

Steen Treumer & François Lichère (eds)

Enforcement  
of the EU Public  
Procurement Rules



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## Foreword by the Editors of the European Procurement Law Series

This is the third volume in the Series where we tackle another core issue in EU public procurement law: Enforcement. An analysis of enforcement of the EU public procurement rules is of particular interest not only for those working in the field but also for those with a general interest in EU law or in enforcement of law. It is highly interesting from a general perspective because it is an area of law where the European legislator has made exceptional efforts in order to ensure effective enforcement at national level and has pushed the development forward. In this respect the state of the law in the field of public procurement deviates from the clear starting point in EU law. As a main rule remedies and procedural law concerning breaches of the law are considered matters for the national legislator according to the principle of national and remedial autonomy.

The European Commission showed early awareness of the fact that measures had to be taken in order to ensure fast and efficient enforcement of the public procurement rules at national level. This led to the adoption of the so-called Remedies Directives – Directive 89/665 and Directive 92/13 – applicable for the classic sector and the utilities sector respectively. These Directives are still the essential sources of law in the area even though these Directives recently were amended and developed with Remedies Directive 2007/66.

Another feature that makes this field particularly interesting is that the Court of Justice of the European Union also has been highly aware of the importance of effective enforcement in the field of public procurement. As a consequence the Court of Justice has interpreted the law in a very dynamic manner in a number of landmark cases leading to fundamental improvements of the enforcement system both at national and supranational level.

Public Procurement is also a field of law where you can find noteworthy examples of dynamic interpretation at national level. It is remarkable that the principle of effectiveness appears to have been used in some national jurisdictions as a lever for the creation of new law when national courts or review

### 3 Derogations from standstill period, ineffectiveness and remedies in the new tendering procedures: efficiency gains vs. risks of increasing litigation

*By Gabriella M. Racca*

#### 1 Derogations from the standstill period in the European provisions with regard to new tendering procedures

A possibility of derogation from the standstill period is contemplated 'in the case of a contract based on a framework agreement as provided for in Article 32 of Directive 2004/18/EC and in the case of a specific contract based on a dynamic purchasing system as provided for in Article 33 of that Directive'.<sup>1</sup> Such derogation is not mandatory and Member States have the discretionary choice to invoke it, with the aim of ensuring the efficiency gains linked to these new tendering procedures. If the said derogation is invoked, the national law must provide for the ineffectiveness<sup>2</sup> of the individual contracts, above European thresholds, in case of infringements of the award procedure. More specifically, this applies to infringements<sup>3</sup> occurring in the second call for competition among economic operators already part of the framework agreement. The same applies in case of dynamic purchasing systems in which the invitation to tender for a specific contract is addressed to all the economic operators previously admitted to the system.<sup>4</sup> The *ratio* of such a wide provision of ineffectiveness is probably due to the fear – clearly expressed in Directive 18/04/EC – of an improper use of this tool 'in such a way as to

1. Art. 2b par. 1(c), dir. 66/07/EC.
2. Art. 2,d, 2, dir. 66/07/EC.
3. Infringements of the 'second indent of the second subparagraph of Article 32(4) or of Article 33(5) or (6) of Directive 2004/18/EC'.
4. Ar. 33, par.5 e 6 dir. 2004/18/EC.



prevent, restrict or distort competition'.<sup>5</sup> Nonetheless, the risk of making these procedures too cumbersome, as underlined also in the recent Green paper<sup>6</sup> is considerable.

To-date, most Member States opted for the implementation of such derogation to the standstill period in compliance with the European provision.<sup>7</sup> Interesting specifications can be found in EU Member States implementations. In France, for example, the derogation from the standstill period seems to be linked to the respect of a delay (16 days or 11 days in case of electronic communication) between the second call for competition and the award of an individual contract based on a framework agreement or a dynamic purchasing system.<sup>8</sup> Nonetheless, it is not yet possible to foresee whether the benefits of proceeding quickly to the signature of the contract will be thwarted by the ensuing possible increase of litigation linked to the wider provision of ineffectiveness entailed. The present situation is also due to Member States' scarce use of these new tendering procedures.

5. Art.32 par. 2. dir 18/04/EC.

6. Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market, Brussels, COM(2011) 15/4.

