days starting from the day following the date of publication of the notice before concluding the contract. If this procedure is followed, then the contract

may be concluded without any risk of ineffectiveness. There is a new standard form Notice for this voluntary publication which can be accessed from the simap website.

#### **Use of voluntary *ex ante* transparency notice**

##### **Fastweb case – Judgment of the ECJ**

(C-19/13 Reference for a preliminary ruling: *Consiglio di Stato - Italy*, available at <http://eur-lex.europa.eu.int/>)

##### **Facts:**

In 2003, the Italian Ministry of Interior concluded a contract with Telecom Italia for the management and development of telecommunications services that was due to expire on 31 December 2011. Before the contract expired, the ministry considered it possible, for the purposes of awarding the new electronic communications contract, to use the negotiated procedure without prior publication of a contract notice, provided for in article 31(1)(b) of Directive 2004/18, the predecessor of the 2014 Directive. The ministry considered that, for technical reasons and in order to protect certain exclusive rights, Telecom Italia was the only economic operator in a position to perform the contract at issue. In December 2011, the ministry published a voluntary *ex ante* transparency notice in the *Official Journal of the European Union (OJEU)*, announcing its intention to award the contract directly to Telecom Italia. In the notice, the ministry justified its decision to award the contract without prior publication of a contract notice on the grounds of technical reasons.

The Ministry of Interior and Telecom Italia signed a contract and contract award notice was published in the *OJEU* in February 2012.

Following the publication of the contract notice, the company Fastweb brought an action before the Regional Administrative Court of Lazio for annulment of the award of the contract and demanded a declaration that the contract was ineffective. Fastweb claimed that the conditions laid down in article 31(1)(b) of Directive 2004/18 for the use of the negotiated procedure without prior publication of a contract notice were not satisfied.

The Regional Administrative Court of Lazio found that the reasons set out by the Ministry of Interior as justification for the use of that procedure did not constitute ‘technical reasons’ by which the contract could be awarded only to a particular economic operator, but rather reasons of urgency. It annulled the decision awarding the contract and declared the contract ineffective.

The Ministry of Interior and Telecom Italia each lodged an appeal against that decision of the Regional Administrative Court of Lazio before the *Consiglio di Stato*.

The *Consiglio di Stato* found that the ministry had failed to demonstrate that the conditions for using the negotiated procedure without prior publication were satisfied. The Court was uncertain, however, as to the proper conclusions to be drawn from that annulment in terms of the effects of the contract at issue, in the light of article 2d(4) of Directive 89/665/EEC. The *Consiglio di Stato* requested the ECJ to give a preliminary ruling on two questions concerning the interpretation of Directive 89/665/EEC, including the question as to whether, where a public contract is awarded without prior publication of a contract notice, but the conditions laid down in Directive 2004/18 for the use of that procedure are not satisfied, the contract is

not to be declared ineffective if the contracting authority had published in the *OJEU* a voluntary *ex ante* transparency notice and, before concluding the contract, had allowed the 10-day minimum standstill period to elapse from the day following the date on which that notice was published.

**Decision:**

The ECJ first noted that in article 2d(4) of Directive 89/665/EEC the EU legislature had laid down an exception to the general rule regarding the ineffectiveness of a contract, which had to be interpreted strictly. The ECJ also noted that it would be contrary to both the wording and purpose of article 2d(4) of Directive 89/665/EEC to allow the national courts to declare that a contract was ineffective where the three conditions laid down in that provision were satisfied.

However, the ECJ indicated that it was important that the body responsible for the review procedure, when verifying whether the conditions laid down in article 2d(4) of Directive 89/665/EEC had been fulfilled, should carry out an effective review.

Specifically, the condition laid down in the first indent of article 2d(4) of Directive 89/665/EEC relates to the need for the contracting authority to consider it permissible under Directive 2004/18 to award the contract without prior publication of a contract notice in the *OJEU*.

The condition laid down in the second indent of article 2d(4) of Directive 89/665/EEC relates to the additional need for the contracting authority to publish a notice in the *OJEU* announcing its intention of concluding the contract. The notice must state the justification for the contracting authority's decision to award the contract without prior publication of a contract notice. The 'justification' must disclose clearly and unequivocally the reasons that moved the contracting authority to consider it legitimate to award the contract without prior publication of a contract notice, so that interested persons are able to decide with full knowledge of the relevant facts whether they consider it appropriate to bring an action before the review body and so that the review body is able to undertake an effective review.

The ECJ stated that in its review, the review body had the duty to determine, when the contracting authority took the decision to award a contract, whether it acted diligently and whether it could legitimately hold that the conditions laid down in article 31(1)(b) of Directive 2004/18 were in fact satisfied.

If, at the conclusion of its review, the review body finds that the conditions laid down in article 2d(4) of Directive 89/665/EEC are not satisfied, it must then declare that the contract is ineffective, in accordance with the rule laid down in article 2d(1)(a) of that directive.

On the other hand, if the review body finds that those conditions are satisfied, it must maintain the effects of the contract, pursuant to article 2d(4) of Directive 89/665/EEC.

**(d) Ineffectiveness of concluded contracts**

Article 2d(1) of Directive 89/665/EEC provides that local review bodies are to set aside or otherwise render ineffective a concluded contract when that contract has been concluded:

- **without the contracting authority publishing a contract notice and without running an award procedure**, despite an obligation to do so under Directive 2014/24/EU;
- **without the observation of a standstill period** for the award of specific contracts under a framework agreement or dynamic purchasing system and this award therefore breaches the relevant applicable rules under Directive 2014/24/EU;
- **during the automatic suspension period** when a pre-trial complaint is sought against any contracting decision or **during the standstill or suspension period throughout legal proceedings against contract award decisions**, if the tenderer claiming to have been harmed is deprived of asking for interim measures or for the setting aside of the concerned contracting or award decision *and* the rules of Directive 2014/24/EU have been breached *and* the concerned tenderer's chances of obtaining the contract have been affected as a result.

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 conclusion of these contracts. It 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. There is also a serious risk that the successful tenderer, for which the contract has been terminated in this way, would seek damages under local contracts law.

The legal action to set aside a signed contract (in the case described above) would be instituted by a tenderer claiming to be harmed as a consequence. Deadlines and procedures for such a request are governed by local law. However, minimum deadlines are 30 calendar days, starting from the day following the date of publication of the contract award notice (this notice must include a justification of the award of the contract without prior publication of a contract notice, if that was the case) or of the notification to tenderers/candidates by the contracting authority of the conclusion of the contract, provided that a summary of the reasons for the award decision were mentioned in the notification (see below in section 2.6.3. the relevant information requirements of Directive 2014/24/EU). Otherwise, deadlines may be extended. If no contract award notice was published or if there was no notification transmitted to tenderers/ candidates, the minimum deadline for legal action against a concluded contract is six months from the day following the date of conclusion of the contract.

