UNICE
THE VOICE OF BUSINESS IN EUROPE

29th April 2005

UNICE position on the Revision of the EU Remedies Directives for Public Procurement, Public Remedies Directive 89/665/EEC and Remedies Utilities Directives 92/13/EEC

In the process leading to a possible revision of the remedies directives, the European Commission has urged the Member States to define their position on various questions concerning the effects of remedies directives. In this context, Industry feels obliged to define its position on the issue.

In a first sense we must state that we do not believe that the solution to the problems that continue to persist in the way public procurement is conducted in Europe will only come from changing the remedies directives. Rather it will come from better quality public procurement, better public procurement planning and better understanding of its value to the national and the European economy. However changing specific problematic aspects of the Remedies Directives will improve the situation.

Public Procurement legislation which currently exists with the new legislative package provides the rules that are needed for public procurement. It is how they are and will be used that is the issue.

1. Mandatory prior notification to the contractor

Industry is of the opinion that the introduction of legislation that would result in unsuccessful bidders being provided with the name of the successful bidder and with the reason why their own bid was not successful 14 days before the contract is awarded, is desirable. The stipulation also being that if the contractor violates this obligation a contract concluded with the successful bidder is declared invalid.

The important point is that the contracting authority must be obliged to provide the unsuccessful bidders with information, which actually enables the bidders to assess whether or not the decision of the award of contract was made in a correct and proper way.

A regulation such as this would be a very strong inducement towards ensuring that contracting authorities take the procurement regulations seriously.

Such regulations exist and have proved successful in Germany and in Austria (where a variation exists that provides a time window for contestations from the unsuccessful bidders between award and conclusion of the contract).

2. Preconditions for initiating legal remedies: the need for legal protection and violated rights of the bidder

A regulation that expressly allows review procedures for illegal direct procurement would be considered a positive step forward.

In certain European countries companies that have an interest in a contract and whose rights have been infringed through the non-compliance of the procurement regulations are authorized to apply for review. The company must prove that the claimed violation has caused damage or threatens to do so and must lodge the complaint without delay or after the time period for the handing in of bids and/or fixed in the announcement have expired.

In many instances there are no regulations on so-called illegal direct procurement. In some cases legislation determines that the first law decision applies, which means that the right to apply for a review also applies to illegal direct procurement before the contract is concluded. After the contract is closed, the bidder who was not considered must resort to civil law procedures to pursue compensation for damages and in this regard legislation at the European level that would allow review procedures for illegal direct procurement. The most obvious solution would be to declare illegal direct procurement invalid.

3. Independent national public procurement authorities

Proposals to establish national authorities that are independent from the contracting authority and have the power to initiate legal remedies when a violation of the EU procurement law is perceived are viewed by industry as having some merit. Independent authorities to whom bidders would have the option of recourse could provide independence, professionalism, the possibility of quick reactions and increased transparency while at the same time offering increased scope for actions by companies that might otherwise fear being blacklisted by contracting authorities. It should however be left to Member States to decide whether or not to establish them.

4. Administrative bodies with mediatory and conciliatory powers

In some countries special administrative bodies for procurement with mediatory and conciliatory powers exist and are used by bidders in individual public procurement cases. The experience of many companies is that such extra-judicial institutions contribute little to settling disputes.

5. Advantages and disadvantages of administrative bodies

Where administrative bodies exist that have the responsibility for reviews at first instance, are entitled to take provisional measures and annul decisions, and do not have the status of a court, sufficient doubt can exist as to the independence and therefore the usefulness of that body.

There are acknowledged advantages to such bodies such as quicker decision making process and less costly procedures therefore it would be useful at a higher level to see introduced in the proposed revision of the remedies directives wording which would underline the independence of such bodies such as “an authority competent for the review procedure that is not a court must be independent and obliged to always justify its decisions in writing”.

6. Minimum time period between announcing the decision and signing the contract

It is the case that legal remedies are often rejected as not permissible because the contract had already been signed (and no obligation to prior notification applies). It is the opinion of industry that either legislation mentioned in point 1 or the introduction of a minimum time period between the award decision and the actual signing of the contract at a European level would be a very effective method of ensuring that procurement regulations are adhered to.

The adoption of a minimum time period of up to 14 calendar days in the Legal Remedies Directive would therefore be welcomed.

7. Suspensive effect when a review procedure is initiated prior to the conclusion of contract.

In some Member States, regulation, which provide for an automatic suspensive effect (ban on award of contract) during a first instance pre-contractual review procedure, exists. Further procedure applies if review procedures enter into the second instance. These regulations have proven to be both useful and effective. The EU's Remedies Directives should make it mandatory to introduce legislation on suspension:

- either as a part of the appeal which the court has to decide upon;
- or as an automatic suspensive effect which the contracting authority has to challenge.

In both cases the suppliers should be free from the obligation to raise a deposit.

8. Legal remedies should target better rules for compensation

It is the experience of many of the companies that they have seen the need to bring actions seeking damages for an injury arising from an irregularity in a public contract award procedure. (It can be pointed out though that demanding compensation for damages is of secondary interest to that of proving that a wrongdoing occurred).

Success in these actions is relative and dependent on what is required of the plaintiff. In this context a real problem exists regarding what is required in that the plaintiff has to provide evidence that his chances of being awarded the contract would have been good to very good (causality connection), the obligation in some cases to obtain beforehand the annulment or the declaration of illegality of the contested decision and the high costs of court proceedings for damages which can be quite disproportionate to the actual amount of damages expected.

In so far as the intention to revise is built on the desire to improve the regulations, consideration should focus on strengthening the legal protection of the bidder against violations prior to the award of contract rather than after.

In some Member States the possibility for claiming damages for a loss of profit does not exist. In these cases where only damages for costs incurred exist the supplier will be unwilling to go to court. The possibility of introducing positive damages should be considered.

9. Initiating legal remedies after conclusion of contract

Initiating legal remedies after the contract has been concluded is not a general alternative to the mandatory prior notification of the bidders.

10. Payment of fines by contracting authorities

The possibility of providing for the payment of a sufficiently large fine, as a protective measure and/or sanction, instead of the imposition of provisional measures and the annulment of illegal decisions is not a realistic option. The ideal situation is one where it would be possible public procurement to work without the necessity of fines/penalties. But in the special case of illegal direct procurement the alternative to invalidation should be a fine.

11. Attestation and conciliation

Attestation (stating at a given time that public contract awarding procedures are in accordance with the Community law in this field and with the national rules transposing this law) that are applied in some jurisdictions to contracts awarded by contracting authorities are in general superfluous and contribute to an increase in bureaucracy. They serve no worthwhile purpose and should be removed.

The regulation providing for conciliation as it stands is surplus to requirements. We do not know of a single case in which it has ever been used.

12. Initiating legal remedies in another Member State

Cross-border initiations of legal remedies sometimes occur. Calls for tender in other Member States are handled by the branch offices / subsidiaries in these countries, who then have the competence to decide whether and in what manner to take action in cases of dispute - in accordance with the law of the respective Member State.