7. Summary results on the survey on the draft transposition of the directive 2007/66/EC into Member States law, in [www.publicprocurementnetwork.org](http://www.publicprocurementnetwork.org), reporting the full compliance with the EU Directive of Denmark, Poland, Romania, while for Germany and Italy the implementation seems partial. For the UK implementation: Public Contracts Regulations (Amendment) Regulations 2009 SI 2009 No. 2992, art. 32, (7), 'where a contracting authority awards a contract under a framework agreement or a dynamic purchasing system, that contracting authority need not comply with paragraph (1)'.

8. Ordonnance no 2009-515 du 7 mai 2009, L. 551-15.-Le recours régi par la présente section ne peut être exercé ni à l'égard des contrats dont la passation n'est pas soumise à une obligation de publicité préalable lorsque le pouvoir adjudicateur ou l'entité adjudicatrice a, avant la conclusion du contrat, rendu publique son intention de le conclure et observé un délai de onze jours après cette publication, ni à l'égard des contrats soumis à publicité préalable auxquels ne s'applique pas l'obligation de communiquer la décision d'attribution aux candidats non retenus lorsque le pouvoir adjudicateur ou l'entité adjudicatrice a accompli la même formalité. La même exclusion s'applique aux contrats fondés sur un accord-cadre ou un système d'acquisition dynamique lorsque le pouvoir adjudicateur ou l'entité adjudicatrice a envoyé aux titulaires la décision d'attribution du contrat et observé un délai de seize jours entre cet envoi et la conclusion du contrat, délai réduit à onze jours si la décision a été communiquée à tous les titulaires par voie électronique.

## 2 The Italian implementation of the derogation from standstill period in case of contracts based on framework agreements

As already pointed out, derogation from the standstill period can be foreseen in the case of individual contracts awarded on the basis of a previous framework agreement (the so-called master contract) or after the admission in a dynamic purchasing system.<sup>9</sup>

A general standstill provision was provided for in the former Italian regulatory system, but the consequences of its derogations were not defined.<sup>10</sup> Furthermore, the standstill period could be waived whenever the public administration invoked reasons of urgency. At first, in the delegated law, the Italian Parliament transposed the EU directive not including the provision of derogation to the standstill for framework agreements procedure, thus implying a critical implementation of the legislative decree that finally provided for it. In fact, the EU Directive does not impose a mandatory avoidance of the standstill period but foresees the possibility of derogation so as not to make the procedure too cumbersome. Nonetheless, in the preparatory works for the legislative decree and in the opinion of the Parliamentary commission, the inclusion of the derogation of the standstill period in framework contracts<sup>11</sup> was suggested by the joint Justice and Environment, Territory and Public Works Commissions and it was finally included in the legislative decree, implementing the remedies directive. Such provision is now included in art. 11, para. 10 bis<sup>12</sup> of the Italian Public Contracts Code. Yet, the implementation presents a criticality: the Government law decree that provided for this deroga-

9. Directive 2007/66/EC of European Parliament and Council of 11 December 2007 [2007] O.J. L 335, art. 2b, (c).

10. Italian public contracts code, d.lgs April 12, 2006, n. 163, art. 10, c. 7 (before the implementation of Directive 2007/66, occurred by Legislative Decree March 20, 2010, n. 53. See also R. Caponigro 'Annullamento dell'aggiudicazione ed effetti sul contratto' (2009) *Il Foro Amministrativo* - C.d.S. 2423 et seq.

11. Italy's Camera dei Deputati, Commission II (Justice) and VIII (Environment, Public Works), March 3, 2010: 'b) art.11, par. 10-bis, law decree, come introdotto dall'articolo 2, comma 1, lettera c), valuti il Governo l'opportunità di estendere le deroghe ivi previste per l'applicazione dello *standstill period* anche nei casi di appalti basati su un accordo quadro di cui all'articolo 59 del codice e nei casi di appalti specifici basati su un sistema dinamico di acquisizione di cui all'articolo 60 del codice'.

12. Italian Public Contracts Code, d.lgs April 12, 2006, n. 163, art. 11, c. 10 bis, 'Il termine dilatorio di cui al comma 10 non si applica nei seguenti casi: ... b) nel caso di un appalto basato su un accordo quadro di cui all'articolo 59 e in caso di appalti specifici basati su un sistema dinamico di acquisizione di cui all'articolo 60'.



gation of the standstill period exceeded the limits of the Parliament's delegation attributed to it, thus possibly leading to a recourse to the Italian Constitutional Court.

