Public Procurement World - Belgium

8. Remedies and Enforcement

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# a. Are there any remedies and enforcement mechanisms in the procurement legislation?

Yes. The following remedies are available under Belgian public procurement legislation: (i) suspension and/or (ii) annulment of administrative decisions and (iii) statement of absence of effect of a contract.

As a matter of law, any person having an interest in the award of a public contract and affected by a decision of the contracting authority (i.e., the decision to award the contract to another bidder but also any preparatory decision having a decisive impact on the situation of the claimant), may apply for the suspension and/or annulment of the award decision before either the Council of State-or judicial courts (see *8.c*).

The Council of State or judicial courts will then verify whether a breach of the law in general or of the public procurement rules in particular justifies the suspension and/or the annulment of the administrative decision at stake.

The suspension of an administrative decision prevents the contracting authority from giving any effect to the said decision. For instance, the suspension of the award decision implies that the parties cannot enter into the contract. The suspension of an administrative decision will last until (i) the Council of State or the judicial courts rule on the annulment of the same decision, or (ii) the time limit to file a plea for annulment against the said decision expires.

The annulment of an administrative decision has for effect to make that decision disappear from the legal order *ab initio*.

Where a public contract has already been entered into, no plea for suspension or annulment can validly be filed any longer. In that case, interested parties can, however, still file a plea to have the said contract declared without effect. Such a plea, however, is only possible (i) where the contracting authority has violated the rules allowing interested parties to file suspension and annulment pleas effectively (e.g., non compliance with the mandatory 15-days *standstill* period between the award decision and the conclusion of the contract or non-compliance with the prohibition to enter into the awarded contract pending a suspension procedure), (ii) where the contracting authority has concluded a contract with an estimated value above the European thresholds without publishing beforehand a contract notice at the European level, or (iii) where the contracting authority has violated the rules applicable to the award of contracts in the frame of a framework agreement. A statement of absence of effect can result in the annulment of the contract *ab initio*, or the annulment of the part of the contract still to be performed in combination with a fine. If there are overriding reasons of general interest, the Council of State or judicial courts can also decide to limit the duration of the contract or to impose a fine upon the contracting authority.

# b. Are remedies available outside the scope of procurement legislation, e.g. civil law damage claims?

Yes. In addition to the above-mentioned remedies, a plaintiff can also claim damages before the Council of State or judicial courts , and this regardless of the fact that a contract was entered into or not.

The plaintiff must prove that the contracting authority has committed a violation that caused him a prejudice in the sense that, without such violation, it should have been awarded the procurement or should have had a reasonable chance to be awarded therewith. Damages may cover the loss of profit or a loss of chance and a compensation for the expenses incurred by the plaintiff for the preparation of its bid.

# c. Is there a specific forum before which procurement disputes are heard?

Where the contracting authority is an entity with public authority (e.g., the state, a region, a municipality…), the Council of State (*Conseil d'Etat / Raad van State*) is the exclusive forum before which public procurement disputes are heard.

Where the contracting authority is another public or private entity subject to public procurement legislation (e.g., public companies, hospitals…), any claim must exclusively be filed before the judicial courts .

The distinction between such a 'public authority' and 'another public or private entity' is sometimes difficult and depends on various factors.

# d. Are there any timing requirements for the review?

Yes. As a rule, a plea for annulment must be filed within 60 days after the publication or notification of the said decision to the claimant or after the latter took knowledge of the said decision.

A plea for suspension (in extreme urgency) must be filed within 15 days after the publication, the notification or the knowledge of the said award decision so as to suspend the award proceedings and prevent the conclusion of the contract.

A claim for damages must be filed within 5 years after the publication, the notification or the knowledge of the award decision.

A plea for a statement of absence of effect must be filed (i) within 30 days as from the day after the publication of an award notice in the Belgian Official Gazette if the contract was awarded without publicity and if the award notice contains a justification therefor, (ii) within 30 days after the day after the communication of a reasoned decision informing the interested candidates and bidders that the contract was awarded to another bidder, when the contract was awarded with prior publicity or (iii) maximum 6 months following the award of the contract if the said award was not published in an award notice or communicated to the interested parties, as per (i) or (ii).

# e. What are the main preconditions for review?

Claimants must have a personal, current, certain, direct and legitimate interest.

Before the Council of State, when a legal person, the claimant must also demonstrate that the decision to file the plea has been taken by its legal representatives (i.e., most of the time, by the board of directors), prior to the filing of the plea. Where the legal person is represented by a lawyer admitted to plead before Belgian courts, such decision by the relevant persons within the company as well as the lawyer's power of attorney are presumed.

# f. What are admissible grounds for starting a review proceeding?

Any violation of the law *sensu lato* can theoretically be the ground for starting a review proceeding.

