

that the contractor will have the right to receive compensation he deserves for the work that he demonstrates to have carried out.

Part IX Remedies

Remedies before Closing Date of a Call for Competition

Remedies before
closing date of a
call for
competition.
Amended by:
L.N. 301 of 2019;
L.N. 196 of 2020.

262. (1) Prospective candidates and tenderers may, within the first two-thirds of the time period allocated in the call for competition for the submission of offers, file a reasoned application before the Public Contracts Review Board:

- (a) to set aside or ensure the setting aside of decisions including clauses contained in the procurement document and clarification notes taken unlawfully at this stage or which are proven to be impossible to perform; or
- (b) to determine issues relating to the submission of an offer through the government's e-procurement platform; or
- (c) to remove discriminatory technical, economic or financial specifications which are present in the call for competition, in the contract documents, in clarifications notes or in any other document relating to the contract award procedure; or
- (d) to correct errors or to remove ambiguities of a particular term or clause included in a call for competition, in the contract documents, in clarifications notes or in any other document relating to the contract award procedure; or
- (e) to cancel the call for competition on the basis that the call for competition is in violation of any law or is likely to violate a particular law if it is continued.

(2) The application shall only be valid if accompanied by a deposit equivalent to zero point five per cent (0.50%) of the estimated value set by the contracting authority of the whole tender or if the tender is divided into lots according to the estimated value of the tender set by the contracting authority for each lot submitted by the tenderer, provided that in no case shall the deposit be more than fifty thousand euro (€50,000) which may be refunded as the Public Contracts Review Board may decide in its decision.

Publication of the
application.

263. (1) The application by the complainant shall be affixed on the notice board of the Public Contracts Review Board and shall also be published on the website of the same board.

(2) The Public Contracts Review Board shall notify the contracting authority and, or the Director about this request.

(3) It shall be the responsibility of the prospective candidates or tenderers to visit the website of the Public Contracts Review Board and be aware of the latest information published online.

- 264.** The contracting authority and any interested party may, within five days from the date when the application is uploaded on the website of the Public Contracts Review Board, file a written reply. Such replies shall also be affixed to the notice board of the Review Board and uploaded online. Reply to the application.
- 265.** The Public Contracts Review Board shall decide the application with urgency after hearing the parties, provided that not more than one sitting may be fixed for such purpose. The final decision of the Public Contracts Review Board may be appealed by the aggrieved party before the Court of Appeal as provided in regulations 284, 285, 286, 288 and 290. Decision by the Public Contracts Review Board.
- 266.** Pending the decision of the Public Contracts Review Board the process of the call for tenders shall be suspended. Suspension of the process.
- 267.** In its final decision the Public Contracts Review Board must always establish the new deadline for the submission of tenders. New deadline for the submission of tenders.
- 268.** The contracting authority shall abide by the decision of the Public Contracts Review Board in the shortest time possible and where the contracting authority fails to implement the decision of the Public Contracts Review Board the latter may report the matter to the Minister responsible for that contracting authority. Implementation.
- 269.** Deleted by Legal Notice 196 of 2020. Charges for this type of application.
- Appeals from decisions taken after the closing date for the submissions of an offer
- 270.** Where the estimated value of the public contract meets or exceeds five thousand euro (€5,000) any tenderer or candidate concerned, or any person, having or having had an interest or who has been harmed or risks being harmed by an alleged infringement or by any decision taken including a proposed award in obtaining a contract, a rejection of a tender or a cancellation of a call for tender after the lapse of the publication period, may file an appeal by means of an objection before the Public Contracts Review Board, which shall contain in a very clear manner the reasons for their complaints. Appeals from decisions taken after the closing date for the submissions of an offer.
- 271.** The objection shall be filed within ten calendar days following the date on which the contracting authority or the authority responsible for the tendering process has by fax or other electronic means sent its proposed award decision or the rejection of a tender or the cancellation of the call for tenders after the lapse of the publication period. Filing of the application.
- 272.** The communication to each tenderer or candidate concerned of the proposed award or of the cancellation of the call for tenders shall be accompanied by a summary of the relevant reasons relating to the rejection of the tender as set out in regulation 242 or the reasons why the call for tenders is being cancelled after the lapse of the publication period, and by a precise statement of the exact standstill period. Communication to the tenderer or candidate.

