

Opinion of the Committee of the Regions on improving the effectiveness of review procedures concerning the award of public contracts

(2007/C 146/10)

THE COMMITTEE OF THE REGIONS

- endorses the proposal to introduce a ten-day standstill period in order to prevent awarding authorities from concluding contracts before the procurement decision has been communicated to competing suppliers. This procedure makes it possible to review the decision before it becomes final, which benefits both awarding authorities and suppliers;
- considers that the proposal to prevent illegal direct procurement is too far-reaching and prefers the current system that provides for damages. The Commission claims that illegal direct procurement is a big problem, but does not back this up with, for example, relevant statistics. The CoR calls on the Commission to provide details of the extent of illegal direct procurement;
- takes the view that the extent to which the remedies directives apply to procurement of services over the threshold value in Annex II B is unclear. The Committee of the Regions considers that a review of procurement of 'B' services should be explicitly exempt from the scope of the remedies directives and it should be left entirely to the Member States to decide how to guarantee legal certainty for suppliers in the procurement of 'B' services. Several of these services, such as healthcare services and social services, are at the very heart of regional and local authority work. The European Union's competence within these areas is very limited and it should not be using the remedies directives to extend this competence through the backdoor.

Reference Document

Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC CEE with regard to improving the effectiveness of review procedures concerning the award of public contracts

COM(2006) 195 final

THE COMMITTEE OF THE REGIONS,

Having regard to the European Commission's proposal for a Directive of the European Parliament and of the Council 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 (COM(2006) 195 final — 2006/066 (COD));

Having regard to the decision of the European Commission of 4 May 2006 to consult it on this subject, under the first paragraph of Article 265 of the Treaty establishing the European Community;

Having regard to its Bureau's decision of 25 April 2006 to instruct the Commission for Economic and Social Policy to draw up an opinion on this subject;

Having regard to the draft opinion (CdR 182/2006 rev. 2), adopted on 15 December 2006 (Rapporteur: **Catarina Segersten Larsson (SE/EPP)** Member of Värmland County Council);

adopted the following opinion at its 68th plenary session, held on 13-14 February 2007 (meeting of 13 February):

1. Views of the Committee of the Regions

The Committee of the Regions

1.1 **welcomes** the proposal for new remedies directives as it believes that an effective, more transparent review system leads to better protection for suppliers, which hopefully makes them more inclined to submit tenders. This increases competition, which ultimately benefits the awarding authorities;

1.2 **believes**, however, that simple legislation is one of the most important requirements in order to reduce the number of legal proceedings. Simple rules are easier to follow and offer less scope for misinterpretation. Unfortunately, the new procurement directives do not deliver this. The directives' complicated procedural rules make it easy for awarding authorities to make mistakes. This particularly affects the smaller local and regional authorities that do not have access to legal procurement specialists. The CoR would also remind the European Commission that public procurement is largely carried out by local and regional authorities rather than at national level;

1.3 **considers** that excessive penalties for breaches of the procurement rules, especially where the legal framework is complicated, could have negative consequences. For example, the awarding authorities might simply decline to tender services out, and opt to run them themselves instead. Another conse-

quence could be excessive focus on the lowest price. There is no disputing which tender comes in at the lowest price, whereas quality and similar parameters are easier to query;

1.4 **endorses** the proposal to introduce a ten-day standstill period in order to prevent awarding authorities from concluding contracts before the procurement decision has been communicated to competing suppliers. This procedure makes it possible to review the decision before it becomes final, which benefits both awarding authorities and suppliers. The Committee of the Regions also endorses the proposal to enable Member States to require anyone wishing to seek review to inform the awarding authority of the claimed infringement and of their intention to request a review. At the same time, the Committee of the Regions urges the Commission to examine, after one year, the impact of introducing such a ten-day period and thus determine the extent to which this has, as in a number of Member States, resulted in a marked increase in review cases;

1.5 **envisages problems**, however, with regard to the effect of contracts that are concluded in breach of the provisions. The proposed directive states that such agreements will be considered invalid, but the Committee of the Regions considers that this should be left to the Member States to decide, so that national legislation on contracts and damages can be adapted;

1.6 **questions** the Commission's assumption that the introduction of a ten-day rule could lead to an initial increase of a few per cent in the number of appeals. In Sweden, for example, appeals initially increased by 150 % after the introduction of a standstill period such as the one suggested, and the number of appeals has continued to grow ⁽¹⁾;

1.7 **considers** that the proposal to prevent illegal direct procurement is too far-reaching and prefers the current system that provides for damages. The Commission claims that illegal direct procurement is a big problem, but does not back this up with, for example, relevant statistics. The CoR calls on the Commission to provide details of the extent of illegal direct procurement. The on-line questionnaire referred to is far too inadequate to provide the basis for such a major upheaval. Mandatory publication of all public contracts above the threshold value and which an awarding authority considers may be concluded without a formal tender procedure and subsequent standstill period is a major encroachment on awarding bodies. This area includes agreements with in-house companies and certain agreements on inter-municipal cooperation. Previous Committee of the Regions opinions have highlighted the problems involved in procurement with in-house companies and the problems that arise in inter-municipal cooperation. The

Committee of the Regions takes the view that procurement legislation must not hinder these processes or render them unviable;

1.8 **takes the view** that the extent to which the remedies directives apply to procurement of services over the threshold value in Annex II B ⁽²⁾ is unclear. The Committee of the Regions considers that a review of procurement of 'B' services should be explicitly exempt from the scope of the remedies directives and it should be left entirely to the Member States to decide how to guarantee legal certainty for suppliers in the procurement of 'B' services. Several of these services, such as healthcare services and social services, are at the very heart of regional and local authority work. The European Union's competence within these areas is very limited and it should not be using the remedies directives to extend this competence through the backdoor. The CoR believes that the legal arrangements for procurement of 'B' services and services under the threshold value must be left exclusively to the Member States;

1.9 **endorses** the proposal to repeal the attestation mechanism and the conciliation procedure;

2. Recommendations of the Committee of the Regions

Recommendation 1

Commission's proposed amendments to Article 1(3) of Directive 89/665/EEC

Commission's proposed amendments to Article 1(3) of Directive 92/13/EEC

Text proposed by the Commission	CoR Amendment
The 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 public contract and who has been or risks being harmed by an alleged infringement.	The 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 public contract, who is able to fulfil the requirements of the tender , and who has been or risks being harmed by an alleged infringement.

Reason

To ensure that the review procedures are only available to suppliers who are actually able to perform the duties required by the awarding authority.

⁽¹⁾ Nämnden för offentlig upphandling (Swedish Public Procurement Agency), Annual Report 2003 and 2004.

⁽²⁾ Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

*Recommendation 2***Commission's proposed amendments to Article 2(4) of Directive 89/665/EEC****Commission's proposed amendments to Article 2(4) of Directive 92/13/EEC**

Text proposed by the Commission	CoR Amendment
The Member States may provide that, when considering whether to order interim measures, the body responsible for review procedures may take into account the probable consequences of the 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.	The Member States may provide that, when considering whether to order interim measures, the body responsible for review procedures may take into account the probable consequences of the measures for all interests likely to be harmed, as well as especially the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits.

Reason

The public interest must be given greater emphasis.

Brussels, 13 February 2007.

The President
of the Committee of the Regions
Michel DELEBARRE