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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)

(OJ L 395, 30.12.1989, p. 33)

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► <u>M2</u>	Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007	L 335	31	20.12.2007
► <u>M3</u>	Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014	L 94	1	28.3.2014

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► **C1** Corrigendum, OJ L 63, 10.3.2016, p. 44 (89/665/EEC)

**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)

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 ⁽¹⁾,In cooperation with the European Parliament ⁽²⁾,Having regard to the opinion of the Economic and Social Committee ⁽³⁾,

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 ⁽⁴⁾, as last amended by Directive 89/440/EEC ⁽⁵⁾, and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts ⁽⁶⁾ as last amended by Directive 88/295/EEC ⁽⁷⁾, 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

⁽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.

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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:

▼ M2*Article 1***Scope and availability of review procedures****▼ M3**

1. This Directive applies to contracts referred to in Directive 2014/24/EU of the European Parliament and of the Council ⁽¹⁾ unless such contracts are excluded in accordance with Articles 7, 8, 9, 10, 11, 12, 15, 16, 17 and 37 of that Directive.

This Directive also applies to concessions awarded by contracting authorities, referred to in Directive 2014/23/EU of the European Parliament and of the Council ⁽²⁾ unless such concessions are excluded in accordance with Articles 10, 11, 12, 17 and 25 of that Directive.

Contracts within the meaning of this Directive include public contracts, framework agreements, works and services concessions and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2014/24/EU or Directive 2014/23/EU, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of public procurement or national rules transposing that law.

⁽¹⁾ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (OJ L 94, 28.3.2014, p. 65).

⁽²⁾ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contract (OJ L 94, 28.3.2014, p. 1).

▼ M2

2. Member States shall ensure that there is no discrimination between undertakings claiming harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. Member States shall ensure that the review procedures are 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.

4. Member States may require that the person wishing to use a review procedure has notified the contracting authority of the alleged infringement and of his intention to seek review, provided that this does not affect the standstill period in accordance with Article 2a(2) or any other time limits for applying for review in accordance with Article 2c.

5. Member States may 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.

Member States shall decide on the appropriate means of communication, including fax or electronic means, to be used for the application for review provided for in the first subparagraph.

The suspension referred to in the first subparagraph 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**

1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for 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;

▼ M2

(c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.

3. When a body of first instance, which is independent of the contracting authority, 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 referred to in Article 2a(2) and Article 2d(4) and (5).

4. Except where provided for in paragraph 3 and Article 1(5), review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.

5. Member States may provide that the body responsible for review procedures 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.

A decision not to grant interim measures shall not prejudice any other claim of the person seeking such measures.

6. Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

7. Except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.

8. Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

9. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 234 of the Treaty and independent of both the contracting authority and the review body.

▼ **M2**

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.

*Article 2a***Standstill period**

1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting authorities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.

2. ► **M3** A contract may not be concluded following the decision to award a contract falling within the scope of Directive 2014/24/EU or Directive 2014/23/EU 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 the following:

▼ **M3**

— a summary of the relevant reasons as set out in Article 55(2) of Directive 2014/24/EU, subject to Article 55(3) of that Directive, or in the second subparagraph of Article 40(1) of Directive 2014/23/EU, subject to Article 40(2) of that Directive, and

▼ **M2**

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

▼ M2*Article 2b***Derogations from the standstill period**

Member States may provide that the periods referred to in Article 2a(2) of this Directive do not apply in the following cases:

▼ M3

(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*;

▼ M2

(b) if the only tenderer concerned within the meaning of Article 2a(2) of this Directive is the one who is awarded the contract and there are no candidates concerned;

▼ M3

(c) in the case of a contract based on a framework agreement as provided for in Article 33 of Directive 2014/24/EU and in the case of a specific contract based on a dynamic purchasing system as provided for in Article 34 of that Directive.

▼ M2

If this derogation is invoked, Member States shall ensure that the contract is ineffective in accordance with Articles 2d and 2f of this Directive where:

▼ M3

— there is an infringement of point (c) of Article 33(4) or of Article 34(6) of Directive 2014/24/EU, and

— the contract value is estimated to be equal to or to exceed the thresholds set out in Article 4 of Directive 2014/24/EU.

▼ M2*Article 2c***Time limits for applying for review**

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 falling within the scope of ► M3 Directive 2014/24/EU or Directive 2014/23/EU ◀ 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 referred to in Article 2(1)(b) of this Directive 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.

▼ M2*Article 2d***Ineffectiveness**

1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

▼ M3

(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 being permissible in accordance with Directive 2014/24/EU or Directive 2014/23/EU;

▼ M2

(b) in case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) of this Directive, if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of ► M3 Directive 2014/24/EU or Directive 2014/23/EU ◀, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract;

(c) in the cases referred to in the second subparagraph of Article 2b(c) of this Directive, if Member States have invoked the derogation from the standstill period for contracts based on a framework agreement and a dynamic purchasing system.

2. The consequences of a contract being considered ineffective shall be provided for by national law.

National law may provide for the retroactive cancellation of all contractual obligations or limit 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 within the meaning of Article 2e(2).

3. Member States may provide that the review body independent of the contracting authority 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), which shall be applied instead.

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 shall not constitute overriding reasons relating to a general interest. Economic interests directly linked to the contract include, inter alia, 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.