The Directive also provided that if this derogation is invoked, Member States shall ensure that the contract concluded after the second step of competition, provided in the framework agreement will be ineffective<sup>13</sup> whenever the essential rules regulating this second step of competition are violated.<sup>14</sup> This straightforward provision for ineffectiveness has not been included in the Italian implementation.<sup>15</sup> This may consequently lead to some problems with regard to compliance with the EU provisions, and it could induce Italian procuring entities to prefer a 'voluntary' application of the standstill period before signing the individual contract, thus forgoing the efficiency gains ensuing from framework agreement procedures. This choice could be detrimental considering the peculiar Italian implementation of such a long standstill period of 35 days. On the contrary, the derogation from the standstill period could become an incentive for public entities to adhere to framework agreements, thus awarding a contract with a simple call for competition in a short time, particularly thanks to the use of electronic tools.<sup>16</sup>

As well known, the master contract can include more economic operators and it involves the opening of a second step of competition for the awarding of single 'contracts'.<sup>17</sup> The so-called 'mini competition' – among at least three

13. In accordance with Articles 2d and 2f of Directive 2007/66/EC.
14. There is an infringement of the second indent of the second subparagraph of Article 32(4) or of Article 33(5) or (6) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.
15. R. De Nictolis 'Il recepimento della direttiva ricorsi nel codice appalti e nel nuovo codice del processo amministrativo' (2010) in *www.giustizia-amministrativa.it*, last visited on September, 2010.
16. ECJ, in case C-455/08, *EU Commission v Ireland*, [2010], declares that, by adopting Article 49 of Statutory Instrument No 329 of 2006 and Article 51 of Statutory Instrument No 50 of 2007, Ireland established the rules governing the notification of contracting authorities' and entities' award decisions and their reasoning to tenderers in such a way that by the time that tenderers are fully informed of the reasons for the rejection of their offer, the standstill period preceding the conclusion of the contract may already have expired.
17. G. M. Racca – R. Cavallo Perin – G. L. Albano 'The safeguard of competition in the execution phase of public procurement: framework agreements as flexible competitive tools' (2010) VI *Quaderni Consip*; G. L. Albano – M. Sparro 'A simple model of framework agreements: competition and efficiency' (2008) *J.P.P.* 356.

economic operators – is ruled by much simpler provisions.<sup>18</sup> The procedure for the award must define, if necessary, more precise terms than the ones already defined in the framework agreement. Furthermore, the procuring entity must consult in writing the economic operators capable of performing the contract, an adequate time limit to allow tenders to participate must be set, and confidentiality of the tenders until the stipulated time limit for reply has expired must be assured. The contract must be awarded to the tenderer who submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement. Any violation of such rules, according to the EU provisions, can determine the ineffectiveness of the contract whenever the standstill period has not been applied. This may lead economic operators being harmed by such violations to file claims against the Italian implementation of the EU Directive and thus requesting a direct application of the same.

### 3 The criticalities arising from the safeguard of participants in framework agreement procedures and the evolution of remedies

The main risk involved in the new remedies Directive consists in a wider provision for ineffectiveness that can limit and discourage the use of framework agreements and could lead to a significant increase of bid protests. Some criticalities are emerging with regard to the application of framework agreements. A specific focus on remedies is needed. Evidence of the risks involved in such procedure could be traced in the lack of tenderers' protests and the provision of specific remedies against ensuing risks. More specifically, a comparison with the U.S experience in this regard, allows us to trace the difficulties deriving from the lack of adequate remedies designed for harmed bidders.<sup>19</sup> It thus seems encouraging that the new remedies directive has foreseen specific provisions for such a tool. It is significant that some cases of violations in this regard have recently emerged, specifically considering the constant increase of the use of such a tool in Europe. This should prevent its

18. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004, cit., art. 32, §4, II c., ii. For Italian implementation see the Italian public contracts code, d.lgs April 12, 2006, n. 163, art. 59, c. 8.
19. C. Yukins 'Integrating Integrity and Procurement: The United Nations Convention Against Corruption and The Uncitral Model Procurement Law' (2007) *P.C.L.J.* 307; C. Yukins 'Are IDIQs inefficient? sharing lessons with European framework contracting' (2008) *P.C.L.J.* 565 et seq.

