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Remedies

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What are remedies?

Remedies are legal actions which allow economic operators to request the enforcement of public procurement regulations and their rights under those regulations in cases where contracting authorities, either intentionally or unintentionally, fail to comply with the legal framework for public procurement.

Where can we find out about available remedies?

In the Remedies Directives and local law: Remedies are covered by the EU legal framework and local laws implementing that framework. The EU legal framework on remedies is found in Directive 89/665/EEC which relates to public sector contract award procedures and Directive 92/13/EEC which relates to utilities contract award procedures. Both of these Directives were amended by Directive 2007/66/EC.

Certain procedural rules are set out in the Remedies Directives themselves but much of the detail and specific procedural rules are implemented in national law.

What is the aim of the Remedies Directives?

The aim of the Remedies Directives is to allow irregularities occurring in contract award procedures to be challenged and corrected as soon as they occur. This should increase the lawfulness and transparency of contract award procedures, build confidence among businesses, and facilitate the opening of local public contract markets to foreign competition.

It is important for economic operators to have mechanisms available to them to enforce procurement rules. These mechanisms encourage them to monitor contract award procedures and to require that procurement rules be followed so that their chances of being awarded a contract are not unlawfully diminished. Thus these mechanisms both enhance the lawfulness of procedures and encourage competition.

It follows that all national remedies procedures must be:

- clear and straightforward, i.e. understandable and easy to use by economic operators;
- available to all economic operators wishing to participate in a specific contract award procedure without discrimination, in particular on the grounds of nationality;
- effective in preventing or correcting instances of unlawfulness on the part of economic operators and/or contracting authorities.

Who has the right to claim remedies?

The Remedies Directives provide that remedies are available to any economic operator that has or has had an interest in obtaining a particular contract and that risks or has risked being harmed by an alleged violation of the applicable procurement rules.

This means that all economic operators that have expressed an interest in participating in a contract award procedure – or might have done so if the contract had been advertised – have the right to benefit from the available remedies.

Generally, local laws on standing and on representation in legal proceedings are applicable to the extent that they do not interfere with the requirements of the Remedies Directives.

Which bodies consider complaints and legal cases relating to procurement?

Complaints before the contracting authority or an authority supervising the contracting authority: To encourage the settlement of disputes without recourse to legal action, local law may require or allow the economic operator concerned, before filing a legal action with the competent review body, to first seek review by lodging an 'application for review' (i.e. complaint) with the contracting authority against an alleged infringement in a contract award procedure. Complaints are not legal courses of action as such, as they are submitted prior to the proceedings before review bodies. Depending on the specific facts and circumstances, complaints can lead to enforcement of the law and to quick and early resolution of disputes.

Tribunals or courts: Procurement cases are brought before a review body that may be either a specialised procurement tribunal or a regular court. EU Member States are free to choose between the two.

What types of remedies are available?

Detailed provisions relating to the types of remedy available are generally subject to local law. The Directives require member states to ensure that three types of remedies are available: interim measures, set aside and damages.

- **Interim measures:** Interim measures are provisional measures taken in relation to the contract notice and any contracting decision, including the contract award decision. The aim of interim measures is to prevent the creation of unalterable situations and to avoid the continuation of the contract award procedure without an economic operator that would otherwise have been able to participate and possibly be awarded the contract. These aims may only be achieved if the local legal system provides an effective, simple and speedy possibility of obtaining interim relief and if the competent review body is not reluctant to grant interim relief as a matter of principle.

The following interim measures can typically be ordered:

- Suspension of the implementation of any decision taken by the contracting authority
 - Suspension of the whole contract award procedure
 - Provisional correction of a breach (this depends on local law and is rather unusual)
- **Set aside:** The application for the set-aside remedy cancels or renders ineffective a contracting decision taken unlawfully or otherwise corrects an unlawful situation. The aim of set-aside is to correct proven irregularities. This aim is only achieved if the local legal system provides an effective possibility of cancelling an unlawful specification or contracting decision and if the competent review body reviews the reasonableness of contracting decisions.

The following measures can typically be ordered:

- Removal of discriminatory technical, economic or financial specifications in the contract notice, tender documents or any other document relating to the contract award procedure;
- Annulment of an unlawful contracting decision
- Positive correction of any unlawful document or contracting decision, for example an order of the contracting authority to amend or delete an unlawful clause in the tender documents or to reinstate an economic operator that had been unlawfully excluded.

Where legal proceedings are commenced claiming interim measures or set aside can the contracting authority still go ahead and award the contract? No, the Remedies Directives provide that where an application for interim measures or an application to set aside the contract award decision is implemented by way of legal proceedings then the contracting authority may not conclude the contract until the review body has issued a decision.

- **Damages:** Damages are compensation paid to economic operators harmed by an infringement of the public procurement rules. The procedure and venue for bringing claims for damages depends on local legislation, which sets the filing rules, deadlines, requirements of proof, and extent of compensation (for example, the conditions under which tendering costs can be recovered). This remedy aims to compensate harmed economic operators.

The measures that are ordered if a claim for damages is successful are the compensation of all harms suffered by the economic operator, which usually includes actual costs incurred and, exceptionally, lost profits. The compensation must be full –however, it is often very difficult to establish the extent of the damage suffered in a competitive process. This remedy does not interfere with the contract award procedure, its progress or conclusion.

What is the “standstill period”?

Contracting authorities are required to wait for a certain number of days between the contract award decision and the conclusion of the contract with the successful tenderer. This “standstill period” allows rejected tenderers to challenge the contracting authority’s decision not to award the contract to them, if they think that such a decision was unlawful, and therefore to prevent the contract from being concluded on the basis of an improper award decision.

