

Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (89/665/EEC)

COUNCIL DIRECTIVE

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on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts

(89/665/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission<sup>(1)</sup>,

In cooperation with the European Parliament<sup>(2)</sup>,

Having regard to the opinion of the Economic and Social Committee<sup>(3)</sup>,

Whereas Community Directives on public procurement, in particular Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts<sup>(4)</sup>, as last amended by Directive 89/440/EEC<sup>(5)</sup>, and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts<sup>(6)</sup> as last amended by Directive 88/295/EEC<sup>(7)</sup>, do not contain any specific provisions ensuring their effective application;

Whereas the existing arrangements at both national and Community levels for ensuring their application are not always adequate to ensure compliance with the relevant Community provisions particularly at a stage when infringements can be corrected;

Whereas the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; whereas, for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement. or national rules implementing that law;

Whereas in certain Member States the absence of effective remedies or inadequacy of existing remedies deter Community undertakings from submitting tenders in the Member State in which the contracting authority is established; whereas, therefore, the Member States concerned must remedy this situation;

Whereas, since procedures for the award of public contracts are of such short duration, competent review bodies must, among other things, be authorized to take interim measures aimed at suspending such a procedure or the implementation of any decisions which may be

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taken by the contracting authority; whereas the short duration of the procedures means that the aforementioned infringements need to be dealt with urgently;

Whereas it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement;

Whereas, when undertakings do not seek review, certain infringements may not be corrected unless a specific mechanism is put in place;

Whereas, accordingly, the Commission, when it considers that a clear and manifest infringement has been committed during a contract award procedure, should be able to bring it to the attention of the competent authorities of the Member State and of the contracting authority concerned so that appropriate steps are taken for the rapid correction of any alleged infringement;

Whereas the application in practice of the provisions of this Directive should be re-examined within a period of four years of its implementation on the basis of information to be supplied by the Member States concerning the functioning of the national review procedures,

HAS ADOPTED THIS DIRECTIVE:

- (1) OJ No C 230, 28.8.1987, p. 6 and OJ No C 15, 19.1.1989, p. 8.
- (2) OJ No C 167, 27.6.1988, p. 77 and OJ No C 323, 27.12.1989.
- (3) OJ No C 347, 22.12.1987, p. 23.
- (4) OJ No L 185, 16.8.1971, p. 5.
- (5) OJ No L 210, 21.7.1989, p. 1.
- (6) OJ No L 13, 15.1.1977, p. 1.
- (7) OJ No L 127, 20.5.1988, p. 1.