widespread use without the necessary means and limits to ensure compliance with EU provisions on public procurement. Until now the main Italian case law was related to the possible restriction of competition and of business opportunities due to framework contracts.<sup>20</sup> This tender procedure can lead to infringements when the contracting authority chooses the negotiated procedure<sup>21</sup> to select the economic operator with whom to sign the framework agreement. Case law includes claims by economic operators (previous suppliers) challenging the choice of the contracting entity to adhere to a framework agreement; economic operators challenging the value for money resulting from the performance agreed upon in the framework agreement when the contracting entity is non obliged to adhere to such agreement;<sup>22</sup> or else, economic operators part of the framework agreement disputing the choice of terminating the contract. Other interesting examples of case law refer to the 'congruence assessment' (valutazione di congruità, prescribed by Italian law)<sup>23</sup> in order to avoid to get conditions worse than the ones set in the framework agreement (when the adherence to the framework agreement is not mandatory). For example, a private supplier challenged an Italian health agency's evaluation of 'incongruence' of its offer in a single award procedure, in comparison with the ones set in the framework agreement, and the court agreed with the procuring entity assessment.<sup>24</sup>

A significant European case is the dispute concerning the conclusion of a framework agreement for the supply of haemostats<sup>25</sup> of a UK Central Pur-

20. State Council, Sect. V – November 23, 10 – n. 8158; T.A.R. Lombardia – Brescia sez. II, November 5, 2009 – n. 1920. T.A.R. Puglia – Lecce, sez. III, March 11, 2010, n. 700, T.A.R. Lazio – Rome sez. III, 23 June 2009, n. 6031.
21. State Council, Sect. V – November 14, 08 – n. 5693.
22. Regional Administrative Court of Puglia – Sect. I, May 6, 2009, n. 1038.
23. Art. 26, clause III, law 488 of 1999, in replacement, first, of art. 3, clause 166, of *Law no. 350 of December 24, 2003*, and later of art. 1, *L.D. no. 168 of July 12, 2004*, as amended by the relative law of conversion no. 191 of 30.7.2004: the conditions set in the framework agreement define a sort of benchmark that must be complied with by all procuring entities, even when they decide to have recourse to their own awarding procedure with a view to try and obtain better conditions.
24. State Council, Sect. V – November 23, 10-n. 8158; State Council, Sect. V – February 2, 09-n. 557, S. Ponzio, 'La verifica di congruità delle offerte rispetto alle convenzioni Consip negli appalti pubblici di forniture e servizi?' (2009) *Foro amm. – C.d. S.*, 2355. G. M. Racca 'Aggregate Models of Public Procurement and Secondary Consideration: An Italian Perspective', in R. Caranta and M. Trybus (eds.), *The law of green and social procurement in Europe*, Copenhagen, 2010, 175.
25. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004, cit., art. 9, concerning the Methods for calculating the estimated value of public

chasing Body<sup>26</sup> (NHS Business Services Authority) through a restricted tendering procedure. One of the unsuccessful tenderers filed a claim against the supposed violation of the equal treatment and non-discrimination principle, disputing before that the application of the standstill period and of the deadline to file claims. The UK provision for prompt claims left a discretionary power to the judge on the interpretation of the prompt claim, thus limiting the possibilities of bringing proceedings by aggrieved undertakings. The ECJ further clarifies that the term cannot start from the notice of non-awarding of the contract and the deadline must be defined and adequate. This is an example of how the inadequacy of remedies does not prevent the emergence of serious violations of the principles of equal treatment and non discrimination. Surprisingly enough, the reasons for the refusal to award the framework agreement were based on a score of zero for price and other cost effectiveness factors, because the tenderer had submitted its list prices while all the other tenderers had offered discounts on their list prices. Secondly, with regard to the delivery performance and capability criterion, all tenderers which were new to the relevant market in the United Kingdom received a score of zero for the sub-criterion relating to customer base in the United Kingdom. Central Purchasing bodies should develop good practices and fully comply with the European directives, providing the communication of a 'correct award decision' to each tenderer, accompanied by a summary of the relevant informations. Otherwise the derogation from the standstill period will become a serious obstacle to effective judicial protection. The aim of the new remedies directive 66/07/EC is precisely to fully clarify the reasons of the choice of the best tender also in order to assure transparency and encourage transborder participation.