These deadlines are only the minimum requirements; local law may provide for longer (but not shorter) periods.

Depending on local law, the setting aside of a signed contract may be retroactive (i.e. 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 (i.e. only future and unperformed contractual obligations may be annulled). In the case of prospective cancellation, there must also be other penalties, such as fines imposed on the contracting authority, in accordance with article 2d(2) of Directive 89/665/EEC.

Unlawfully concluded contracts may be maintained, if the cumulative conditions are not met, i.e. breach of the standstill or suspension periods *and* breach of the rules of Directive 2014/24/EU, *and* possible harm of chances of obtaining the contract. Then, depending on

local law, review bodies may have the discretion of deciding not to render ineffective an unlawfully concluded contract.

According to article 2d(3) of Directive 89/665/EEC, discretion may 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 provided as an exception to the general rule that unlawfully concluded contracts must not be maintained.

Economic reasons – such as costs arising from delays in carrying out the project, restarting of the award procedure, changing of the contractor, or damages that may be sought by the successful tenderer of the cancelled contract – cannot be taken into account by review bodies, and contracting authorities therefore should not, and cannot, rely on them.

In cases such as those cited above, where unlawfully concluded contracts are allowed to stand, or in cases where the cancellation of an unlawfully concluded contract applies only for the future, i.e. not retroactively, the following alternative penalties must be imposed, in accordance with article 2e(2) of Directive 89/665/EEC:

- **Fines imposed on the contracting authority:** Such fines must be adequately high in order to punish the unlawfulness. Their amount should take into account both the seriousness of the breach as well as the contracting authority's conduct. The harmed tenderer is entitled to ask for compensation in any case.

or

- **Shortening of the duration of the contract.**

#### **2.4.5. Damages**

##### **(a) What do damages consist of?**

The compensation of economic operators harmed by an infringement of the public procurement rules should be available.

##### **(b) Where is the remedy brought?**

Claims for damages are brought before the local review body. Often, even if there is a procurement tribunal, the local review body will hear applications for interim measures and/or set-asides, while the regular courts will hear claims for damages.

##### **(c) Procedure**

The procedure 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).

##### **(d) Measures that can be ordered**

The measures that are ordered 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 very difficult to establish the extent of the damage suffered in a competitive process.

#### **(e) Aim**

This remedy aims to compensate harmed economic operators.

#### **(f) Use**

This remedy does not interfere with the contract award procedure, its progress or conclusion. It is of use to economic operators but is not used very often because it is difficult to prove actual harm and therefore difficult to be granted compensation. The award of damages as a result of an irregularity occurring in a contract award procedure would be relevant for the audit of award procedures by local audit bodies.

### **2.5. General principles to be observed by review bodies and contracting authorities with regard to remedies**

**Adapt all of this section for local use – using relevant local legislation, processes and terminology.**

The general principles below must be observed by local review bodies as well as by contracting authorities, which are obliged to follow the law (including legal principles) in their procedures.

#### **2.5.1. Non-discrimination**

Access to remedies should be open to all economic operators without discrimination, especially on grounds of nationality. Also, 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. This principle is expressly stated in article 1(2) of Directive 89/665/EC.

The procedural rules themselves are a matter for local law to decide, on condition that the rules of Directive 89/665/EC as well as the legal principle of non-discrimination (and that of effectiveness, examined below) are complied with. If there are no remedies to enforce domestic procurement rules, then remedies for the enforcement of EU public procurement rules only have to comply with the rules of Directive 89/665/EC, as well as with the legal principle of effectiveness, since there is no scope for the application of the principle of non-discrimination.

From the point of view of contracting authorities, the principle of non-discrimination mainly means that they should treat all economic operators in the same manner, in particular with regard to their actions and duties, as set forth in section 2.6. below.

#### **2.5.2. Effectiveness**

Remedies must have sufficient power to ensure observance of EU public procurement rules, i.e. they must be effective.

This means that contracting authorities should try to facilitate the proper conduct of all legal procedures and should always comply with decisions concerning remedies.

One aspect of remedies that is extremely important in procurement is speed. The importance of speed is stressed in article 1(1) of Directive 89/665/EEC, which states that “decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible...”.

In practice, for contracting authorities this means that even if there are no maximum deadlines within which they must respond to requests for information, complaints, etc., they must nevertheless in practice try to ensure speed by giving priority to dealing with such requests and to responding quickly.

More detailed information on the duties of contracting authorities is set forth in section 2.6. below.

### **2.5.3. Transparency**

Transparency in the context of remedies and review procedures means, as far as the contracting authority is concerned, that through the tender documents themselves as well as in the notifications of contracting decisions, maximum information is provided to economic operators on:

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

More detailed information on the duties of contracting authorities is set out in section 2.6. below.

## **2.6. What is required by contracting authorities with regard to remedies?**

**Adapt all of this section for local use – using relevant local legislation, processes and terminology.**

Some of the directions to contracting authorities that follow are legal duties arising from EU Directives or from the case law of the ECJ or the Court of First Instance. However, many of the directions are good practice rules. Where relevant, the applicable EU legal rules will be mentioned.

In many of the areas examined below, there will be local rules applicable to public authorities, defining the due manner of exercising their duties and specifying their powers and obligations in communicating with their counterparts (economic operators, tenderers and contractors), as well as relevant response, disclosure and co-operation rules. All such local rules should be observed.

### **2.6.1. Notification of available remedies in tender documents**

It is very helpful if the tender documents clearly explain the remedies available to economic operators (both pre-trial complaints, if any, and legal actions), by summarising local law and including a reference to the applicable rules.

In particular with regard to pre-trial complaints, the tender documents should mention where to file such complaints (for example, with the competent committee and/or contact person in the contracting authority) and the forms of submission of complaints (for example, if submission of a complaint by fax is allowed).

### **2.6.2. Drafting of detailed and reasoned contracting decisions**

All contracting decisions should set out clearly the grounds, manner and method that provided the basis on which each contracting decision was reached.

This information enables economic operators to understand the contracting decision and to make an informed opinion as to whether the decision was lawfully reached. If they consider that it was unlawful, then a detailed contracting decision would allow them to defend their rights and to prepare a reasoned and relevant complaint or action, which would then possibly allow the contracting authority to correct any involuntary mistakes that it had made. If, on the other hand, the contracting decision was lawful, the fact that it was reasoned and clear would dissuade economic operators from bringing unfounded complaints on the off-chance that the review body might take a different view from that of the contracting authority. As mentioned above in section 2.4.3. on the remedy of set-aside, persons sitting on review bodies, whether they be procurement tribunals or courts, are neither interested in nor empowered to second-guess contracting decisions and only can – or want to – make sure that the law is complied with.

Also, detailed contracting decisions enable supervisory authorities or audit bodies to exercise their duties.

