European Public Procurement

Legislative History of the 'Remedies' Directives 89/665/EEC and 92/13/EEC

Edited by
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in cooperation with
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Preface

This book gathers in one place the legislative history of Directives 89/665/EEC and 92/13/EEC as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 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. Earlier publications involved the legislative history of Directives 2004/18/EC (ISBN 90 411 2473 X) and 2004/17/EC (ISBN 978-90-411-2558-3).

Directives 89/665/EEC and 92/13/EEC actually find their origin in the European Commission White Paper on completing the internal market, COM(85) 310. In this book the first legislative document of each Directive is taken to be the Proposal for a Directive lodged by the European Commission on July 1, 1987, COM (87) 134 final (Document 89.1 [Proposal EC 1989]) and on July 30, 1990, COM (90) 297 final (Document 92.1 [Proposal EC 1990]) respectively.

In the List of Legislative Documents located at the end of this book there is as complete an overview as possible of the documents that had a role to play in all these Directives coming into effect. Note, however, that some of these documents, especially cover notes and accompanying letters, are not pertinent to the substantive interpretation of the text of a directive. Also, references are made in this book to documents that have not been included in the book. In addition, a number of these documents are not accessible to the general public. Where possible, these confidential documents have been listed in the List of Legislative Documents, but without citations.

The final text of Directive 89/665/EEC is found in Documents 89.52 and 07.44; the final text of Directive 92/13/EEC is found in Documents 92.80 and 07.44. The documents that were formative in the implementation of the directives in their final text are numbered and referred to as follows:

Directive 89/665/EEC

- Document [89.1] [Proposal EC 1987]
- Document [89.29] [EP reading I]
- Document [89.31] [Proposal EC 2002]
- Document [89.38] [Council Common Position]
- Document [89.48] [EP reading II]

Directive 92/13/EEC

- Document [92.1] [Proposal EC 1990]
- Document [92.54] [EP reading I]
- Document [92.56] [Proposal EC 1991]
- Document [92.64] [Council Common Position]
- Document [92.75] [EP reading II]

Directive 2007/66/EC

- Document [07.1] [Proposal EC 2006]
- Document [07.30] [Compromise Text]
- Document [07.33] [EP reading I]
- Document [07.44] [Directive 2007/66]

Unofficial consolidated texts are found in Document 89.54 [Directive 89/665-C] and Document 92.84 [Directive 92/13-C].

The organisation of the book is apparent from the Table of Contents that follows this preface.

Introducing the book are excerpts from the documents that give a general picture of the reasons that led to the intention to introduce remedies directives for the classic and utilities sectors and amend those directives in 2007. Then follow excerpts from the documents that give an insight into the drafting of the recitals in the Preamble, the articles and the annexes.

The book concludes with a chronological overview of the legislative documents associated with each of the Directives and a Keyword Index.

When reproducing excerpts from the documents that provide an insight into the drafting of the relevant parts of Directive 89/665/EEC, 92/13/EEC and 2007/66/EC, every attempt was made to avoid duplication. Where appropriate, quotations of recitals, articles and other provisions in the documentary excerpts were removed from the text to avoid repetitiveness. A full reproduction of the entire text of the documentary excerpts - in other words, the unnecessary repetition of identical or virtually identical proposals for the wording of the text - would not lead to a better understanding of the intention of the European lawmakers. If this approach had not been taken, the book would have become unmanageable in size.

As a result, however, there may be apparent gaps in the logical development of a recital or article. The enumeration of some of the recitals and articles changed during the legislative drafting process. While following the progress of the consecutive texts of a recital or article, the reader may be confronted with an unaccountable change in the enumeration or a minor change in the text. Unless indicated otherwise, this means that an intermediate step was not included in the book because no explanation for the change was provided in the documentation itself. In these situations the reader should not assume that there is a typographical mistake or an inaccuracy in the faithful reproduction of the text.

To set a recital, article or annex into a relevant perspective, the reader is referred to an identical or comparable provision in any of the other Directives.

* * * * *

For this publication I owe much gratitude to my former colleague Wynand Brants at Houthoff Buruma and my student assistants at Leiden University, in particular Marijke Kos, who placed (and replaced) and numbered (and renumbered) the

various texts, and did much more that was absolutely necessary for the project. I am also grateful to the staff at Houthoff Buruma's information services department, particularly Annette de Nerée tot Babberich at the firm's office in Brussels, for gathering documentation that was sometimes difficult to obtain.

