

Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (Text with EEA relevance)

#### TITLE IV

### **RULES TO BE APPLIED TO REVIEWS**

#### *Article 55*

#### **Scope and availability of review procedures**

1 The review procedures provided for in this Title apply to the contracts referred to in Article 2, subject to the exceptions provided for in Articles 12 and 13.

2 Member States shall take the measures necessary to ensure that decisions taken by the contracting authorities/entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 56 to 62, on the grounds that such decisions have infringed Community law in the field of procurement or national rules transposing that law.

3 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 in this Title between national rules implementing Community law and other national rules.

4 Member States shall ensure that review procedures are available, under detailed rules which Member States may establish, at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement.

5 Member States may require that the person wishing to use a review procedure has notified the contracting authority/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 57(2) or any other time-limits for applying for review in accordance with Article 59.

6 Member States may require that the person concerned first seek review with the contracting authority/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.

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/entity 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/

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.

### *Article 56*

#### **Requirements for review procedures**

1 Member States shall ensure that the measures taken concerning the review procedures specified in Article 55 include provision for powers:

- a to take, at the earliest opportunity and by way of interlocutory procedures, 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 authority/entity, and to 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 in question; or
- b 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 point (a) 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.

In both the above cases, the powers provided for shall include the power to award damages to persons injured by the infringement.

2 The powers specified in paragraph 1 and Articles 60 and 61 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/entity, reviews a contract award decision, Member States shall ensure that the contracting authority/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 57(2) and Article 60(4) and (5).

4 Except where provided for in paragraph 3 of this Article and Article 55(6), 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, in particular defence and/or security interests, 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 60 to 62, 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 55(6), paragraph 3 of this Article or Articles 57 to 62, 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/entity and the review body.

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 decisions taken by the independent body shall, by means determined by each Member State, be legally binding.

10 Member States shall ensure that the bodies responsible for review procedures guarantee an adequate level of confidentiality of classified information or other information contained in the files transmitted by the parties, and act in conformity with defence and/or security interests throughout the procedure.

To this end, Member States may decide that a specific body has sole jurisdiction for the review of contracts in the fields of defence and security.

In any case, Member States may provide that only the members of review bodies personally authorised to deal with classified information may examine applications for review involving such information. They may also impose specific security measures concerning the registration of applications for review, the reception of documents and the storage of files.

Member States shall determine how review bodies are to reconcile the confidentiality of classified information with respect for the rights of the defence, and, in the case of a judicial review or of a review by a body which is a court or tribunal within the meaning of Article 234 of the Treaty, shall do so in such a way that the procedure complies, as a whole, with the right to a fair trial.

#### *Article 57*

#### **Standstill period**

1 Member States shall ensure that the persons referred to in Article 55(4) have sufficient time for effective review of the contract award decisions taken by contracting authorities/entities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 59.

2 A contract may not be concluded following the decision to award a contract falling within the scope of this Directive 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

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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 either has 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/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 35(2), subject to Article 35(3), and,
- a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph,

#### *Article 58*

### **Derogations from the standstill period**

Member States may provide that the periods referred to in Article 57(2) do not apply in the following cases:

- (a) where this Directive does not require prior publication of a contract notice in the *Official Journal of the European Union*;
- (b) where the only tenderer concerned within the meaning of Article 57(2) is the one which is awarded the contract and there are no candidates concerned;
- (c) in the case of a contract based on a framework agreement as provided for in Article 29.

If this derogation is invoked, Member States shall ensure that the contract is ineffective in accordance with Articles 60 and 62 where:

- there is an infringement of the second indent of the second subparagraph of Article 29(4), and,
- the contract value is estimated to be equal to or to exceed the thresholds set out in Article 8,

#### *Article 59*

### **Time-limits for applying for review**

Where a Member State provides that any application for review of a decision of a contracting authority/entity taken in the context of, or in relation to, a contract award procedure falling within the scope of this Directive 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 decision of the contracting authority/entity 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 decision of the contracting authority/entity 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 decision of the contracting authority/entity. The communication of the decision of the contracting authority/entity 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 56(1)(b) 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.

### Article 60

#### Ineffectiveness

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

- a where the contracting authority/entity 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 this Directive;
- b in the case of an infringement of Article 55(6), Article 56(3) or Article 57(2), where this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with another infringement of Titles I or II, 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 58(c), where Member States have invoked the derogation from the standstill period for contracts based on a framework agreement.

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 alternative penalties within the meaning of Article 61(2).

3 Member States may provide that the review body independent of the contracting authority/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, first and foremost in connection with defence and/or security interests, require that the effects of the contract should be maintained.

Economic interests in the effectiveness of the contract may only be considered as overriding reasons relating to a general interest within the meaning of the first subparagraph, if 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 within the meaning of the first subparagraph. 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

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economic operator performing the contract and the costs of legal obligations resulting from the ineffectiveness.

In any event, a contract may not be considered ineffective if the consequences of this ineffectiveness would seriously endanger the very existence of a wider defence or security programme which is essential for a Member State's security interests.

In all the abovementioned cases, Member States shall provide for alternative penalties within the meaning of Article 61(2), which shall be applied instead.

- 4 Member States shall provide that paragraph 1(a) does not apply where:
- the contracting authority/entity 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 this Directive,
  - the contracting authority/entity has published in the *Official Journal of the European Union* a notice as described in Article 64 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 Member States shall provide that paragraph 1(c) does not apply where:
- the contracting authority/entity considers that the award of a contract is in accordance with the second indent of the second subparagraph of Article 29(4),
  - the contracting authority/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 57(2), 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 61*

#### **Infringements of this Title and alternative penalties**

1 In the case of an infringement of Article 55(6), Article 56(3) or Article 57(2) which is not covered by Article 60(1)(b), Member States shall provide for ineffectiveness in accordance with Article 60(1) to (3), or for alternative penalties. Member States may provide that the review body independent of the contracting authority/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 authority/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

contracting authority/entity and, in the cases referred to in Article 60(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 62

### Time-limits

1 Member States may provide that the application for review in accordance with Article 60(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 authority/entity published a contract award notice in accordance with Articles 30(3), 31 and 32, provided that this notice includes justification of the decision of the contracting authority/entity to award the contract without prior publication of a contract notice in the *Official Journal of the European Union*, or
  - the contracting authority/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 35(2), subject to Article 35(3). This option also applies to the cases referred to in Article 58(c); and
- b in any case, before the expiry of a period of at least 6 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 61(1), the time-limits for the application for a review shall be determined by national law, subject to Article 59.

## Article 63

### Corrective mechanism

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 Community law in the field of procurement has been committed during a contract award procedure falling within the scope of this Directive.

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.

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/entity on its own initiative or on the basis of the powers specified in Article 56(1)(a).

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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 56(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 concerned 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 new notification shall confirm that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made.

#### *Article 64*

##### **Content of a notice for voluntary ex ante transparency**

The notice referred to in the second indent of Article 60(4), the format of which shall be adopted by the Commission in accordance with the advisory procedure referred to in Article 67(2), shall contain the following information:

- (a) the name and contact details of the contracting authority/entity;
- (b) a description of the object of the contract;
- (c) a justification of the decision of the contracting authority/entity 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 which a contract award decision has been taken; and
- (e) where appropriate, any other information deemed useful by the contracting authority/entity.