### **2.6.3. Informing promptly and fully all tenderers or candidates of all contracting decisions (including the decision to abandon the award procedure) and of the general progress of the award procedure**

Article 55(1) of Directive 2014/24/EU provides that contracting authorities should inform as soon as possible all candidates or tenderers of all decisions concerning the award of a contract, including the decision (and the underlying reasons) not to award the contract or to restart the procedure. Such a notification requirement should apply to all contracting decisions and therefore include decisions reached at the selection stage as well as other interim contracting decisions. See also module E6 on transparency and communication between the contracting authority and economic operators.

Usually, the time of notification of any contracting decision (including the decision not to award or to restart the procedure) is the starting date for the calculation of deadlines under local laws for the submission of complaints and/or legal remedies. This means that the contracting authority has an interest in notifying all economic operators *as quickly as possible* and at the same time of all contracting decisions so that deadlines start running, in order to see if there are any challenges and, if not, to lawfully proceed with the award procedure or conclusion of the contract or to relaunch the procedure. Economic operators

that bring complaints outside such deadlines will normally be time-barred under local laws, and their complaints or legal remedies will be dismissed.

Care should be taken to contact tenderers at their *correct addresses and contact persons*, as stated in their tenders. Failure to observe this simple procedure would normally lead to an extension of deadlines for lack of proper notification.

Article 55(2) of Directive 2014/24/EU imposes a specific obligation on the contracting authority to indicate as soon as possible, on written request from the party concerned, the reasons why an application or tender was rejected. The time for the contracting authority's reply to such a request may not exceed 15 calendar days under any circumstances. See also module E6 on transparency and communication between the contracting authority and economic operators.

### **Stating the reasons for the decision rejecting a tender**

#### ***Adia Interim /Strabag* cases - Judgments of the Court of First Instance (CFI)**

T-19/95 *Adia Interim SA v Commission of the European Communities*, available at <http://eur-lex.europa.eu.int/>

#### **Facts**

The European Commission published an open invitation to tender for the conclusion of a framework agreement with three employment agencies for the supply of agency staff. In the contract notice, three award criteria were set, one of which was price.

Adia Interim was such an employment agency. It was at the time the main supplier of agency staff to the Commission and had worked well with the Commission. Adia Interim placed a tender in response to the contract notice. However, the tender contained a systematic error in the calculation of the offered price, which the selection committee of the Commission detected in the course of assessing the tenders. The Commission did not contact Adia Interim to correct this error. As a result of the error, Adia Interim was placed in tenth position and its tender was rejected. The Commission informed Adia Interim of the rejection of its tender by letter, without stating the reasons for the rejection; it only stated in the rejection letter that "following an in-depth comparative study of the tenders... the Commission considered that it was unable to accept your proposal". Adia Interim asked by letter to be informed of the reasons for the rejection. The Commission by letter dated 15 days after the rejection letter explained to Adia Interim of the whole selection and award process and informed Adia Interim of the names of the three successful tenderers. However, it did not spell out the exact rejection reason (i.e. the calculation error that had made its price more expensive and therefore its tender less competitive than those of other tenderers).

Adia Interim applied to the Court of First Instance (CFI) to annul the Commission's decision rejecting the Adia Interim's tender and to annul the Commission's decision to award the contract to the three successful tenderers, pleading, on the one hand, that the Commission had a duty to state the precise reasons for the rejection in the letter of rejection and that the Commission had breached this duty. Adia Interim pleaded, on the other hand, that the Commission, by not asking it to clarify the systematic calculation error in the tender, had infringed the principles of equal treatment of tenderers and of sound administration.

What is relevant to our analysis is Adia Interim's first plea, i.e. the Commission's duty, as the contracting authority, to state the precise reasons for the rejection of Adia Interim's tender in the letter of rejection.

**Decision:**

The CFI ruled that contracting authorities had an obligation vis-à-vis eliminated tenderers to state the reasons for the rejection of their tenders. However, they would have fulfilled this obligation if they had first immediately informed eliminated tenderers of the fact that their tenders had been rejected, by means of a simple communication that did not set out any reasons, and had subsequently provided tenderers that had made a special request to that effect with a reasoned explanation within 15 days. The fact that tenderers received a reasoned rejection decision only if they had made a special request did not deprive them of legal protection, as deadlines for legal challenges (in the case before the CFI) started after notification of the reasoned decision.

The CFI also ruled that the Commission's second 'reasoned' letter had provided sufficiently detailed reasons for the rejection of Adia Interim's tender to allow the legal challenge of the award decision because it confirmed that the tender was less economically advantageous than the winning tenders.

In Case T-183/00 (***Strabag Benelux NV v Council of the European Union*** available at <http://eur-lex.europa.eu.int/>), the CFI found that the letter sent by the Council (as contracting authority for a framework agreement for general installation and maintenance works in the Council's buildings in Brussels) to the company Strabag Benelux BV (rejected tenderer for the agreement), stating that the company's tender had ranked highly for the qualitative evaluation criteria but had been unsuccessful because of its price provided an acceptable level of explanation of the reasons for the rejection of Strabag's tender (i.e. value not quality). However, that letter did not explain how the ranking had been done.

The amended Directive 89/665/EEC provide in article 2c that the communication of all contracting decisions is to be accompanied by a summary of the relevant reasons. Thus a contracting authority must provide a summary of the reasons for the rejection of an application or tender in the rejection letter itself, even if the candidate/ tenderer did not explicitly request it. For reasons of good practice and in order to comply with the general legal principles of transparency and effectiveness as well as with the rule set forth in article 1 of Directive 89/665/EC that the review of contracting decisions should take place effectively and as quickly as possible, it is recommended that decisions rejecting an application or tender mention the reasons for the rejection *clearly and precisely*.

In the case of the *contract award decision*, according to article 2a(2) of Directive 89/665/EEC, contracting authorities are not only required to notify concerned tenderers/ candidates of the award decision but also to include in the notification a summary of the information set out in article 55(2) of Directive 2014/24/EU, in particular the name of the successful tenderer and the characteristics and relative advantages of the selected tender, before/ without being requested by the concerned tenderer, and in sufficient detail to enable the concerned party to effectively seek review. How to comply with this requirement has to be assessed each time by the contracting authority. The most thorough way (but, to an extent, time-consuming and effort-consuming) is for the

authority to compare rejected tenders against the winning tender on the basis of the award criteria. It should be noted that Directives 2014/24/EU, 2007/66/EC and 2014/23/EU were adopted after, and are stricter than, the CFI's decisions on Adia Interim and Strabag, which had accepted as sufficient information a reference that the rejected tender had been less economically advantageous than the winning tenders (in the case of Adia Interim) or had been more expensive (in the Strabag case).