I would like to express my appreciation to the partners at Houthoff Buruma for giving me the opportunity to take on and complete a project such as this. And finally I thank Kluwer International for lending its moral support to the project and by, once more, demonstrating flexibility with regard to deadlines.

* * * * *

I trust that this publication will be a useful resource in the further development of European procurement law.

Jan M. Hebly
Rotterdam and Leiden (NL) – Rochepaule (FR)
September 2010

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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

GENERAL EXPLANATION

General Explanation

Doc. 89.1 [Proposal EC 1987]

If public contracts are to be opened up to Community competition by 1992, more visible action is needed to ensure monitoring of compliance with Community rules in this field. The Commission drew the European Council's attention to this need in its White Paper on completing the internal market (COM(85) 310). Furthermore, as part of its public procurement action programme set out in its Communication to the Council of 19 June 1986, the Commission indicated its intention of intervening to prevent or punish breaches of Community discipline and of establishing a system of rapid redress permitting intervention during award procedures.
The Council took note of this intention on 22 December 1986.

The Commission would like to emphasize the following points in support of the present proposal.

The community rules on public procurement, and in particular Directives 71/305/EEC and 77/62/EEC do not specifically provide for effective monitoring of their application.

The monitoring arrangements that exist at both national and Community levels for ensuring their application are not adequate to ensure compliance with the relevant Community provisions before violation of the latter becomes irreparable.

The Commission has noted that contracting authorities may infringe the Community and/or national law applicable at various stages of the contract award procedures. The most serious and frequent infringements include the following:

- failure to publish invitation to tender in the Official Journal of the European Communities;
- misuse of the exceptional award procedures;
- inclusion, in the tender notice (local press and Official Journal of the European Communities) or in any other document laying down the contract award conditions, of administrative, financial, economic or technical clauses (and in particular where the technical specifications are concerned, the obligation to apply national standards even where Community standards exist) which are incompatible with the relevant Community legislation;
- the unlawful exclusion of tenderers or candidates from Member States other than that of the contracting authority from open, restricted or negotiated procedures;
- discrimination in the checks made of the technical, financial and economic standing of tenderers;
- discrimination in the award of contracts.

It transpires from these examples that infringements of the Community rules on public procurement generally occur before the contract is awarded. Since contract award procedures are of short duration (a decision being taken within

a few weeks), any failure to comply with the Community rules in question needs to be dealt with urgently and rapidly.

The Commission has also noted that the remedies open to a contractor or supplier when he considers that a decision taken by a contracting authority rejecting his candidature or bid under a public contract award procedure is in breach of the Community and/or national law applicable vary from one Member State to another. This disparity creates differences of treatment between those who have had recourse to such remedies and differing situations between Member States as regards the infringement of Community law, i.e. differences in appeal disputes in some Member States and not in others, and unequal opportunities for claiming damages.

The Commission therefore considers it necessary for Member States to amend, where appropriate, their administrative and judicial procedures so as to afford contractors and suppliers taking part in a contract award procedure effective and rapid remedies against impending decisions of the contracting authority that are clearly incompatible with Community and/or national law.

The Commission has also found that the penalties it has been able to impose in the public procurement field in response to complaints or on its own initiative have, in most cases, been imposed too late and have therefore proved counter-productive. Their ineffectiveness encourages infringements of the Community rules, and contracting authorities tend to regard the Commission's intervention under the procedure provided for in Article 169 of the EEC Treaty as arbitrary and unprovoked interference. Moreover, this ineffectiveness does not encourage contractors and suppliers to approach the Commission for assistance.

The Commission therefore considers it necessary that it should be empowered to require the contracting authorities, before the final award of the contract, to suspend the contract award procedure for a limited period.

Doc. 89.3 10. Public supplies and public works contracts (Doc. C2-110/87 – COM(87) 134 fin., Draft Directive, Rule 36)

Rapporteur Mr. Beumer
– Exchange of views
The following took part in the exchange of views: Mr Herman, Ms Tongue, Mr Kilby, Mr von Bismarck, Mr von Wogau, Mr Chantérie, the rapporteur and the competent Commission official.

The exchange of views centred on:
- the scope of application of the directive (works and services contracts),
- the authorities covered by the directive,
- areas outside the scope of application of the directive (post an telecommunications),
- threshold values.