- contracts, framework agreements and dynamic purchasing systems, § 9, 'With regard to framework agreements and dynamic purchasing systems, the value to be taken into consideration shall be the maximum estimated value net of VAT of all the contracts envisaged for the total term of the framework agreement or the dynamic purchasing system'. ECJ, in case C-406/08, *Uniplex (UK) Ltd v NHS Business Services Authority*, [2010] E.C.R. 11. The award criteria, with the relevant weighting to be given to each, set out in the tendering documentation sent to the tenderers, were as follows: price and other cost effectiveness factors (30%); quality and clinical acceptability (30%); product support and training (20%); delivery performance and capability (10%); product range/development (5%); and environmental/sustainability (5%).
26. ECJ, in case C-406/08, *Uniplex (UK) Ltd v NHS Business Services Authority*, [2010] E.C.R. I-11.



#### 4 Conclusions as to the effect of the remedies directive on the new tendering procedures

The *ratio* of the new remedies directive 66/07/EC provides for a correction of infringement occurred during the awarding procedure before the signing of the contract. Nevertheless, the Directive allows derogation from the standstill period when a master contract is in place so as to ensure efficiency gains in the subsequent award of the individual contracts. On the other hand, the price to pay for such efficiency is a wider provision for ineffectiveness for any infringement occurred in the mini-competition. It is becoming evident that framework agreements and dynamic purchasing systems are not suitable for small procuring entities, but they are ideal for complex awarding organizations such as Central purchasing bodies that can aggregate public demand and achieve savings in procedure costs and scale economies in the costs of works, services and supplies.<sup>27</sup> Central purchasing bodies' professionalism in using framework agreements and dynamic purchasing systems should guarantee the correctness in carrying out such more complex procedures, also with the use of platforms and IT tools. The ratio of the Remedies Directive, in compliance with this perspective recognizes that these professional organizations need to guarantee efficiency, and thus the derogation from the standstill period. On the other hand, they must guarantee full transparency and communication with all tenderers on the reasons of their rejection of their offer. The professional skills necessary to elaborate such more complex tendering documents should assure full compliance to all European and national provisions, so as to not be too affected by the wide provision for ineffectiveness that the Directive entails.

Future case law will provide us with further data for a comprehensive evaluation of the outcomes of the implementation of the provisions of the Remedies Directive, whether the efficient development of competition and improvement of the quality of the performance has been attained or if it resulted in the limitation and infringement of free competition among European economic operators.

27. Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market, Brussels, COM(2011) 15/4; G. M. Racca 'Collaborative procurement and contract performance in the Italian healthcare sector: illustration of a common problem in European procurement' (2010) 8 P.P.L.R. 119-133.

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## 4 EU Procurement Rules – A Report about the German Remedies System

By *Martin Burgi*

### 1 Introduction

This report is not only meant to lay down the specifics of the German remedies system but is also dictated by the concern to spark the reader's interest in the importance of review measures. The provisions in the field of public procurement law confer individual rights to bidders and candidates, but these are, beyond doubt, only of value if effective enforcement in front of judicial bodies is guaranteed. The protection of bidder's rights is said to be the most important political goal in public procurement law, which is why the decisions of contracting authorities and judicial bodies alike can be challenged by bidders.

Highly appreciated, the German law on public procurement offers a potpourri of various review mechanisms.

#### 1.1 An overview of the German Remedies System

It is widely known that German Public Procurement Law is a discipline markedly influenced by European law, especially by the procurement directives.

Traditionally, the German legislator in public procurement law has always found its own and special way regarding the establishment of a public procurement system and the adoption of the European Remedies. Regarding Directives 2004/18/EC and 2004/17/EC, Germany opted for a rather complicated procurement law on the basis of three different legal acts (GWB,<sup>1</sup> VgV<sup>2</sup> and Procurement Regulations),<sup>3</sup> constituting the so-called *cascade variant*. Another basic feature of German procurement law is the dichotomy between

1. Act against the Restraints on Competition.
2. Public Procurement Regulation.
3. Contracting rules for the award of public service contracts, public work contracts and contracts for professional services (VOL/A, VOB/A, VOF).