

# The Growth of Transparency

Evolution of Bid Protest Mechanism in the EU

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# TOPICS

- I. General Information
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# I. General Information (1)

- Effective review and remedy mechanisms are essential to guarantee public procurement processes in compliance with relevant laws
  - Non-discrimination
  - Fair treatment
  - Transparency
  - Best value for money
  - Prevention of corruption
- A system without effective and rapid legal remedies would be ineffectual and “toothless” - Remedies Directives from 1989 and 1992

# I. General Information (2)

- **Europe's public procurement market**
  - Economic importance: governmental purchase activity ~ 16% of EU's GDP
  - Expected total investment of 2,6 billion EURO (about 3,6 billion US-\$) in government procurement for 2011
  - Important market for U.S. companies doing business overseas
- **US federal procurement market**
  - ~ 400 billion US-\$
- **CEE/SEE-region**
  - Still emerging markets
  - Huge contracts for infrastructure (airports, roads, ports, bridges)

## II. “Old” EU Remedies Directives

- **Effective enforcement of EU public procurement directives**
  - Utmost importance for proper functioning of public procurement
  - Effective and rapid remedies necessary to ensure adequate procedures for setting aside decisions taken unlawfully
- **“Old” EU Remedies Directives (89/665/EEC and 92/13/EEC) had several weaknesses:**
  - missing **mandatory standstill period** – between decision on successful bidder and award of contract
  - lack of legal protection against **“illegal direct award”** (contract entered into without any competition) - only possibility to sue for damages
  - No **interim measures**, no possibility to **annul decisions**

### III. “New” EU Remedies Directive (1)

- “New” Remedies Directive 2007/66/EC – Reform
  - Radical overhaul of remedies available
- Mandatory standstill period
  - minimum 10 (15) days before the contract can be awarded:
  - reasonable period of time to object to the decision and decide whether to request review or not
  - Sufficient information in award decision
    - Exact reasons for the rejection of the tender
    - Name of successful tenderer
    - Characteristics and relative advantages of winning tender
    - standstill period and its end

### III. “New” EU Remedies Directive (2)

- **Illegal direct award of contracts**
  - “most serious breach of Community law in the field of public procurement”
  - Power for review authorities to strike down a contract awarded in breach of public procurement law (e.g. standstill period)
  - **Ineffectiveness** of contract
    - **Retroactive cancellation** of contractual obligations
    - **Cancellation of future** contractual obligations
    - Flexibility not to render a contract ineffective if there are “**overriding reasons relating to a general interest**”
      - Disproportionate consequence
      - “Effective, proportionate, dissuasive” alternative penalty

### III. “New” EU Remedies Directive (3)

- **Voluntary transparency notice (VTN)**
  - Ineffectiveness/cancellation not available if procuring authority issues notice with
    - The **name and contact details** of authority
    - A copy of the description of the **object of the contract**
    - **Justification** for award without prior notice
    - **Name and contact details of operator** to be awarded the contract
    - Other useful information
  - If there is no **challenge** within **10-day standstill period** the **contract cannot be declared ineffective!**



## IV. Selected Topics (1)

- “Contestable” vs “Non-contestable” decisions
  - Many EU Member States implemented remedy mechanism of “contestable decisions”:
    - Only certain, “significant” decisions are challengeable (e.g., tender notice, tender document, short-listing decision, award decision) – listed in national procurement legislation
    - Decisions not listed are only challengeable with the subsequent contestable decision
    - Preclusive effect of contestable decision (e.g. discriminatory award criteria – thus originally objectionable – become final and absolute)
    - Country specific particularities

## IV. Selected Topics (2)

- **Institutional framework**
  - No comprehensive regulation on organization of national review authorities in Remedies Directive
  - Majority of EU Member States implemented specialized procurement review authorities
  - These procurement authorities solely competent for
    - granting interim measures
    - Setting aside certain decisions
  - Some states require “request for remedy” with contracting authority as precondition before turning to review body
  - Compensation for damages is, however, subject to consideration by “ordinary” civil courts

# V. Access of U.S. Companies to EU remedies system

- **WTO Government Procurement Agreement (GPA)**
  - EU directives confer rights only to suppliers registered in EU
  - Non-EU-suppliers not automatically granted access to EU internal market
  - 41 GPA-members: all 27 EU member states, United States, Japan, Canada (China/India within next decade?)
  - Effectiveness of the GPA - GPA direct applicable?
    - Some good arguments (core provisions of GPA are formulated sufficient clear, precise and unconditional)
    - Up to now no decision of European Court of Justice – literature predominately rejects direct effect
    - Possibility of enforcement by U.S. companies remains unclear

# VI. Excursus: The situation in Non-EU Member States <sup>(1)</sup>

- **Many CEE/SEE-countries are not bound by EU public procurement law** e.g. Albania, Bosnia & Herzegovina, Croatia, Serbia, Ukraine)
  - Market of about 135 million people – rapidly growing economic regions
  - Numerous projects tendered in this region
  - Some countries implemented review/remedy mechanisms in line with Remedies Directive (view of possible accession to the EU)
- **Most are not signatories to the GPA or other bilateral agreements with the U.S, thus:**
  - No guarantee for national treatment/ non-discrimination
  - No minimum standards regarding procurement processes for U.S. companies

## VI. Excursus: The situation in Non-EU Member States (2)

- No right of participation in public tender procedures for U.S. companies in these countries
  - For lack of international agreements liberalizing the respective markets
  - Case-by-case clarification with contracting authority whether participation is allowed for U.S. companies is vital
- Possibility of participation through a subsidiary with a registered office in the EU
  - EU concluded many (bilateral) agreements with non-EU countries regarding the liberalization of procurement market
  - Feasible approach to by-pass access restrictions and to benefit from the country-specific remedy mechanisms granted by these agreements

## VII. Summary

- **New EU Remedies Directive**
  - More effective remedies for aggrieved tenderers
  - New penalty of setting-aside illegal direct awards is a useful tool
  - U.S. suppliers should enforce GPA's non-discrimination provisions for having access to national bid protest mechanism in EU
- **Non-EU countries**
  - Need for special evaluation from case to case

# Thank you for your attention !

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