

A “New Remedies Directive”?

This month, the European Commission published proposals to “modernise” the public procurement remedies regime. Amongst its plans are pre-contractual standstill periods and greater publicity in the case of contracts awarded without prior public competition. If adopted these will become uniform Community-wide rules that will take precedence over national laws.

Practitioners may recall a public consultation conducted by Commission in and around spring 2004. Citing, in its Explanatory Memorandum, a “virtual consensus on the need for improvements”, the Commission has now responded with its proposals that claim to eschew a complete overhaul in favour of limited “improvements or clarifications” to the existing system. If adopted, Directives 89/665/EEC (for the classical sector) and 92/13/EEC (for the utilities sector) will have to be read in conjunction with the new amending directive. There will however be greater symmetry between the two sectors, which is analogous to that presently demonstrated by the current substantive procurement regime.

Overall, the proposed amendments continue with the same approach established by the founding remedies directives. So one measure expressly ruled out is the compulsory introduction at the national level of a prescribed administrative institutions to handle reviews. Member states are therefore left to choose whether to place their constitutional courts or, as is more prevalent (especially amongst newer and candidate states), a dedicated review body at the frontline for appeals and enforcement. Another option is to require aggrieved tenderers to pre-notify contracting authorities of an impending appeal against an award decision, or even to seek a formal review with that authority. The new regime will remain principally focussed on pre-contractual remedies.

In this regard, potentially the most significant improvement to the current regime is the inclusion of minimum stand still periods. Although these are for short duration that will only apply in certain circumstances, they remove the discretion that Member States had in the founding directives whether or not to suspend the pre-contractual period. Also there happens to be several standstill provisions on account of the variations in procedure. Generally time periods start the day after the catalytic event in question. But the overriding requirement is to allow applicants “enough time for effective review” of award decisions. So in some circumstances the minimum periods could be ruled insufficient. In all cases communication is by fax or email.

In the standard scenario, an authority may not conclude a contract before a period of ten “calendar” days from communicating an award decision to participating tenderers. At what point a decision is “communicated” to tenderers is not prescribed, but ‘receipt’ might be inferred because courts or review bodies are required to consider “all reasonable and relevant evidence” as to whether the decision was sent and received. There is the possibility of a reduced period of seven days (plus three if a review application is notified) in cases of (mere) urgency and for contracts based on any framework agreements and on dynamic purchasing agreements. Contracts concluded in extreme urgency may be totally excluded from the need for a standstill period as are contracts based on single operator framework agreements, multiple operator framework agreements where contracts have been awarded without re-opening competition and where open, restricted and negotiated procedures lawfully result in a single tenderer. Conversely, where contracts must by national law be concluded within a certain time then this may not be less than ten days or, if it applies, the reduced period of seven plus three.

The alternative scenario is one in which pre-notification to or pre-emptive review by the contracting authority is required. It is unclear but presumably intended that the ten-day period similarly applies; and (also presumably) regardless of whether pre-notification is concurrent with or in place of directly lodging an application with the court or review body. But whether pre-notification or pre-emptive review, an unlimited period of suspension must respectively apply until the application is lodged with the court or review body, or until the review is complete. In the case of pre-emptive review, the applicant is given an additional “five working days” (from the date the authority has “sent” its response) to appeal to the court or review body.

Illegal contracts, described by the Court of Justice as “the most serious breach of Community law in the field of public procurement”, receive special but perhaps superfluous treatment. Any decision by the contracting authority to award an above-EU-threshold contract without formal prior procedure must be devoid of contractual effect and cannot acted upon without publishing a new prescribed notice. Then the ten-day standstill applies; curiously, this runs from the time the notice “has begun to receive the required publicity”, but perhaps this is merely a heavy-handed reference back to publication in the OJEU. Extreme urgency cases and contracts outside the scope of the substantive directives are exempt.

Two sanctions are prescribed for infringement of the new rules. Firstly, contracts must be considered invalid, but derogations are permitted for “certain effects between the parties” for a period of six months of the date of conclusion of the contract. A review body independent of the Contracting Authority may also be empowered to grant immunity to challenge to certain binding commitments if they are in the general interest of a non-economic nature. Secondly, the proposal requires Member States to provide a system of sanctions intended not to let an infringement go “unpunished”; which appears to be an attempt to introduce a system of penalties.

Finally, there are two interesting proposals outside the strict parameters of remedies. Firstly, there is a significant proposed change to post-evaluation procedure, which typically should come within the realm of the substantive procurement Directives 17 and 18. Whereas to date contracting authorities only have to supply reasons for non-selection in response a request from the tenderer concerned, through the backdoor via the remedies regime comes the compulsory requirement for unsolicited notification of those reasons to all tenderers and candidates. Secondly, the proposal attempts to rationalise the standard of liability for breaches of Community law. At present, intervention by the Commission in an awarded but uncompleted contract is premised on a “clear and manifest infringement”, according to the proposal that standard will be softened to that which is (merely) “serious”.

Remedies in the utilities sector is treated in a similar fashion, without derogation for entities operating under special or exclusive rights. However, await the arrival of slimmer directive: both attestation and conciliation are to be deleted in their entirety.

A marked-up consolidation of Directive 89/665 incorporating the proposed amendments can be found at the Public Procurement Portal (<http://publicprocurement.wikia.com>).

Joseph Dalby, Barrister – June 2006
jd@josephdalby.ie