Mentioning precisely the reasons for the rejection of an application or tender or for the award of the contract to another tenderer/ candidate is required, first of all, because only a clear and precise decision can enable a candidate/tenderer to understand and assess the rejection and to decide which rights are jeopardized and whether or how it will defend them. Secondly, if a contracting authority gives summary information and waits for a special request to state the precise and detailed reasons for rejection and then, by a second communication, states such reasons, it may waste time unnecessarily, since it is likely that candidates/ tenderers will wish and will request to be informed. Also, if this information is adequate and convincing, it is also likely to dissuade a tenderer from pursuing legal action if it is not certain of its grounds.

Article 55(3) of Directive 2014/24/EU allows contracting authorities to admissibly withhold certain information regarding contracting decisions in some restricted cases, as mentioned in that article. See also module E6 on transparency and communication between the contracting authority and economic operators. Reasons for withholding information linked to prejudice concerning the legitimate commercial interests of economic operators or to fair competition between them are more likely to relate to pre-award circumstances. In post-award circumstances, i.e. when the competition is over and at least certain technical characteristics of the winning tender have been made public, contracting authorities would have fewer reasons to withhold information. This essentially means that the reasons for rejecting a tender and in particular the reasons for selecting another tender should always be notified to the rejected tenderer or tenderers (unless commercially sensitive information or trade secrets are involved).

Regarding in particular the decision not to award the contract or to restart the award procedure concerning a contract for which a contract notice has already been published, contracting authorities have the obligation under article 55(1) of Directive 2014/24/EU to inform all candidates or tenderers and to provide reasons for this decision, even without a request by a concerned candidate or tenderer. Therefore, the mere communication that the award procedure has been abandoned or restarted is not sufficient, according to the Directive. The decision not to award must be open to legal challenge, and it must be possible to suspend or annul this decision where appropriate, i.e. if it has infringed public procurement law, in the same way as any other contracting decision. Review of the decision to terminate an award procedure should be full and not limited to a mere examination of whether the decision was arbitrary or fictitious (i.e. a pretext, hiding a non-stated reason for termination of the procedure).

#### **Review of the decision to abandon the award procedure / extent of review**

##### **HI case - Judgment of the ECJ**

(C-92/00 *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Stadt Wien*, available at <http://eur-lex.europa.eu.int/>)

**Facts:**

The Mayor of the City of Vienna, acting on behalf of the contracting authority, the *Wiener Krankenanstaltenverbund* (Vienna Associated Hospitals), published an invitation to tender for project management of the catering supply in Viennese associated hospitals. After the submission of tenders, including the tender by HI, the City of Vienna withdrew the invitation to tender and informed HI that it had decided to abandon the procedure for compelling reasons. Namely, it was decided to develop the project in a decentralised manner, without the need for an outside project manager. HI then brought a number of claims, seeking, among other actions, the annulment of the withdrawal of the invitation to tender. The review body (the *Vergabekontrollsenat des Landes Wien*, i.e. the Public Procurement Review Chamber of the Vienna Region) requested the ECJ to give a preliminary ruling on several questions concerning the interpretation of Directive 89/665/EC, including whether that directive required the review of a decision of a contracting authority to cancel an award procedure and allowed the possibility of setting aside that decision, as well as whether the review could be limited to an examination of whether the cancellation of the award procedure was arbitrary or fictitious.

**Decision:**

The ECJ ruled that Directive 89/665/EC required that the decision of the contracting authority to withdraw an invitation to tender would have to be open to a review procedure and that the decision could be annulled where appropriate, on the grounds that it had infringed Community law on public contracts or national rules implementing that law.

The ECJ also ruled that the scope of the review of the decision to cancel an award procedure could not be limited to a mere examination of whether the decision was arbitrary. It had to be a full review, allowing the local review body to assess the compatibility of that decision with the relevant EU rules.

The ECJ referred to all legal principles (examined in section 2.5. above) in its decision (principles of equal treatment, transparency and effectiveness).

See also ECJ case C-15/04 *Koppensteiner GmbH v Bundesimmoliengesellschaft mbH*, available at <http://eur-lex.europa.eu.int/>.

**Good practice note – Form of communication**

Contracting authorities should communicate with tenderers/ candidates *in writing* in the interests of the principle of transparency as well as for record-keeping.

The *time limits* for challenges of notified contracting decisions should be communicated. This communication is only compulsory for the contract award decision, but it is good practice to communicate this information in all cases.

Contracting authorities should try, whenever possible, to use *fax or e-mail* to notify tenderers/ candidates of contracting decisions, so that they are informed of all decisions at the same time and that no time is lost in sending/ receiving documents. Often under local law the deadline date for receipt of documents is the starting date for the setting of deadlines for legal challenges (thus the earlier the receipt, the sooner the deadline will

expire). Note that, as mentioned above, normally this would only be true if the notified contracting decision also stated specifically and precisely the reasons for the rejection of an application or tender, and otherwise deadlines would only be set once such reasons were duly notified.

In the case of the award decision, notification by e-mail or fax may mean that the shorter deadline for challenging the decision applies (10 days as opposed to 15, if notified by post), depending on local law.

With regard to informing candidates or tenderers of the general progress of an award procedure even if it was not contained in a contracting decision, see in module E6 the discussions on transparency and communication in the Embassy Limousine case (T-203/96, judgment of the Court of First Instance available at <http://eur-lex.europa.eu.int/>).

#### **2.6.4. Providing all supporting documentation on all contracting decisions**

The provision of supporting documentation is actually a duty linked to that of drafting reasoned and detailed decisions (such decisions should contain all elements showing how they were reached) and providing full information to all economic operators of all contracting decisions. Contracting authorities must provide all supporting documentation relevant to the contracting decision together with the notification to economic operators of the contracting decision. Supporting documentation includes opinions or recommendations by procurement officers, which served as a basis for the decision made by the decision-making officer, committee or body, subject to applicable disclosure rules and article 55(3) of Directive 2014/24/EU.

Contracting authorities should also respond promptly to requests by economic operators for disclosure of supporting documentation. Such requests are usually made and the relevant duty of the contracting authority applies:

- before the economic operator lodges a complaint; providing all documentation at this stage helps the economic operator to decide whether or not to lodge a complaint and also prevents allegations of withholding documents, obstructing use of remedies, etc.;
- during a complaint brought by an economic operator; often joined to complaints is a request for disclosure of documents;
- during litigation; requests for disclosure at this stage may come from the economic operator bringing the legal action or from the competent review body.

#### **2.6.5. Providing access to other tenders – Localisation required**

To enable economic operators to assess whether or not they have reasons to challenge contracting decisions, it may be regarded as good practice to provide them with the opportunity to check, at every stage of the contract award procedure, the terms of other applications/ tenders. They should therefore be granted access to the applications of other economic operators, as well as to their tenders, with the exception of information that is marked by the submitting economic operator as commercially sensitive. Regarding such commercially sensitive information, as suggested in module E6, contracting authorities should make the disclosure of certain information a condition of participation in the contract award procedure and require economic operators to designate only particular parts of their tender as confidential, so as to allow review of the other parts by other economic operators.