What are the standstill notification requirements?: As soon as contracting authorities have made an award decision, they must notify all tenderers or candidates, including unsuccessful ones, of this decision and then allow a certain number of days to pass before they conclude the contract. The notification must include a summary of the reasons for this decision, as set out in the Remedies Directives, and in particular the name of the successful tenderer and the characteristics and relative advantages of the tender selected; certain information may be withheld. The exact duration of the standstill period must also be mentioned in the notification, so that tenderers/candidates know how much time they have to challenge the award decision, if they wish to do so.

How long is the standstill period? The standstill period must last at least 10 days, starting from the day following the date on which the contracting authority sends the notification of the contract award decision to tenderers or candidates, if fax or electronic

means is used. The standstill period may be longer if the contracting authority uses other means of communication, such as the postal service, to send the notification of the contract award decision. These standstill periods are only the minimum requirements: local law may provide for longer but not shorter periods.

During this standstill period, rejected tenderers can apply for the review of the award decision, either first by the contracting authority using a complaints procedure and/or directly before the review body, asking for interim measures or for the setting aside of the award decision. This choice depends on whether there are pre-trial complaints under local law and whether these complaints are optional or compulsory prior to the use of other remedies.

Do the standstill notification requirements apply to all contract award decisions?

The requirements for a standstill period apply to most contract award decisions. There are a few exceptions provided for in the Remedies Directives:

- the decision is for the award of specific contracts under a framework agreement or a dynamic purchasing system;
- there is no obligation under Directive 2004/18/EC to publish a contract notice;
- there is only one tenderer/candidate left at the award stage of the procedure; in that case, there are no other persons remaining in the award procedure with an interest or right to challenge the contract award decision and to benefit from the standstill period.

Ineffectiveness of concluded contracts

The Remedies Directives require member states to ensure that local review bodies set aside or otherwise render ineffective a concluded contract where specific conditions are satisfied; such as failure to publish a contract notice and run an award procedure, non compliance with the rules applying to the award of contracts under a framework agreement or breach of standstill requirements which harm the tenderer and deprive them of the opportunity to claim interim measures or set aside.

The ineffectiveness sanction was adopted to prevent contracting authorities from hastening to conclude contracts, even in violation of the standstill or suspension periods or of basic procurement rules, assuming that they would be immune to any sanctions following conclusion of these contracts. It was intended to incite procurement officials to be very careful when applying the procurement rules. The risk of termination of unlawfully concluded contracts is a serious one. There is also a serious risk that the successful tenderer, for which the contract has been terminated in this way, would seek damages under local contracts law.

The legal action to set aside a signed is instituted by a tenderer claiming to be harmed as a consequence. The Directive requires member states to allow for minimum specified time periods for making such a claim but these are only minimum requirements and so detailed deadlines and procedures for such a claim are governed by local law.

Member states have the option of allowing contracts to be declared ineffective either retrospectively or prospectively. Local law will therefore specify whether the declaration of ineffectiveness is:

- Retrospective: so that all contractual obligations, including those already performed, are to be cancelled, and the tenderer and contracting authority must settle their relationship under local rules; or
- Prospective: so only future and unperformed contractual obligations may be annulled). Where the member state opts for prospective cancellation, the Directive requires that there must also be other penalties available. These additional penalties are (1) fines imposed on the contracting authority which must be adequately high in order to punish the unlawfulness; and (2) contract shortening.

The Directive does allow for discretion to be granted to review bodies if they find that there are overriding reasons related to a general interest in maintaining the contract. This discretion must be used with care, as it is provided as an exception to the general rule that unlawfully concluded contracts must not be maintained.

General principles to be observed by review bodies and contracting authorities with regard to remedies

The general principles below must be observed by member states in the implementation of the Remedies Directives and by local review bodies as well as by contracting authorities in their procurement procedures.

Non-discrimination: Access to remedies should be open to all economic operators without discrimination, especially on grounds of nationality. Remedies to enforce EU public procurement rules and their conditions (procedural rules, such as deadlines and filing requirements) should be at least as favourable as those available to enforce domestic procurement rules.

Effectiveness: Remedies must have sufficient power to ensure observance of EU public procurement rules and review must be as rapid as possible. This means that contracting authorities should try to facilitate the proper conduct of all legal procedures and should always comply with decisions concerning remedies. Legal procedures and the conduct of review bodies must ensure for speedy consideration and resolution.

Transparency: Contracting authorities must ensure that through the tender documents themselves as well as in the notifications of contracting decisions, maximum information is provided to economic operators on:

- rights to remedies under the law, in particular remedies having to do with the conduct of the award procedure, i.e. interim measures and set-aside applications;
- relevant procedural rules, in particular deadlines and names of persons/ committees receiving pre-trial complaints within the contracting authority; and
- all information on how contracting decisions were reached, to the extent that this information is relevant to economic operators.

Review bodies must operate in accordance with the requirements of the Remedies Directives and local legislation and their conduct and decision making must be open and transparent.

Utilities

Directive 92/13/EEC (amended by Directive 2007/66/EC) also provides for the three remedies of interim measures, set-aside and damages.

Directive 92/13/EEC gives EU Member States the option, instead of interim measures and the setting aside of unlawful decisions, of providing for the payment of a sum (such as a fine) when a breach of procurement rules occurs. This sum must be sufficiently high to dissuade contracting entities from committing (or assisting) a breach.

The standstill period, the obligation to notify concerning direct awards, and the sanction for ineffectiveness of contract which apply to contracting authorities also apply in the case of utilities.

Further reading:

[SIGMA Public Procurement Training Manual](#)