

DIRECT AWARD OF CONTRACTS UNDER THE NEW REMEDIES DIRECTIVE

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INTRODUCTION

The new Remedies Directive introduces a mechanism aimed at combating the illegal direct award of contracts. This new mechanism includes a heavy sanction on the illegal direct award of contracts: ineffectiveness of the contract. By means of a publication in the Official Journal of the European Union of the intention to directly award a contract, the contracting authority can escape ineffectiveness. By way of 'best practice' a contracting authority should have to strive for publication at the earliest possible stage.

HISTORY

Procurement rules require an effective system of judicial protection. The system of judicial protection in procurement matters has been laid down in two directives: the General Remedies Directive and the Utilities Remedies Directive. In this contribution only the General Remedies Directive is referred to. This directive in essence provides that anyone with an interest in being awarded a public contract and who believes that European procurement rules have been infringed, must have prompt and effective access to the domestic courts.

On 4 May 2006 the European Commission presented a proposal to tighten the Remedies Directives.¹ In an 'Impact Assessment' preceding

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¹ COM (2006) 195 final of 4 May 2006.

the proposal, the Commission observed two major flaws in the area of award of contracts. The direct award of a contract is illegal if the judicial protection. Firstly there was no statutory obligation for contracting authorities to use a standstill period between the decision to award the contract and the contract being signed, which sometimes resulted in a race to sign the contract. Damages were often the only possibility left for the (allegedly) prejudiced economic operators. Secondly the Commission refers to the phenomenon of the illegal direct contracting authority has awarded a contract without previous publication of a contract notice, without this being permissible in accordance with the directive.² For third parties it is often difficult to timely apply for review against this, in particular because of the lack of information (after all, the contract has been awarded without publication). These are serious breaches of the European procurement rules, the Commission observes, following the ECJ³.

As regards the illegal direct award of contracts, the proposal to tighten the Remedies Directives included an obligation to previously give a sufficient degree of publicity to every intention for directly awarding contracts with a value exceeding the applicable threshold.⁴ According to the proposal the contracting authority had to observe a standstill period of ten calendar days after publication of the intention to directly award a contract before the contract could be entered into. A contract that would be entered into during this standstill period was considered to be invalid. A direct award of a contract, moreover, that is wrongfully not published, would not have any legal effect.

THE NEW REMEDIES DIRECTIVE

On 20 December 2007 the new directive for tightening the Remedies Directives was published.⁵ This new directive has to be implemented by the Member States before 20 December 2009. As regards the direct

² Article 2d paragraph 1a Remedies Directive.

³ ECJ case C-26/03 (*Stadt Halle*).

⁴ Article 2e paragraph 2 of the Commission proposal.

⁵ Directive 2007/66/EC of the European Parliament and the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ 335/31 of 20 December 2007.

award of contracts the mechanism is considerably less far-reaching than the mechanism in the proposal: publication of the intended direct award of contracts is permitted, but not required. In the event of a failure to publish, however, there is a threat of the heavy sanction of ineffectiveness if the direct award of contracts in retrospect turned out to be in conflict with procurement law.⁶

The consequences of the ineffectiveness sanction are provided for by the national laws of the Member States.⁷ Member States may choose between retroactive cancellation of all contractual obligations (*ex tunc*) or the cancellation of obligations which still have to be performed (*ex nunc*). In the latter case, Member States must also provide for the application of alternative sanctions.

The sanction of ineffectiveness requires judicial intervention. In addition Member States may decide that ineffectiveness of a contract must be invoked within a specific period of time. This period is at least six months as from the conclusion date of the contract. If the conclusion of the contract is published in the Official Journal, this period may be reduced until 30 days after the publication.

Ineffectiveness may have far-reaching consequences. To avoid undesirable effects, the directive provides for the possibility for Member States to decide not to impose the sanction of ineffectiveness if required by overriding reasons relating to a general interest.⁸ An exception to the rule of ineffectiveness is also applicable for the events where:

- i) the contracting authority is of the opinion that the direct award of contracts is permissible;
- ii) the contracting authority has published the notice of its intention to award the contract in the Official Journal, and;
- iii) the contracting authority has observed a standstill period of at least 10 calendar days, as from the day after the date of the publication of the aforementioned notice in the Official Journal.⁹

⁶ See preamble (13) and article 2d paragraph 1a in conjunction with paragraph 3 of the Remedies Directive.

⁷ Article 2d, paragraph 2 Remedies Directives, as amended by Directive 2007/66/EC.

⁸ Article 2d, paragraph 3 Remedies Directive.

⁹ Article 2d paragraph 4 Remedies Directive.

The notice in the Official Journal must include the information needed by the economic operators to be able to seek effective review.¹⁰ Article 3a of the Remedies Directive lists the information that has to be included in the notice. This includes the name and the contact details of the economic operator in favour of which a contract award decision has been taken.

PRACTICAL MEANING OF THIS MECHANISM

To escape the risk of ineffectiveness, the contracting authority must therefore publish a direct award of contracts in the Official Journal. If a contracting authority is in doubt as regards the permissibility of the intended direct award of contracts, it may be assumed that it chooses to pursue this course.

