

Legal protection against unlawful direct awards

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A popular way for contracting authorities to avoid a time-consuming and costly award procedure is a so-called direct award. In such a procedure, contracting authorities decide in favour of a supplier without publishing a tender. If a direct award is unlawful, affected competitors often lack legal protection in the absence of timely knowledge of an infringement. What many do not know is that, even if the deadline for a review procedure under public procurement law has expired, there are still opportunities to take action against illegal direct awards.

Direct awards only possible within tight limits

Contracting authorities in the EU are generally obliged to award contracts that exceed certain thresholds in a competitive procurement procedure. Exceptions are only possible within very strict limits set out in the EU Procurement Directives. Only if the conditions of a so-called *negotiated procedure without prior publication* (informally often referred to as “*direct award*”) are met, is an EU-wide publication of the tender unnecessary. This means that contracting authorities can negotiate and conclude the contract with one or more companies in a less formal procedure. A direct award is permissible, for example, where the works, supplies or services can only be provided by a particular economic operator because competition is absent for technical reasons or because of the protection of exclusive rights, e.g., intellectual property rights (so-called unique selling proposition). As a direct award excludes competition for the contract in question, these exceptions must be interpreted very narrowly. Thus, a direct award based on a unique selling proposition may only be made if no other than the provider of the direct award is able to perform the required services or supplies.

Legal protection against direct awards before the review chamber

However, because of the considerable simplifications that direct award procedures offer contracting authorities, they may be inclined to interpret the requirements less strictly. If a competitor wishes to take action against a direct award that it considers to be illegal, it must assert this infringement no later than six months after the conclusion of the contract, in Germany by submitting an application for review to the public procurement chamber (*Vergabekammer*). In case the contracting authority publishes the direct award in the Official Journal of the EU the deadline for application is reduced to ten or 30 days.

If a request for review is submitted within this timeframe and the conditions for a direct award are not met, the contract is generally declared invalid in Germany. If the contracting authority still wishes to procure the services concerned, it must carry out a competitive tendering procedure.

Other means of legal protection: Infringement procedure by the European Commission or national review authorities

It is often difficult for firms to meet the above deadlines. Without a publication in the Official Journal, companies often find out too late about a direct award. If there is a notice, the short deadlines may prevent a timely application for review.

However, the expiry of the review period does not mean that an (unlawful) exclusion of competition can no longer be claimed. As mentioned above, the framework for direct awards is set by EU law, which Member States are obliged to comply with. If this is not the case, the European Commission (*Commission*) can initiate infringement proceedings. If the Member State concerned does not put an end to the infringement (here: an illegal direct award), financial penalties may be imposed. To inform the Commission of an alleged infringement, companies can lodge a complaint (which is free of charge). The Commission has discretion as to whether to take up a complaint and investigate the infringement. The more systemic the problem and the more companies from other Member States are discriminated against, the more likely it is that the Commission will initiate proceedings.

Depending on the law of the Member State concerned, there may also be national competition authorities to which companies can turn and which can impose sanctions in the event of infringements.

A case in a Scandinavian country we recently advised in shows that such measures may indeed have an impact. After an affected competitor had involved the Commission and the national competition authority, the contracting authority decided to cancel the direct award of a high volume and long-lasting framework contract for infrastructure equipment.

Be careful with direct awards

What follows from this is that contracting authorities should assess very carefully whether the strict conditions for a direct award are met. Even after the deadline for a review procedure has expired, contracting authorities are not "off the hook". Companies that consider themselves disadvantaged by a direct award still have the possibility of taking action against the contract, in particular by means of a complaint to the Commission.

If you have any questions about the requirements for direct awards, the [BLOMSTEIN public procurement law team](#) will be happy to advise.