Where member states allow for such access then the terms of access to applications/ tenders of other economic operators should, ideally, be stated in the contract notice, for example the contracting authority could set a specific date, following the opening of the applications/ tenders, on which it would allow economic operators to inspect the applications/ tenders of other operators. Usually, a representative of each economic operator, possibly accompanied by a lawyer, would attend. A procurement officer of the contracting authority should also be present.

#### **2.6.6. Replying to all pre-trial complaints and replying quickly**

It may be that under local laws there is no legal requirement as such to reply to a pre-trial complaint. In such cases, the law would usually provide that if a certain period of time passed without a reply, then the complaint is considered to have been tacitly rejected and the economic operator that had submitted the complaint would be able to proceed with legal action. Notwithstanding such a lack of obligation, it is good practice and serves the purpose of sound administration to reply to all complaints within the period of time set for reply (or, as explained above, tacit rejection would apply). One reason for this practice is that if the reply is convincing, economic operators may not try to pursue the matter further before review bodies, not least because a convincing reply would also persuade the review body, which is not usually empowered to re-decide in the contracting authority's place but only seeks to be assured that the law has been followed. If economic operators do pursue the matter further, the response to the complaint will help the review body to understand the case and reach a decision. Also, responding to complaints is a good exercise for contracting authorities, which may find, when they examine the complaint in depth in order to reply, an irregularity that they had not noticed and can still correct (or they can make a note of avoiding such an error in the next award procedure).

Naturally, contracting authorities should respect all applicable local maximum deadlines for responding to complaints. However, even if there are no such deadlines, the competent procurement official should try to prioritise responses to these complaints and to act as quickly as possible.

#### **2.6.7. Suspending the award procedure while a contracting decision is being challenged**

We have seen that after an application for interim measures or application to set aside the contract award decision has been filed, the contract cannot be concluded until the review body has decided on the application. For other contracting decisions this is not a requirement under Directive 89/665/EEC; it may nevertheless be the case that local law provides for the suspension of contract award procedures during legal action.

In any event, also with regard to challenges to contracting decisions other than the contract award decision, proceeding with an award procedure before a review body has decided on applications pending before it, may lead to situations where, if the legal action succeeds, the unlawful contracting decision will have tainted the whole procedure. It is up to the contracting authority to assess whether going ahead with the procedure pending review of a complaint is safe or, inversely, whether this may cause future actions or decisions of the contracting authority to be tainted by the challenged contracting decision if it is found to be unlawful.

#### **2.6.8. Notifying tenderers of the contract award decision and of the exact standstill period and observing the standstill period**

This obligation is self-explanatory. Contracting authorities should comply with the relevant rules of Directive 89/665/EEC as amended in these respects by Directive 2007/66/EC and Directive 2014/23/EU. It should be kept in mind that contracts concluded in violation of the standstill period may be declared to be ineffective.

### **2.6.9. Complying with decisions on remedies**

This is obvious, but all contracting authorities must comply strictly with all legal decisions and not try to work around them, as this would probably lead to more legal actions and further delays in the conclusion of the award procedure. It would also entail the risk of disciplinary action against the officials involved. EU Member States have an obligation to ensure the enforcement of decisions on remedies under article 2(8) of Directive 89/665/EEC.

## **2.7. Defining the overall strategy for an efficient award procedure: main points that a contracting authority should keep in mind**

The following is a checklist of points that concern the efficient preparation of an award procedure and the minimisation of challenges.

### **2.7.1. Good preparation**

This goes without saying, but the better the preparation of the award procedure, the less likely it is to be challenged. All steps and procedures must be followed, in particular steps mentioned in module E. It is particularly important to have very well thought out the procurement in advance so as to accurately reflect in the contract notice and tender documents the specifications, selection and award criteria, and documentation to be submitted by economic operators as evidence, as well as the procedure to be followed (not only the type – i.e. open, restricted, negotiated, etc. – but also the precise steps of each procedure). Then it will be a matter of the procurement officers following the law and the tender documents.

The simpler and clearer these documents are, the better. If the contract award procedure is carefully planned and implemented and the procurement rules are strictly followed, there will be few grounds for economic operators to complain or for review bodies to make a finding of unlawfulness. This does not mean that complaints by economic operators will be avoided entirely, as there may always be a question or doubt as to whether the rules were correctly interpreted, if the contracting assessments and decisions of the contracting authority were sound and/or lawful, etc., but if the contract award procedure is lawful and the contracting authority tries to remain available to explain this award to economic operators (see below in section 2.7.2.) it is possible to avoid, or at least minimise, legal actions before review bodies.

Good preparation is also relevant from the point of view of the relationship between contracting authorities and economic operators. Economic operators sometimes threaten to bring, and may actually bring, legal action, hoping that they can reach an arrangement with the contracting authority so as to secure work in exchange for dropping the claim. Such conduct is less likely when there are no significant uncertainties about the details of the contract award procedure or about compliance with the law, as legal action is unlikely to succeed and therefore unlikely to be effectively used as a threat.

### **2.7.2. Availability**

Contracting authorities should try to keep all economic operators informed of the progress of the award procedure, answer their queries (in compliance with the law) and, in the event that their decisions are challenged, respond quickly and in detail to complaints and refrain from doing anything that could jeopardise the outcome of legal action.

All inefficiencies lead invariably to increased challenges, delays and possibly cancellation of award procedures. It does happen that economic operators initiate a case because they could not obtain adequate responses from contracting authorities.

### **2.7.3. Planning ahead**

Challenges, if brought, lead to delays in the awarding of contracts. Contracting authorities should calculate these possible delays so that they are able to obtain their contracts when they need them. Contracting authorities should bear in mind that the contract notice and tender documents can be challenged and subsequently all contracting decisions (selection and award) as well. In a procedure where the contract is awarded to the most economically advantageous tender that is assessed on the basis of the best price-quality ratio (and not on the basis of price or cost only), there may be more challenges (in number) because the application of the award criteria is more open to interpretation.

### **2.7.4. Appointment of competent procurement officials**

It is very important that competent and trained procurement officers are appointed, at least as leaders, assisted by less experienced staff. On this issue refer in particular to modules B1 and B2.

## **2.8. How do economic operators approach remedies?**

Economic operators that have an interest in a contract want to obtain it. They are therefore more interested in pre-trial complaints (for which they may not even use lawyers and which may thus not be expensive to lodge) or interim measures, i.e. courses of action that can quickly correct irregularities in a contract award procedure and allow economic operators to compete fairly for the contract. As discussed in section 2.6.6., if an economic operator obtains a reasoned reply to its pre-trial complaint filed with the contracting authority, it may not pursue the matter further. If it does not obtain a reasoned reply or any reply at all or if it does not receive documents relevant to contracting decisions, the disclosure of which it has requested from the contracting authority, it would at least consider legal action. Depending on the characteristics of the local review system and the economic operator's particular case (i.e. cost and duration of proceedings and likelihood of success), it may also proceed to request disclosure, suspension and annulment of the contracting decision that it considers to have been harmful and/ or suspension and annulment of the contract award procedure.

