INTEGRATING COMPLAINT PROCEDURES INTO THE PUBLIC PROCUREMENT PROCESS

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INTRODUCTION

Nobody is perfect. Even in the public procurement process, a contracting authority is bound to make a mistake at least once in a while. But when this happens, how should it be dealt with?[1] Judicial review is one option, but there should be alternatives to this process. In this paper we propose the integration of an expedited complaint procedure into the public procurement process as a "best practice" for contracting authorities. We think this might solve a number of the problems we have identified in today's public procurement practice.

We begin with a brief overview of some of the problems that an economic operator faces when confronted with a mistake made by a contracting authority. We look briefly at what the aim should be in this situation and the alternative problem-solving methods already in place. We then propose that an integrated complaint procedure be introduced and assess the merits of such a procedure.

PROBLEMS WITH THE REMEDIES

EC Level: Post-Contractual Reviews

The Commission has noticed that economic operators are faced with several problems in the post-contractual judicial review process. These

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[1] This paper looks only at procurement procedures falling within the scope of Directive 2004/18/EC.

problems include the burden of proof and the length and expense of proceedings. The Commission stated this expressly its explanatory memorandum[2] to the recently amended Remedies Directives.[3]

The explanatory memorandum mainly dealt with the distinction between "pre-contractual reviews seeking primarily to correct in time infringements of Community law on public procurement and post-contractual reviews which are generally limited to awarding damages". In the view of the Commission, more effective pre-contractual reviews are needed to help avoid the problems that arise in post-contractual reviews.

National Level: Pre-Contractual Reviews in The Netherlands

A pre-contractual review process that is in accordance with the Remedies Directive already exists in the Netherlands. However, in Dutch public procurement practice it has become apparent that a pre-contractual review system (e.g. interim proceedings) is itself not without its problems. We have identified three specific issues: (i) the loss of goodwill, (ii) the dubious benefit of the result achieved, and (iii) the expense.[4]

Economic operators are unlikely to challenge procurement decisions in court for fear of losing the goodwill of the contracting authority involved. In most cases, they have worked together in the past or are planning to do so in the future. Either way, an economic operator knows that litigation risks the relationship it has developed with the contracting authority and is reluctant to harm its chances of winning future contracts. This problem is commonly referred to as "Don't bite the hand that feeds you".

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[2] COM (2006) 195 def., p. 5.

[3] Directive 2007/66/EC, Pb EU L 335 of 20 December 2007, p. 31–46.

[4] See 'Visiedocument aanbesteden', Dutch Ministry of Economics, 15 July 2004, Kamerstukken II 2003-2004 27 709, no. 1, p. 10 and M.J.J.M. Essers, 'Publieke handhaving van het Europese aanbestedingsrecht', TA 2008/1, p. 449-457.

The second problem is that, even if an economic operator wins the interim proceedings, the result is usually the re-tendering of the contract.[5] There is no guarantee that the complainant will win the contract in the end, despite the time, effort and cost involved. On the other hand, there is some guarantee that the contracting authority will not appreciate having to incur the extra expense required to start up the entire procedure all over again.

The third problem has also been specifically identified by the Commission: the substantial costs involved in conducting interim proceedings. Both parties (the economic operator and the contracting authority) usually retain lawyers specialising in public procurement law. Even if a party wins the proceedings, the piper will have to be paid once the party is over. This might be one of the reasons why public procurement is often described as a "lawyers' paradise".[6]

Are These Local Or Isolated Problems?

The Dutch are not the only ones facing these issues. The fear of losing the goodwill of the contracting authority was noted in the Wood Review, a British report cited by the Commission in its annex to the explanatory memorandum referred to above.[7] The problem of an unsatisfactory result is the logical consequence of the judicial review taking place (as it usually does) after the decision to award the contract. But regardless of whether the review is pre-contractual or post-contractual, the judicial review process will be expensive. It is submitted therefore that these problems generally occur whenever an economic operator turns to judicial review to challenge a procurement decision. They are not local, isolated problems. Alternative, non-judicial methods are needed.

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[5] There are exceptions. In the UK, for example, the court may order the amendment of the tender documents. See Works Regulation 31(6)(b)(i).

[6] See, for example, the farewell address of Prof. W.G.P.E. Wedekind, 28 October 2005, http://www.aanbestedingsrecht.org/docs/afscheidsoratie_wedekind.doc.

[7] Wood Review 'Investigating UK business experiences of competing for public contracts in other EU countries', November 2004, http://www.ogc.gov.uk/documents/woodreview.pdf.