Deposit.

273. The objection shall only be valid if accompanied by a deposit equivalent to 0.50 per cent of the estimated value set by the contracting authority of the whole tender or if the tender is divided into lots according to the estimated value of the tender set by the contracting authority for each lot submitted by the tenderer, provided that in no case shall the deposit be less than four hundred euro (€400) or more than fifty thousand euro (€50,000) which may be refunded as the Public Contracts Review Board may decide in its decision.

Service on the Director, the Ministerial Procurement Unit and contracting authority.

274. The Secretary of the Public Contracts Review Board shall immediately notify the Director, the Ministerial Procurement Unit and, or the contracting authority, as the case may be, that an objection had been filed with his authority thereby immediately suspending the award procedure.

Suspension of the process.

275. The Department of Contracts, the Ministerial Procurement Unit or the contracting authority involved, as the case may be, shall be precluded from concluding the contract during the period of ten calendar days allowed for the submission of appeals. The award process shall be completely suspended if an appeal is eventually submitted.

Procedure of the appeal.

276. The procedure to be followed in submitting and determining appeals as well as the conditions under which such appeals may be filed shall be the following:

- (a) any decision by the General Contracts Committee, the Ministerial Procurement Unit or the Special Contracts Committee or by the contracting authority, shall be made public by affixing it to the notice-board of the Department of Contracts, the Ministerial Procurement Unit or of the office of the contracting authority, as the case may be, or by uploading it on government's e-procurement platform prior to the award of the contract if the call for tenders is administered by the Department of Contracts;
- (b) the appeal of the complainant shall also be affixed to the notice-board of the Public Contracts Review Board and shall be communicated by fax or by other electronic means to all participating tenderers;
- (c) the contracting authority and any interested party may, within ten calendar days from the day on which the appeal is affixed to the notice board of the Review Board and uploaded where applicable on the government's e-procurement platform, file a written reply to the appeal. These replies shall also be affixed to the notice board of the Review Board and where applicable they shall also be uploaded on the government's e-procurement platform;
- (d) the authority responsible for the tendering process shall within ten days forward to the chairman of the Public Contracts Review Board all documentation pertaining to the call for tenders in question including

files and tenders submitted;

- (e) the secretary of the Review Board shall inform all the participants of the call for tenders, the Department of Contracts, the Ministerial Procurement Unit and the contracting authority of the date or dates, as the case may be, when the appeal will be heard;
- (f) when the oral hearing is concluded, the Public Contracts Review Board, if it does not deliver the decision on the same day, shall reserve decision for the earliest possible date to be fixed for the purpose, but not later than six weeks from the day of the oral hearing:
 Provided that for serious and justified reasons expressed in writing by means of an order notified to all the parties, the Public Contracts Review Board may postpone the judgment for a later period;
- (g) the secretary of the Review Board shall keep a record of the grounds of each adjournment and of everything done in each sitting;
- (h) after evaluating all the evidence and after considering all submissions put forward by the parties, the Public Contracts Review Board shall decide whether to accede or reject the appeal or even cancel the call if it appears to it that this is best in the circumstances of the case.

Ineffectiveness of a contract

277. (1) An interested party or a tenderer may file an application before the Public Contracts Review Board to declare that a contract with an estimated value which meets or exceeds the threshold established under Schedule 5 is ineffective.

Ineffectiveness of a contract.

(2) An interested party may only request the Public Contracts Review Board to declare a signed contract ineffective if the authority responsible for the tendering process has awarded a contract without prior publication of a contract notice in the Official Journal of the European Union without this being permissible in accordance with Directive 2014/23/EC, Directive 2014/24/EC and Directive 2014/25/EC.

