

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

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

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 Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors<sup>(4)</sup> lays down rules for procurement procedures to ensure that potential suppliers and contractors have a fair opportunity to secure the award of contracts, but does not contain any specific provisions ensuring its effective application;

Whereas the existing arrangements at both national and Community levels for ensuring its application are not always adequate;

Whereas the absence of effective remedies or the inadequacy of existing remedies could deter Community undertakings from submitting tenders; whereas, therefore, the Member States must remedy this situation;

Whereas Council Directive 89/665/EEC 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<sup>(5)</sup> is limited to contract award procedures within the scope of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts<sup>(6)</sup>, as last amended by Directive 90/531/EEC, and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts<sup>(7)</sup>, as last amended by Directive 90/531/EEC;

Whereas the opening-up of procurement in the sectors concerned to Community competition implies that provisions must be adopted to ensure that appropriate review procedures are made available to suppliers or contractors in the event of infringement of the relevant Community law or national rules implementing that law;

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Whereas it is necessary to provide for a substantial increase in the guarantees of transparency and non-discrimination and whereas, for it to have tangible effects, effective and rapid remedies must be available;

Whereas account must be taken of the specific nature of certain legal orders by authorizing the Member States to choose between the introduction of different powers for the review bodies which have equivalent effects;

Whereas one of these options includes the power to intervene directly in the contracting entities' procurement procedures such as by suspending them, or by setting aside decisions or discriminatory clauses in documents or publications;

Whereas the other option provides for the power to exert effective indirect pressure on the contracting entities in order to make them correct any infringements or prevent them from committing infringements, and to prevent injury from occurring;

Whereas claims for damages must always be possible;

Whereas, 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 is not be required, in order to obtain the reimbursement of his costs, to prove that the contract would have been awarded to him in the absence of such infringement;

Whereas the contracting entities which comply with the procurement rules may make this known through appropriate means; whereas this requires an examination, by independent persons, of procurement procedures and practices applied by those entities;

Whereas for this purpose an attestation system, allowing for a declaration on the correct application of the procurement rules, to be made in notices published in the *Official Journal of the European Communities*, is appropriate;

Whereas the contracting entities should have the opportunity of having recourse to the attestation system if they so wish; whereas the Member States must offer them the possibility of doing so; whereas they can do so either by setting up the system themselves or by allowing the contracting entities to have recourse to the attestation system established by another Member State; whereas they may confer the task of carrying out the examination under the attestation system to persons, professions or staff of institutions;

Whereas the necessary flexibility in the introduction of such a system is guaranteed by laying down the essential requirements for it in this Directive; whereas operational details should be provided in European Standards to which this Directive refers;

Whereas the Member States may need to determine operational details prior to, or in addition to, the rules contained in European Standards;

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 entity concerned so that appropriate steps are taken for the rapid correction of that infringement;

Whereas it is necessary to provide for the possibility of conciliation at Community level to enable disputes to be settled amicably;

Whereas the application in practice of this Directive should be reviewed at the same time as that of Directive 90/531/EEC on the basis of information to be supplied by the Member States concerning the functioning of the national review procedures;

Whereas this Directive must be brought into effect at the same time as Directive 90/531/EEC;

Whereas it is appropriate that the Kingdom of Spain, the Hellenic Republic and the Portuguese Republic are granted adequate additional periods to transpose this Directive, taking account of the dates of application of Directive 90/531/EEC in those countries,

HAS ADOPTED THIS DIRECTIVE:

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- (1) OJ No C 216, 31. 8. 1990, p. 8; and  
OJ No C 179, 10. 7. 1991, p. 18.
- (2) OJ No C 106, 22. 4. 1991, p. 82 and  
OJ No C 39, 17. 2. 1992.
- (3) OJ No C 60, 8. 3. 1991, p. 16.
- (4) OJ No L 297, 29. 10. 1990, p. 1.
- (5) OJ No L 395, 30. 12. 1989, p. 33.
- (6) OJ No L 185, 16. 8. 1971, p. 5.
- (7) OJ No L 13, 15. 1. 1977, p. 1.