Seeking or not seeking damages will depend on the local review system and on the facility to obtain compensation, as well as on the cost of legal advice. In any event, economic

operators are primarily interested in obtaining work, i.e. contracts. See module H, which has been prepared for economic operators.

#### Utilities

**Adapt all of this section for local use – using relevant local legislation, processes and terminology.**

Directive 92/13/EEC (amended by Directive 2007/66/EC and Directive 2014/23/EU) provides that the three remedies of interim measures, set-aside and damages must be available to any economic operator that has or has had an interest in obtaining a particular contract and that has been at risk or risks being harmed by an alleged violation of the applicable procurement rules, and therefore to any economic operator that has expressed an interest in participating in a contract award procedure or that might have done so if the contract had been advertised.

Directive 92/13/EEC gives EU 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 contract also apply in the case of utilities.

## Section 3 Exercises

Check each exercise for local relevance and adapt accordingly.

### Exercise 1

Municipality Y is about to start a restricted procedure to procure digitisation services for the municipal library. It is known that the procedure will be very competitive, as several specialised IT companies are interested in the contract. To the extent it can, the Municipality would like to avoid litigation against the contract award procedure, and asks you, in your role as procurement officer, to advise on how best to avoid or minimise litigation and/or related delays.

**Question 1:** The Municipality is considering using electronic or postal communication in its notifications of contracting decisions to tenderers. You are requested to advise on deadline implications.

**Question 2:** Local law provides for a compulsory pre-trial complaints procedure, *i.e.* aggrieved tenderers must seek review with the contracting authority before they proceed with legal action. Under local law, if the contracting authority does not reply to the complaint within 10 days from its receipt, then such complaint is deemed to have been tacitly rejected and deadlines for legal action start to run. The Municipality anticipates receiving complaints due to the competitiveness of the award procedure, but is short on staff. Therefore, it is already considering allowing the 10-day reply deadline to lapse without replying to complaints it does not consider valid, in order not to allocate resources to such a task. You are requested to advise on deadline and litigation implications.

## Exercise 2

The Ministry of Culture is running a restricted procedure for the supply of books and provision of related library services to equip 25 museum libraries across the country. At the award stage, when the tender evaluation committee reviews the tenders of the selected tenderers, it discovers that, due to a mistake in the drafting of the tender documents, there is a discrepancy between the instructions to the tenderers in the tender documents and the electronic calculation tables, used for computation of the offered quantities and prices and included (as CD-ROMs) in the tender documents and filled in by tenderers as part of their tender. The discrepancy would lead to the rejection of most tenders as non-compliant, through no fault of the tenderers.

The Ministry of Culture is particularly keen to conclude the contract with the remaining tenderer, because it has obtained approval for a subsidy, which it will lose if the contract is not signed and performed in the relevant calendar year, and it cannot afford to cancel the award procedure and rerun it on the basis of corrected tender documents. The head of the tender evaluation committee asks you, in your role as procurement compliance officer, a number of questions.

**Question 1:** The Ministry of Culture wishes to notify all tenderers of the contract award decision and immediately conclude the contract with the successful tenderer -if possible, on the same day as notification. Under local law, concluded contracts cannot, in principle, be reversed. You are requested to advise.

**Question 2:** The Ministry of Culture, while wishing to notify tenderers of the contract award decision, does not wish to explain to them the way in which it has reached this decision, because it does not want to publicise its mistake. You are requested to advise.

**Question 3:** The head of the tender evaluation committee asks whether the contract, if concluded immediately upon notification of the award, would be allowed to stand, on the ground that the approved subsidy would be lost if the contract is not concluded and performed within a set deadline (the end of that calendar year). The Ministry of Culture has documents proving the deadline and the sanction of losing the subsidy if the deadline is exceeded, as well as the impossibility to ask for an extension.

### Exercise 3

The association of municipalities of a large city has run a restricted procedure to award the building and operation of a factory to treat the city's waste. It has reached the decision to award the contract to one of the tenderers and, as required under the law, has notified all tenderers of it, providing a summary of the relevant reasons and mentioning the exact standstill period. Because of the size and desirability of the contract due to its profit margins and the experience it offers, the association has already received several pre-trial complaints. The association considers that most complaints are inadmissible but would like to expressly reject them and provide clear reasons for such rejections, as a matter of good practice and sound administration but also to assist auditing procedures, which are likely to be strict due to the sheer size of the contract. You are requested to advise on a number of related questions in your role as procurement officer.

**Question 1:** A waste treatment company that has not participated in the contract award procedure lodges a complaint, alleging defects in the assessments of the tender evaluation committee at both the selection and award stages and asking for the procedure to be cancelled.

**Question 2:** A tenderer who was qualified at the selection stage but whose tender was unsuccessful has lodged a complaint against the contract award decision, alleging that the successful tenderer had not submitted sufficient proof of its past experience, which was one of the selection criteria. The tenderer claims that it refrained from challenging the selection decision, which was duly notified to all economic operators who had submitted expressions of interest, in order not to delay the award procedure.

**Question 3:** A tendering consortium that qualified at the selection stage was unsuccessful; its tender ranked fourth. Out of its three members, two are local companies that work on a number of projects with the city. The third is a foreign company that participated in the consortium because it was eager to enter the country's waste treatment market, which has only recently started to develop and is likely to offer lots of business opportunities. There are doubts as to whether the award criteria were correctly applied as regards weighting of life cycle costs. The two local companies do not wish to lodge a complaint, because they do a large part of their business with several of the municipalities involved and feel that a complaint will harm their relationship with such municipalities. The foreign company wishes to lodge a complaint because it has allocated resources to the preparation of the complaint and considers that it has some valid grounds to ask for the setting aside of the contract award decision. In the end, the foreign company lodges the complaint on its own.

## Section 4 The Law

**Adapt all this section using relevant local legislation, processes and terminology.**

This section presents and summarises the articles of Directive 89/665/EEC, as amended by Directive 2007/66/EC and Directive 2014/23/EU, on remedies available to economic operators during public sector contract award procedures. It also presents and summarises article 55 of Directive 2014/24/EU regarding the provision of information to economic operators.

### 1. Directive 89/665/EEC, as amended by Directive 2007/66/EC and Directive 2014/23/EU

**Adapt all this section for local use – using relevant local legislation (including secondary legislation) and terminology.**

**Recital 3 (of Directive 89/665/EC)** - refers to the requirement of transparency and non-discrimination in order for public procurement to be opened up to Community competition and to the requirement of rapid and effective remedies to achieve this goal.

