

Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors

CHAPTER I

Remedies at national level

[^{F1}Article 1

Scope and availability of review procedures

1 This Directive applies to contracts referred to in Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors⁽¹⁾, unless such contracts are excluded in accordance with Article 5(2), Articles 18 to 26, Articles 29 and 30 or Article 62 of that Directive.

Contracts within the meaning of this Directive include supply, works and service contracts, framework agreements and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/17/EC, decisions taken by contracting entities 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 Community law in the field of procurement or national rules transposing that law.

2 Member States shall ensure that there is no discrimination between undertakings likely to make a claim in respect of 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 entity 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 entity. 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.

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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 entity has sent a reply 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 contracting entity has sent a reply or at least 10 calendar days with effect from the day following the date of the receipt of a reply.]

Textual Amendments

- F1** Substituted by [Directive 2007/66/EC of the European Parliament and of 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 \(Text with EEA relevance\)](#).

Article 2

[^{F2}Requirements for review procedures]

1 The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers:

either

- (a) to take, at the earliest opportunity and by way of interlocutory procedure, interim measures with the aim of correcting the alleged infringement or preventing further injury to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a contract or the implementation of any decision taken by the contracting entity; and
- (b) to set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the notice of contract, the periodic indicative notice, the notice on the existence of a system of qualification, the invitation to tender, the contract documents or in any other document relating to the contract award procedure in question;

or

- (c) to take, at the earliest opportunity, if possible by way of interlocutory procedures and if necessary by a final procedure on the substance, measures other than those provided for in points (a) and (b) with the aim of correcting any identified infringement and preventing injury to the interests concerned; in particular, making an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented.

Member States may take this choice either for all contracting entities or for categories of entities defined on the basis of objective criteria, in any event preserving the effectiveness of the measures laid down in order to prevent injury being caused to the interests concerned;

- (d) and, in both the above cases, to award damages to persons injured by the infringement.

Where damages are claimed on the grounds that a decision has been taken unlawfully, Member States may, where their system of internal law so requires and provides bodies having the necessary powers for that purpose, provide that the contested decision must first be set aside or declared illegal.

[^{F12} 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 entity, reviews a contract award decision, Member States shall ensure that the contracting entity 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).

3a 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.

4 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.]

5 The sum to be paid in accordance with paragraph 1 (c) must be set at a level high enough to dissuade the contracting entity from committing or persisting in an infringement. The payment of that sum may be made to depend upon a final decision that the infringement has in fact taken place.

[^{F16} 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.]

7 Where a claim is made for damages representing the costs of preparing a bid or of participating in an award procedure, the person making the claim shall be required only to prove an infringement of Community law in the field of procurement or national rules implementing that law and that he would have had a real chance of winning the contract and that, as a consequence of that infringement, that chance was adversely affected.

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

9 Whereas 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 measures 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 [^{F1}court or tribunal within the meaning of Article 234 of the Treaty] and independent of both the contracting entity and the review body.

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The members of the independent body referred to in the first paragraph 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.

Textual Amendments

- F1** Substituted by [Directive 2007/66/EC of the European Parliament and of 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 \(Text with EEA relevance\)](#).
- F2** Inserted by [Directive 2007/66/EC of the European Parliament and of 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 \(Text with EEA relevance\)](#).

[^{F2} 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 entities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.

2 A contract may not be concluded following the decision to award a contract falling within the scope of Directive 2004/17/EC 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 entity 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:

- a summary of the relevant reasons as set out in Article 49(2) of Directive 2004/17/EC, and,
- a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph.

Textual Amendments

- F2** Inserted by [Directive 2007/66/EC](#) of the European Parliament and of 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 (Text with EEA relevance).

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:

- (a) if Directive 2004/17/EC does not require prior publication of a notice in the *Official Journal of the European Union*;
- (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;
- (c) in the case of specific contracts based on a dynamic purchasing system as provided for in Article 15 of Directive 2004/17/EC.

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:

- there is an infringement of Article 15(5) or (6) of Directive 2004/17/EC, and,
- the contract value is estimated to be equal to or to exceed the thresholds set out in Article 16 of Directive 2004/17/EC.

Textual Amendments

- F2** Inserted by [Directive 2007/66/EC](#) of the European Parliament and of 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 (Text with EEA relevance).

Article 2c

Time limits for applying for review

Where a Member State provides that any application for review of a contracting entity's decision taken in the context of, or in relation to, a contract award procedure falling within the scope of Directive 2004/17/EC 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 entity'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 entity's decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of receipt of the contracting entity's decision. The communication of the contracting entity's decision to each tenderer or candidate shall be accompanied by a summary of the relevant reasons. In the case of an application for a review concerning decisions referred to in Article 2(1)

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(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.

Textual Amendments

- F2** Inserted by [Directive 2007/66/EC of the European Parliament and of 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 \(Text with EEA relevance\)](#).

Article 2d

Ineffectiveness

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

- a if the contracting entity has awarded a contract without prior publication of a notice in the *Official Journal of the European Union* without this being permissible in accordance with Directive 2004/17/EC;
- 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 Directive 2004/17/EC, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract;
- c in 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 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 entity 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.

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

- the contracting entity considers that the award of a contract without prior publication of a notice in the *Official Journal of the European Union* is permissible in accordance with Directive 2004/17/EC,
- the contracting entity 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:

- the contracting entity considers that the award of a contract is in accordance with Article 15(5) and (6) of Directive 2004/17/EC,
- the contracting entity 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.

Textual Amendments

- F2** Inserted by [Directive 2007/66/EC of the European Parliament and of 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 \(Text with EEA relevance\)](#).

Article 2e

Infringements of this Directive and alternative penalties

1 In case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) 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 entity 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 entity; or,
- the shortening of the duration of the contract.

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

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contracting entity 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.

Textual Amendments

- F2** Inserted by [Directive 2007/66/EC of the European Parliament and of 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 \(Text with EEA relevance\).](#)

Article 2f

Time limits

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

- a before the expiry of at least 30 calendar days with effect from the day following the date on which:
 - the contracting entity published a contract award notice in accordance with Articles 43 and 44 of Directive 2004/17/EC, provided that this notice includes the justification of the decision of the contracting entity to award the contract without prior publication of a notice in the *Official Journal of the European Union*, or
 - the contracting entity 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 49(2) of Directive 2004/17/EC. This option also applies to the cases referred to in Article 2b(c) of this Directive;
- 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.]

Textual Amendments

- F2** Inserted by [Directive 2007/66/EC of the European Parliament and of 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 \(Text with EEA relevance\).](#)

- (1) [^{F1}[OJ L 134, 30.4.2004, p. 1](#). Directive as last amended by Council Directive 2006/97/EC ([OJ L 363, 20.12.2006, p. 107](#)).]

Textual Amendments

- F1** Substituted by [Directive 2007/66/EC](#) of the European Parliament and of 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 (Text with EEA relevance).