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Creating Change Together

SIGMA

Public Procurement

Training Manual

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Module F

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SECTION 1 – INTRODUCTION

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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

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2.1. Introduction

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.

PDF F-5

Sub-threshold / excluded 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,

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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.

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2.4.3. Setting aside of contracting decisions

(d) Measures that can be ordered

Amendment to sentence 4 on page F-13

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.

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

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:**

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- 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;

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(a) Notification requirement

Amendment to sentence 2 in this paragraph

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.

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(c) Direct awards

When a contracting authority considers that it has the right to directly award a contract without publication of a contract notice, 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)*

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(c) Direct awards

Insert at end of paragraph

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

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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.

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On pages PDF F-17 and F-18: Search and replace all references to Directive 2004/18/EC with reference to the Directive 2014/24/EU.

PDF F-22

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

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Article [55\(2\)](#) of Directive [2014/24/EU](#) imposes a specific obligation

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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](#),

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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,

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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.

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Regarding in particular the decision not to award the contract under article [55\(1\)](#) of Directive [2014/24/EU](#) to inform all candidates or tenderers

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2.6.4. Providing all supporting documentation on all contracting decisions

Amendment at end of paragraph 1

Supporting documentation includes.....and article [55\(3\)](#) of Directive [2014/24/EU](#).

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

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](#).

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2.7.3. Planning ahead

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.

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Utilities

Directive 92/13/EEC (amended by Directive 2007/66/EC [and Directive 2014/23/EU](#)) provides that the three remedies of interim measures,.....

SECTION 4 – THE LAW

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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.

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1. DIRECTIVE 89/665/EEC, AS AMENDED BY DIRECTIVE 2007/66/EC [AND DIRECTIVE 2014/23/EU](#)

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:

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Paragraph 1 (third sub-paragraph) provides have infringed [European Union](#) public procurement law or national rules transposing that law.

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Article 2a – Standstill period

- 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,

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Article 2b – Derogations from the standstill period

(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*;

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▽ 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](#)).

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Article 2d – Ineffectiveness

(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](#);

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Article 2d – Ineffectiveness

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

- 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;

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Article 2f - Time limits

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

- 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.

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2. THE FOLLOWING ARTICLE OF DIRECTIVE 2014/24/EU IS ALSO RELEVANT:

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Article 55 – Informing candidates and tenderers

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Paragraph 1 provides that or to recommence the procedure or implement a dynamic purchasing system.

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

insert at end of list

- any tenderer who has made an admissible tender of the conduct and progress of negotiations and of the dialogue with tenderers.

Paragraph 3 allows contracting authorities to withhold certain information referred to in paragraphs 1 and 2, ...