(3) Any tenderer may also request the Public Contracts Review Board to declare a contract ineffective in the following two instances:

- (a) when, notwithstanding an appeal is lodged before the Public Contracts Review Board, the authority responsible for the tendering process concludes the contract before a final decision is given by the Public Contracts Review Board; or
- (b) when the contract is concluded by a contracting authority or the authority responsible for the tendering process before the expiry of the period for the filing of an appeal as provided for in regulation 271.

(4) The provisions of sub-regulation (2) shall not apply where:

- (a) the authority responsible for the tendering process or the contracting authority considers that the award of a contract without prior publication of a contract notice in the Official Journal of the European Union is permissible in accordance with Directive 2014/24/EC and Directive 2014/25/EC;
- (b) the authority responsible for the tendering process or the contracting authority has published in the Official Journal of the European Union a notice as described in Article 3a of Directive 89/665 or Article 3a of Directive 92/13 expressing its intention to conclude the contract, and;
- (c) the contract has not been concluded before the expiry of a period of at least ten calendar days with effect from the day following the date of the publication of this notice.

(5) An interested party or a bidder cannot proceed before a court or tribunal to challenge an award or a lack of award of a call for tender processed according to these regulations and they cannot ask for damages unless they have first resorted to all the remedies afforded under these regulations.

Request for
compensation.

278. Apart from the declaration for the ineffectiveness of a contract the applicant may request the Public Contracts Review Board to liquidate and order the authority responsible for the tendering process and the contracting authority to compensate him for actual damages suffered.

Deposit and
service.

279. The application must be served to the authority responsible for the tendering process, the contracting authority and to all signatories of the contract sought to be declared ineffective, who shall have twenty days to file a reply.

Decision of the
Public Contracts
Review Board.

280. (1) If the Public Contracts Review Board declares a contract to be ineffective, it shall impose penalties on the authority responsible for the tendering process and the contracting authority after assessing in its decision all relevant factors, including the seriousness of the infringement and the behaviour of those authorities.

(2) The Public Contracts Review Board may not consider a contract ineffective, even though it has been awarded illegally, on the grounds mentioned in regulation 277, if the Public Contracts Review Board finds, after having examined all relevant aspects, that the overriding reasons relating to a general interest require that the effects of the contract shall be maintained.

Penalties.

281. The penalties imposed by the Public Contracts Review Board shall consist of:

- (a) the imposition of fines on the authority responsible for the tendering process and the contracting authority or the central government authority, as the case may be, in the amount of fifteen per cent of the tender value

but not exceeding fifty thousand euro (€50,000); or

(b) the shortening of the duration of the contract:

Provided that the award of damages prescribed in regulation 278 shall not be considered as an appropriate alternative penalty for the purposes of this regulation.

282. Applications for the ineffectiveness of a contract shall be deemed admissible if they are made:

Admissibility of applications.

- (a) before the expiry of at least thirty calendar days with effect from the day following the date on which:
 - (i) the authority responsible for the tendering process or the contracting authority published a contract award notice, provided that this notice includes justification of the decision to award the contract without prior publication of a contract notice in the Official Journal of the European Union; or
 - (ii) the authority responsible for the tendering process or the contracting authority informed the tenderers and candidates concerned of the signing of the contract; and
- (b) in any other case before the expiry of a period of at least six months with effect from the day following the date of the signing of the contract.

283. (1) When the Director issues a decision cancelling a contract or an agreement according to regulation 261(7) he has to deliver this decision to the contractor affected by the cancellation. The contractor shall have ten days from the notification of this decision to file a motivated objection before of the Review Board.

Appeal from a decision cancelling a contract.

(2) This objection is valid only if accompanied by a deposit of four hundred euro (€400), which deposit can be forfeited or may be refunded in whole or in part according to the decision taken by the Review Board in its decision.