**Article 1 - Scope and availability of review procedures** – explains that this directive applies to all contracts falling within the scope of (and not excluded from) Directive 2014/24/EU as well as to all concessions falling within the scope (and not excluded from) Directive 2014/23/EU, i.e. public contracts, framework agreements, work and service concessions, and dynamic purchasing systems. It also lays down some basic rules applicable to review procedures as follows:

Paragraph 1 (third sub-paragraph) provides that all decisions taken by the contracting authorities must be reviewed effectively and, in particular, as rapidly as possible, to assess if such decisions have infringed European Union public procurement law or national rules transposing that law.

Paragraph 2 refers to the principle of non-discrimination.

Paragraph 3 provides that the review procedures must be 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 (of the applicable rules).

Paragraph 5 allows Member States to require that the person concerned first seek review with the contracting authority. 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. The suspension 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 authority has sent a reply if fax or electronic means are used, or, if other means of communication are used, before the expiry of either at least 15 calendar days with effect from the day following the date on which the contracting authority has sent a reply, or at least 10 calendar days with effect from the day following the date of the receipt of a reply.

**Article 2 -Requirements for review procedures-** sets forth the exact types of remedies which must be (at least) available and certain rules on Member States obligations or options regarding organisation and structure of the local remedies system, as follows:

Paragraph 1 provides that remedies must include 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.

Paragraph 2 allows separate bodies to be responsible for different aspects of the review procedures.

Paragraph 3 provides that when a body of first instance reviews a contract award decision, Member States shall ensure that the contracting authority 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.

Paragraph 4 provides that other review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.

Paragraph 5 allows Member States to provide that the review body 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.

Paragraph 7 allows Member States to provide (except where a decision must be set aside prior to the award of damages) that concluded contracts are irreversible, unless the sanction of ineffectiveness is imposed in accordance with articles **2d** to **2f** of the Directive). In such cases, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.

Paragraph 8 sets forth an obligation on Member States to ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

Paragraph 9 sets forth a series of obligations when the bodies responsible for review procedures are not judicial in character: such bodies must provide written reasons for their decisions, there must exist appeal procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it may be reviewed by a court or tribunal independent of both the contracting authority and the review body, members of such court or tribunal must be appointed and leave office under the same conditions as members of the judiciary, at least the president of such court or tribunal must have the same legal

and professional qualifications as members of the judiciary, the procedure followed before such court or tribunal must be contradictory (i.e. both sides must be heard) and its decisions shall be legally binding.

**Article 2a - Standstill period-** sets forth requirements applying to the standstill period. In particular:

Paragraph 2 provides that a contract may not be concluded following its award before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned 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 contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.

Candidates shall be deemed to be concerned if the contracting authority has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned.

The communication of the award decision to each tenderer and candidate concerned shall be accompanied by:

- a summary of the relevant reasons as set out in article 55(2) of Directive 2014/24/EU, subject to the provisions of article 55(3) of that directive (which allows contracting authorities to withhold certain information), or in article 40(1) of Directive 2014/23/EU, subject to article 40(2) of that directive (which allows contracting authorities to withhold certain information), and,

- a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph.

**Article 2b - Derogations from the standstill period-** provides that Member States may provide that the standstill period does not apply in the following cases:

(a) if Directive 2014/24/EU or, where relevant, Directive 2014/23/EU does not require prior publication of a contract notice in the *Official Journal of the European Union*;

(b) if the only tenderer concerned is the one who is awarded the contract and there are no candidates concerned;

(c) in the case of a contract based on a framework agreement or on a dynamic purchasing system.

If this derogation is invoked, Member States shall ensure that the contract is ineffective where:

- there is an infringement of point (c) of Article 33(4) or article 34(6) of Directive 2014/24/EU (i.e. call-off contracts are not awarded according to the applicable rules), and
- the contract value is estimated to be equal to or to exceed the minimum thresholds (set out in article 4 of Directive 2014/24/EU).

**Article 2c - Time limits for applying for review-** provides that where a Member State provides that any application for review of a contracting authority's decision taken in the context of, or in relation to, a contract award procedure must be made before the expiry of a specified period, this period shall be at least 10 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be either at least 15 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of the receipt of the contracting authority's decision. The communication of the contracting authority's decision to each tenderer or candidate shall be accompanied by a summary of the relevant reasons. In the case of an application for review concerning decisions that are not subject to a specific notification, the time period shall be at least 10 calendar days from the date of the publication of the decision concerned.

**Article 2d - Ineffectiveness-** provides for the sanction of ineffectiveness, if certain conditions are met. In particular:

Paragraph 1 provides that a contract shall be considered ineffective by a review body independent of the contracting authority or that ineffectiveness shall be the result of a decision of such a review body in any of the following cases:

(a) if the contracting authority has awarded a contract without prior publication of a contract notice in the *Official Journal of the European Union* without this award being permissible in accordance with Directive 2014/24/EU or Directive 2014/23/EU;

(b) if any of the following are not respected:

- the automatic suspensive effect of an application for pre-trial review (article 1(5) of the Directive), an application for interim measures or set aside against the contract award decision (article 2(3) of the Directive) or the standstill period (article 2a(2) of the Directive),
- if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies and, in addition, is combined with an infringement of the public procurement rules of Directive 2014/24/EU or Directive 2014/23/EU and has also affected the chances of the tenderer applying for a review to obtain the contract;

(c) if Member States have invoked the derogation from the standstill period for contracts based on a framework agreement or a dynamic purchasing system (and the call-off contracts are awarded in breach of the applicable rules and also exceed the thresholds).

Paragraph 2 allows national law to regulate the consequences of ineffectiveness by either providing for the retroactive cancellation of all contractual obligations or by limiting the scope of the cancellation to those obligations which still have to be performed. In the latter case, Member States shall provide for the application of other penalties provided in article 2e(2) of the Directive such as fines.

Paragraph 3 allows Member States to provide that the review body may not consider a contract ineffective, even though it has been awarded illegally on the grounds mentioned in paragraph 1, if the review body finds, after having examined all relevant aspects, that overriding reasons relating to a general interest require that the effects of the contract should be maintained. In this case, Member States shall provide for alternative penalties within the meaning of Article 2e(2), such as fines or shortening of the duration of the contract.

Paragraph 3 specifies that economic interests in the effectiveness of the contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences. However, economic interests directly linked to the contract concerned (including the costs resulting from the delay in the execution of the contract, the costs resulting from the launching of a new procurement procedure, the costs resulting from the change of the economic operator performing the contract and the costs of legal obligations resulting from the ineffectiveness) shall not constitute overriding reasons relating to a general interest.

Paragraph 4 allows contracts awarded without prior publication of a contract notice to be free from the risk of ineffectiveness, if:

- the contracting authority considers that the award of a contract without prior publication of a contract notice is permissible;
- the contracting authority has published in the Official Journal of the European Union a notice expressing its intention to conclude the contract, and,
- the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice.