Many situations are conceivable in which a contracting authority might have doubts about the question whether it is permissible to directly award a contract. The contracting authority may doubt whether it regarded the contract as a service concession for the right reasons whereas it may be a public contract for services¹¹ or a 2B service instead of a 2A service. It may also be unclear whether it subdivided the contract on permissible grounds as a result of which it remains below the threshold value.

The possibility to publish as laid down in the new Remedies Directive is in particular meant for these doubtful cases. Service concessions and 2B services are explicitly mentioned as possible justification for the direct award of contracts.¹² A contracting authority will in such situations benefit from a voluntary publication in order to preclude the risk of ineffectiveness. This does not affect any obligation for transparency - outside the directive's scope - as assumed in accordance with the EC treaty and the case law of the Court of Justice.¹³

¹⁰ Preamble (6).

¹¹ ECJ case C-458/03 (*Parking Brixen*) and ECJ case C-328/05 (*Commission/Italy*).

¹² Ground 15.

¹³ Interpretative Communication of the Commission on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, OJ 2006, C179.

The result of article 3a of the Remedies Directive, in which the information is listed that should be included in the notice, is that the contracting authority cannot publish the notice until the name of the party to whom the contracting authority intends to award the contract is known. This fact does not cause any impediment in those events where the direct award of contracts is justified because of the circumstance that only one party is suitable to perform the contract, for example in the event of a direct award for reasons connected with the protection of exclusive rights (article 31 paragraph 1b General Directive) or a direct award of unforeseen additional services (article 31 paragraph 4a General Directive). After all, the name of the party to whom the contracting authority intends to award the contract is immediately known and can be published as soon as there is a real intention to award a contract.

In most cases where a direct award of contracts is justified, however, there will be more economic operators qualifying as a potential party to the contract. In concession contracts and 2B services, for example. In such event the contracting authority will not be able to mention the name of the party to whom intends to award the contract before an award procedure has been followed. After all, such party will not be known yet at that time.

In situations where more parties are capable of performing the contract, the name of the intended winner is of no relevance for the question whether it is permitted to directly award the contract. For the purpose of the revised Remedies Directive it will therefore not be necessary in our opinion that the name of the intended party to the contract is included in the notice in all cases.

BEST PRACTICE

A contracting authority may publish a notice by way of ‘best practice’ as soon as it intends to directly award the contract. The contracting authority may additionally choose to arrange for the publication by means of a voluntary notice as referred to in article 37 of the General Directive. This publication has to include the information of article 3a of the Remedies Directive with the exception of the name and contact details of the intended winner. After all, the information of the intended winner is not available yet. We consider the risk of ineffectiveness of the contract awarded after publication - after expiry of

the ten-day standstill period - to be minimal; after all, the purpose of the revised Remedies Directive – prior publication of the intention to directly award the contract - is still fully taken account of.

The result of this 'best practice' is that it is not necessary to first, before publication, follow the direct award procedure. In this way it is avoided that - after successfully applying for review based on the publication - the contracting authority again has to put the contract out to public tender. The risk is also reduced that the intended winner of the direct award procedure can no longer compete for the contract in the new procedure because of a conflict with the general principle of equal treatment (level playing field).

If the intention to directly award a contract is published prior to the award procedure, it would in theory be possible for third parties to apply for review against the intention to directly award a contract until the conclusion of the contract. The minimum term of ten days of article 2d paragraph 4 of the Remedies Directive, after all, has not been formulated as an expiry period. To avoid that this best practice would lead to an unacceptable long review period, it should therefore include an expiry period in the publication. The expiry period of thirty days referred to in Article 2f, paragraph 1a, of the revised Remedies Directive may be followed in this respect.

CONCLUSION

In the revised Remedies Directive the heavy sanction of ineffectiveness is introduced for the illegal direct award of contracts. Service concessions and 2B services are expressly mentioned in the directive as justification for the direct award of contracts. The sanction of ineffectiveness therefore only applies if it turns out that a contracting authority wrongly considered a contract to be for example a service concession or 2B service whereas it was a contract for (2A) services. In accordance with article 2d, paragraph 4, of the Remedies Directive, the contracting authority may in such events choose for a voluntary publication of the intention to directly award contracts in order to avoid the risk of ineffectiveness. According to article 3a of the Remedies Directive this publication has to include the name and contact details of the intended contractor.

If a party successfully applies for review against the intended direct award of contracts during the 10-day period after the publication referred to in article 2d, paragraph 4, an European procurement procedure has to be followed as yet. To avoid that a contracting authority unnecessarily spends time and costs on a direct award of contracts procedure, the contracting authority might publish the intention to directly award a contract by way of 'best practice' before starting the direct award of contracts procedure, by means of a voluntary publication in accordance with article 37 of the General Directive in which the information as meant in article 3a of the Remedies Directive - with the exception of the name and contact detail of the intended winner - is included. We consider this voluntary publication to be in line with the purpose of the mechanism of article 2d, paragraph 4, of the Remedies Directive. By acting in this manner the risk is also removed that the party in favour of which the contracting authority in first instance intended to award the contract would no longer be able to compete for the contract in the subsequent (public) procurement procedure as a result of a headstart as regards information.