In particular, for the suspension or annulment of an administrative decision relating to the award of a public procurement, the following grounds are the most common:

incompetency of the contracting authority (e.g., the decision has been taken by the mayor where it should have been taken by the municipality council);

lack of justification (any administrative decision must be properly motivated and the formal justification thereof should be included in the decision);

violation of public procurement laws (e.g., award of a contract without publicity where a prior publication of a contract notice in the Belgian Official Gazette and in the Official Journal of the European Union was required);

violation of any other law (including international and EU laws, Belgian Constitution, Belgian laws and decrees, regional or local decrees…);

violation of the prohibition of any discrimination between bidders;

violation by the contracting authority of its own rules and procedures (e.g. as set out in tender documents).

# g. Does a review proceeding affect an ongoing procurement procedure or an awarded contract respectively?

As a rule, the filing of a plea for suspension or annulment of an administrative decision has no suspensive effect and do not affect ongoing procurement procedures.

However, Belgian public procurement law provides for a *stand still* mechanism, after the award decision has been made. According to that rule, the contracting authority cannot enter into a contract with the awarded bidder before the end of a 15-day *stand still* period, starting on the day on which the award decision has been notified to the other bidders involved.

During the *stand still* period a plea for suspension can be submitted against the award decision. If so, the contracting authority cannot enter into the contract before the final decision of the competent court (i.e. the Council of State or the president of the Court of first instance) on the suspension of the disputed decision. If the suspension is confirmed, it will last until the competent court rules on the annulment of the same decision.

The filing of a plea for suspension or annulment or even of a plea for a statement of absence of effect has no suspensive effect on existing contracts (i.e. contracts which have already been entered into between the contracting authority and the awarded bidder, even if the conclusion of the contract occurred in violation of the law or of the*stand still* period).

# h. What are the consequences of a successful review proceeding for the affected procurement procedure or awarded contract respectively?

The suspension of an administrative decision prevents the contracting authority from giving any effect to the said decision. The suspension of the award decision implies that the parties cannot enter into the contract until the competent court rules on the annulment of the same decision. In practice, contracting authorities will most of the time decide in that case to withdraw the suspended decision without waiting for a decision on the annulment and to take a new decision (taking into account the grounds for the suspension) or even to launch a new procurement procedure.

The annulment of an administrative decision has for effect to make that decision disappear from the legal order *ab initio*. If an award decision would be annulled, the contracting authority can either take a new decision (taking into account the grounds for the annulment) or launch a new award procedure. Obviously, no contract can be entered into based on an annulled award decision.

However, neither the suspension, nor the annulment of an award decision would have any consequence on existing contracts (i.e. contracts which have been entered into between the adjudicating authority and the awarded bidder, even if the conclusion of the contract occurred in violation of the law or of the *stand still* period). Even if, in very few cases, judicial Courts decided to annul contracts based on the annulment of the corresponding award decisions, these are isolated decisions, which are very unlikely to be reproduced now that the statement of absence of effect has been introduced in Belgian law.

Indeed, the consequence of a favorable decision of the Council of State or of judicial Courts on a plea for statement of absence of effect could be the annulment of the contract *ab initio*, or the annulment of the part of the contract still to be performed. As mentioned, the Council of State or judicial courts can also decide to limit the duration of the contract or to impose a fine upon the contracting authority.

# i. How long does a judicial proceeding for review take?

Suspension proceedings can take only a couple of days, in case of urgency, and in any case no more than 6 months.

Annulment proceedings usually take up to 5 years before the Council of State (with no appeal possible) Before judicial court, the same proceedings could take 1 to 2 years before in first instance and 3 to 5 more years in case of an appeal.

Absence of effect proceedings take between 6 months and 1 year before the Council of State. Before judicial courts, the same proceedings could take 1 to 2 years before in first instance and 3 to 5 more years in case of an appeal.

# j. Must unsuccessful bidders be notified before the award? If so, when?

Yes. If the tender procedure includes a prior selection phase, non-selected candidates must be informed of their non-selection immediately after the selection decision has been made. Invitations to submit an offer cannot be sent to selected candidates before the non-selection decisions have been communicated to non-selected candidates.

At the end of the procedure, unsuccessful bidders must be notified of the non-award decision. The contracting authority must do so immediately after the adoption of its motivated award decision. The notification to the unsuccessful bidders must *inter alia* contain the justification of the non-award decision.

# k. Are review proceedings common?

Yes. Review proceedings (suspension and annulment) are very common in Belgium. The statement of absence of effect proceedings is more recent and less known but becomes more and more common.

# l. Are damage claims in relation with procurement procedures common?

No. Since the possibility to claim damages in relation to procurement proceeding is relatively new in Belgium, damage claims are not very common yet. It is however expected that they will become more common in the future.

# m. What are the leading court decisions involving procurement disputes?

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