(3) The Secretary of the Review Board shall immediately notify the Director that an objection had been filed with his authority, thereby immediately suspending the decision cancelling the contract.

(4) The filed objection shall be affixed to the notice-board of the Review Board.

(5) The Director has the right to file a written reply to the objection within ten days from the date he is notified with a copy of the objection, which reply is also to be affixed on the notice board of the Review Board.

(6) The secretary of the Review Board shall inform all interested parties of the date or dates, as the case may be, when the objection will be heard.

(7) When the oral hearing is concluded, the Public Contracts Review Board, if it does not deliver the decision on the same day, shall reserve decision for the earliest possible date to be fixed for

the purpose, but not later than six weeks from the day of the oral hearing:

Provided that for serious and justified reasons expressed in writing by means of an order notified to all the parties, the Review Board may postpone the judgment for a later period.

(8) The Secretary of the Review Board shall keep a record of the grounds of each adjournment and of everything done in each sitting.

(9) After evaluating all the evidence and after considering all submissions put forward by the parties, the Review Board shall decide whether to accede, reject the appeal on the cancellation of the contract.

(10) Any decision taken in terms of this regulation is subject to an appeal before the Court of Appeal according to the time-frames and obligations established under these regulations.

Court of Appeal

Appeal to the
Court of Appeal.
Cap. 12.

284. Any party who feels aggrieved by a decision taken by the Review Board may appeal to the Court of Appeal as constituted in accordance with article 41(1) of the Code of Organization and Civil Procedure by means of an application filed in the registry of that court within twenty calendar days from the date on which that decision has been made public.

Parties to the
appeal.

285. The appeal application shall be addressed against the authority responsible for the tendering process, the contracting authority, the recommended tenderer, if any, and any other party involved in the proceedings before the Public Contracts Review Board, who may file a written reply within twenty days from the date of service:

Provided that if the appellant fails to try to serve the appeal application on all the parties above-mentioned within two weeks of the filing of the appeal, the Court, after hearing during the first sitting of the appeal the reasons why service was not effected, may declare by means of a decree delivered in open court that the appeal is deserted with expenses to be borne by the appellant.

Hearing.

286. (1) The Court of Appeal shall set down the cause for hearing at an early date, in no case later than two months from the date on which the appeal is brought before it and shall cause notice of such date to be given to the parties to the suit who, on their part, shall assume the responsibility to visit the court registry and be aware of the latest information regarding the appointment for the hearing of the case.

(2) After appointing the application for hearing, and after listening to the oral submissions made by all parties, the Court shall decide the application on its merits, within the shortest time possible but not any later than four months from the day when the appeal had been filed and the parties have been duly notified. Pending the decision of the Court the process of the call for tenders shall be suspended.

(3) In its decision the court has the power to cancel the tendering process if it appears to it that this is the best solution in the circumstances of the case; in this case no party will have the right to request damages because of the decision cancelling the call.

287. The Department of Contracts and a contracting authority may only refer a matter to the Court of Appeal in relation to a decision taken by the Review Board relating to the ineffectiveness of a contract or the award of damages.

Appeal by the Director or contracting authority.

288. If, during the hearing of the appeal, the Court finds that the application is frivolous and vexatious, the Court may impose on the party so guilty a penalty, to be paid to the contracting authority, of between one thousand euro (€1,000) and five thousand euro (€5,000).

Frivolous and vexatious applications.

289. (1) The Court vacations mentioned in Court Practice and Procedure and Good Order Rules shall not hold back the hearing of the appeals filed under these regulations, during the court vacations.

Extension of time limits.
S.L. 12.09

(2) In any case the Court may, for serious and necessary reasons, by means of a decree, extend for a reasonable period the judicial time limits that are imposed on it according to these regulations.

290. No application for a re-trial from a decision of the Court of Appeal may be made if, after the final decision has been given, the public contract has been signed between the contracting authority and the recommended tenderer and no request for the suspension of the execution of the decision has been made.

Re-trial.