▼ M2

4. The Member States shall provide that paragraph 1(a) of this Article does not apply where:

▼ M3

— the contracting authority considers that the award of a contract without prior publication of a contract notice in the *Official Journal of the European Union* is permissible in accordance with Directive 2014/24/EU or Directive 2014/23/EU,

▼ M2

— the contracting authority has published in the *Official Journal of the European Union* a notice as described in Article 3a of this Directive 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.

5. The Member States shall provide that paragraph 1(c) of this Article does not apply where:

▼ M3

— the contracting authority considers that the award of a contract is in accordance with point (c) of Article 33(4) or with Article 34(6) of Directive 2014/24/EU,

▼ M2

— the contracting authority has sent a contract award decision, together with a summary of reasons as referred to in the first indent of the fourth subparagraph of Article 2a(2) of this Directive, 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**

1. In the case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) which is not covered by Article 2d(1)(b), Member States shall provide for ineffectiveness in accordance with Article 2d(1) to (3), or for alternative penalties. Member States may provide that the review body independent of the contracting authority shall decide, after having assessed all relevant aspects, whether the contract should be considered ineffective or whether alternative penalties should be imposed.

2. Alternative penalties must be effective, proportionate and dissuasive. Alternative penalties shall be:

— the imposition of fines on the contracting authority; or,

— the shortening of the duration of the contract.

▼ M2

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, in the cases referred to in Article 2d(2), 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.

*Article 2f***Time limits**

1. Member States may provide that the application for review in accordance with Article 2d(1) must be made:

▼ M3

(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 in accordance with Articles 50 and 51 of Directive 2014/24/EU or with Articles 31 and 32 of Directive 2014/23/EU, 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 contains a summary of the relevant reasons as set out in Article 55(2) of Directive 2014/24/EU, subject to Article 55(3) of that Directive or in the second subparagraph of Article 40(1) of Directive 2014/23/EU, subject to Article 40(2) of that Directive. This option also applies to the cases referred to in point (c) of the first paragraph of Article 2b of this Directive;

▼ M2

(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.

2. In all other cases, including applications for a review in accordance with Article 2e(1), the time limits for the application for a review shall be determined by national law, subject to the provisions of Article 2c.

*Article 3***Corrective mechanism****▼ M3**

1. The Commission may invoke the procedure provided for in paragraphs 2 to 5 when, prior to a contract being concluded, it considers that a serious infringement of Union law in the field of public procurement has been committed during a contract award procedure falling within the scope of Directive 2014/24/EU or Directive 2014/23/EU.

▼ M2

2. The Commission shall notify the Member State concerned of the reasons which have led it to conclude that a serious infringement has been committed and request its correction by appropriate means.

▼ **M2**

3. Within 21 calendar days of receipt of the notification referred to in paragraph 2, the Member State concerned shall communicate to the Commission:

- (a) its confirmation that the infringement has been corrected;
- (b) a reasoned submission as to why no correction has been made; or
- (c) a notice to the effect that the contract award procedure has been suspended either by the contracting authority on its own initiative or on the basis of the powers specified in Article 2(1)(a).

4. A reasoned submission communicated pursuant to paragraph 3(b) may rely among other matters on the fact that the alleged infringement is already the subject of judicial or other review proceedings or of a review as referred to in Article 2(9). In such a case, the Member State shall inform the Commission of the result of those proceedings as soon as it becomes known.

5. Where notice has been given that a contract award procedure has been suspended in accordance with paragraph 3(c), the Member State shall notify the Commission when the suspension is lifted or another contract procedure relating in whole or in part to the same subject matter is begun. That notification shall confirm that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made.

Article 3a

Content of a notice for voluntary ex ante transparency

The notice referred to in the second indent of Article 2d(4), the format of which shall be adopted by the Commission in accordance with the advisory procedure referred to in Article 3b(2), shall contain the following information:

- (a) the name and contact details of the contracting authority;
- (b) a description of the object of the contract;
- (c) a 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*;
- (d) the name and contact details of the economic operator in favour of whom a contract award decision has been taken; and
- (e) where appropriate, any other information deemed useful by the contracting authority.

Article 3b

Committee procedure

1. The Commission shall be assisted by the Advisory Committee for Public Contracts set up by Article 1 of Council Decision 71/306/EEC of 26 July 1971 ⁽¹⁾ (hereinafter referred to as the Committee).

⁽¹⁾ OJ L 185, 16.8.1971, p. 15. Decision as amended by Decision 77/63/EEC (OJ L 13, 15.1.1977, p. 15).

▼ M2

2. Where reference is made to this paragraph, Articles 3 and 7 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission ⁽¹⁾ shall apply, having regard to the provisions of Article 8 thereof.

*Article 4***Implementation**

1. The Commission may request the Member States, in consultation with the Committee, to provide it with information on the operation of national review procedures.

2. Member States shall communicate to the Commission on an annual basis the text of all decisions, together with the reasons therefor, taken by their review bodies in accordance with Article 2d(3).

*Article 4a***Review**

No later than 20 December 2012, the Commission shall review the implementation of this Directive and report to the European Parliament and to the Council on its effectiveness, and in particular on the effectiveness of the alternative penalties and time limits.

▼ B*Article 5*

► **C1** Member States shall bring into force, before 21 December 1991, ◀ the measures necessary to comply with this Directive. They shall communicate to the Commission the texts of the main national laws, regulations and administrative provisions which they adopt in the field governed by this Directive.

Article 6

This Directive is addressed to the Member States.

⁽¹⁾ OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).