Paragraph 5 allows call-off contracts based on a framework agreement or a dynamic purchasing system to be free from the risk of ineffectiveness, if:

- the contracting authority considers that the award of a call-off contract is in accordance with the applicable rules,
- the contracting authority has sent a contract award decision, together with a summary of reasons and a statement of the exact standstill period, to the tenderers concerned, and,
- the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned if fax or electronic means are used or, if other means of communications 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 contract award decision is sent to the tenderers concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

**Article 2e - Infringements of this Directive and alternative penalties-** provides that in case of an infringement of the automatic suspensive effect of an application for pre-trial review (article 1(5) of the Directive), an application for interim measures or set aside against the contract award decision (article 2(3) of the Directive) or the standstill period (article 2a(2) of the Directive) not covered by Article 2d(1)(b), Member States may provide, instead of ineffectiveness, for alternative penalties. In particular:

Paragraph 1 allows Member States to provide that the review body shall decide (i.e. choose), after having assessed all relevant aspects, whether the contract should be considered ineffective or whether alternative penalties should be imposed.

Paragraph 2 sets forth an obligation for these alternative penalties to be effective, proportionate and dissuasive. They shall be:

- the imposition of fines on the contracting authority; or,
- the shortening of the duration of the contract.

Member States may confer on the review body broad discretion to take into account all the relevant factors, including the seriousness of the infringement, the behaviour of the contracting authority and the extent to which the contract remains in force.

The award of damages does not constitute an appropriate penalty for the purposes of this paragraph (and is anyway open to harmed economic operators).

**Article 2f -Time limits-** provides that Member States may provide the request for a contract to be rendered ineffective must be made:

(a) before the expiry of at least 30 calendar days with effect from the day following the date on which:

- the contracting authority published a contract award notice, provided that this notice includes justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the Official Journal of the European Union, or
- the contracting authority informed the tenderers and candidates concerned of the conclusion of the contract, provided that this information contained a summary of the relevant reasons, as set out in article 55(2) of Directive 2014/24/EU, subject to the provisions of article 55(3) of that directive, or in article 40(1) of Directive 2014/23/EU, subject to article 40(2) of that directive.

(b) and in any case before the expiry of a period of at least six months with effect from the day following the date of the conclusion of the contract.

**Article 3** of the Directive concerns the Commission's powers as regards enforcement of the public procurement rules.

**Article 3a** concern the contents of the voluntary notice expressing a contracting authority's intention to conclude a contract, when such contract was awarded without prior publication of a contract notice and the contracting authority considers that the award of a contract without prior publication of a contract notice is permissible. This voluntary notice, if complied with along with the standstill period of 10 days following publication, allows the concluded contract to be immune from the sanction of ineffectiveness.

The rest of the articles of the Directive concern Commission or monitoring procedures, as well as the amendment of Directive 92/13/EEC on remedies in the context of utilities contract award procedures.

**2. The following article of Directive 2014/24/EU is also relevant:**

**Adapt this section for local use – using relevant local legislation (including secondary legislation) and terminology.**

**Article 55 – Informing candidates and tenderers** - establishes that contracting authorities must inform unsuccessful economic operators about the reasons for their rejection. In particular:

Paragraph 1 provides that contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure or implement a dynamic purchasing system.

Paragraph 2 provides that upon request from the party concerned, the contracting authority shall as quickly as possible inform:

- any unsuccessful candidate of the reasons for the rejection of his application,
- any unsuccessful tenderer of the reasons for the rejection of his tender, including the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements,
- any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement,
- any tenderer who has made an admissible tender of the conduct and progress of negotiations and of the dialogue with tenderers.

The time taken may in no circumstances exceed 15 days from receipt of the written request.

Paragraph 3 allows contracting authorities to withhold certain information referred to in paragraphs 1, and 2 regarding the contract award, the conclusion of framework agreements or admittance to a dynamic purchasing system where the release of such information would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of economic operators, whether public or private, or might prejudice fair competition between them.

## Section 5 Chapter Summary

### Self-test questions

Check each question for local relevance and adapt accordingly.

1. Is it permitted to deny the right to challenge a contracting decision (for example, the selection decision) to an economic operator who could have, but did not, participate in the award procedure?
2. Is it permitted to deny the right to challenge a contracting decision (for example, the award decision) to an economic operator who was excluded in a previous stage of the award procedure (*e.g.* at the selection stage)?
3. Is the answer to Question 2 the same if the economic operator was (a) lawfully or (b) unlawfully excluded?
4. What are the types of remedies that a state is required to make available?
5. Is it compulsory to provide for pre-trial complaints?
6. Is it permitted to continue with the award procedure after an application for a pre-trial complaint has been filed and before the decision on it is issued?
7. After an application for a pre-trial complaint has been filed, under which conditions can the contracting authority conclude the contract?
8. Must a contracting authority reply to a pre-trial complaint?
9. What is the effect of asking for interim measures or the set-aside of the contract award decision?
10. When we refer to a “concluded” contract, do we mean a “signed” contract? If not, what do we mean?
11. What is the minimum standstill period? Is the minimum length always the same? On what does such minimum length depend?
12. Must the standstill period be expressly mentioned in the communication of the contract award decision to a tenderer or candidate? Is it sufficient if the standstill period is expressly mentioned in the tender documents?
13. What is the effect of a violation of the standstill period on concluded contracts?
14. Are there any exceptions to the sanction of ineffectiveness of contracts concluded in violation of the standstill period? If so, what are they?
15. Is prospective cancellation (*i.e.* annulment of only future and unperformed contractual obligations) of an ineffective contract sufficient, or must the concerned state provide for

additional penalties? If yes, what do such penalties consist of and on whom are they imposed?

16. Is there an obligation on contracting authorities to notify tenderers of the progress of the contract award procedure, even if no formal contracting decision is issued?

17. Is it compulsory to allow the decision to terminate the award procedure (without awarding the contract) to be challenged?

18. When a contracting decision is communicated to a tenderer or candidate, must it be accompanied by a summary of the relevant reasons, or does this depend on whether the tenderer or candidate asks for such a summary?

19. What is the likely consequence of omitting to inform tenderers or candidates fully as regards the reasons and grounds for a contracting decision?

20. What is the main difference as regards remedies available to economic operators in the context of public sector award procedures as opposed to utilities award procedures?

## **Module F2 The OECD Principles for Integrity in Public Procurement**

This document can be downloaded from the OECD i-library

[http://www.oecd-ilibrary.org/governance/oecd-principles-for-integrity-in-public-procurement\\_9789264056527-en](http://www.oecd-ilibrary.org/governance/oecd-principles-for-integrity-in-public-procurement_9789264056527-en)

## **Module F3 Integrity in Public Procurement Good Practice from A to Z**

This document can be downloaded from the OECD i-library

<http://www.oecd-ilibrary.org/content/book/9789264027510-en>