THE AIM OF THE EC REMEDIES DIRECTIVES

When amending the recent the EC Remedies Directives, the Commission stated that "the Member States should ensure that effective and rapid remedies are available against decisions taken by contracting authorities".[8] In this context, "effective" means that in the event of an infringement the remedies available will result in a procurement process that is in accordance with EC law. It is up to the Member States to set out in detail the rules that will apply in the review procedure.[9]

When identifying and evaluating alternative problem-solving methods, the two criteria to bear in mind are the (i) effectiveness and (ii) speed of the remedies.

ALTERNATIVE METHODS OF PROBLEM-SOLVING

EC Level

It is possible for an economic operator to submit a complaint directly to the Commission. However, submission of a complaint is no guarantee that the Commission will take action. Under the EC Treaty, the Commission has a *right* to start infringement proceedings against a Member State if it considers that a Member State has failed to fulfil its obligations under the public procurement directives.[10] Only after many years might infringement proceedings lead to a conviction of the Member State by the European Court of Justice.[11]

National Level

Given the absence of alternative problem-solving methods at the EC level, it is essential to look at proceedings at the national level. In 2002 the Danish Competition Authority published a report that provided an

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[8] Directive 2007/66/EC, consideration 2.

[9] Art. 1(3) Directive 89/665/EC.

[10] Art. 226 EC Treaty.

[11] If a serious infringement has been committed, the Commission can use the corrective mechanism of article 3 of the amended Remedies Directives, which requires a response from the Member State within 21 calendar days.

overview of the alternative methods of pre-contractual problem-solving in a number of countries, including ten Member States.[12] According to this report, most Member States have set up advisory boards, contact points or independent bodies. However, there does not seem to be a single non-judicial problem-solving method that is widely used throughout these countries.

In several Member States, there is a "public procurement authority", i.e. an independent government body that deals with public procurement complaints and that oversees the implementation of alternative problem-solving methods.[13]

Although there is no such authority in the Netherlands, there are three relevant alternative problem-solving methods in this country. First of all, the complainant may contact the Minister of Economic Affairs. The Minister will answer questions regarding the application of public procurement law. Furthermore, the Minister may indicate to which authority - contracting authority (see below), court of law or Commission – the complainant can direct his issue.

Secondly, an economic operator may formally complain to an ombudsman about the conduct of any government institution.[14] The time limitation for commencing this "external complaint procedure" is one year. The ombudsman takes the complaint into consideration, issue a report and make recommendations. The issuance of the report is not subject to any time constraints.

Finally, an economic operator may formally complain directly to the contracting authority that made the decision. This "internal complaint procedure" is provided for in the General Administrative Law Act (*Algemene wet bestuurstrecht*) if the contracting authority is an

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[12] "Report concerning the study of pre-contract problem solving systems", chapter 5, http://www.ks.dk/english/public-procurement/publications/before-2004/20020902-report-concerning-the-study-on-pre-contract-problem-solving-systems/pdf-report-concerning-the-study-on-pre-contract-problem-solving-systems.

[13] The Danish report mentioned in fn. 12 refers to these authorities as 'Complaint Authority'.

[14] Cf. the European Ombudsman, http://ombudsman.europa.eu.

"administrative body" under Dutch law.[15] The time limitation for making the complaint is one year after the decision is made. The administrative body is required first to try to resolve the matter informally. If this proves unsuccessful, the administrative body is required to issue a written decision (with reasons) within six weeks. A person who made the original decision is not allowed to deal with the complaint against that decision.

How effective is this process? A recent evaluation of this internal complaint procedure stated that the decisions made as a result of internal complaint proceedings are practically always complied with by administrative bodies.[16] However, it seems that this procedure is relied on only very rarely in a public procurement context. An application for judicial review to the civil court seems to be preferred.

Evaluation

With regard to alternative pre-contractual problem-solving methods in general, the Danish report concludes:

> In general countries having experiences with alternative methods of pre-contract problem-solving, indicate that this way of solving procurement problems satisfy their need for having a fast, efficient and inexpensive way of handling these kind of problems – a need, which their formal systems in many ways is not able to satisfy.[17]

The criteria in the Remedies Directives (speed and effectiveness) should be used to evaluate the alternative problem-solving methods identified above. The question therefore is to what extent these methods provide for rapid and effective remedies.

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[15] This internal complaint procedure is, however, not limited to administrative decisions by the administrative body; decisions by that body based on private law are also covered.

[16] M. Herweijer and H.B. Winter, 'De wet intern klachtrecht geevalueerd: hoe krijgen we tevreden klagers?', in: NTB 2007, 7, p. 235-244.

[17] *Supra*, fn. 12.

A complaint to the EC fails to meet the EC's own criteria. Obtaining the result of a complaint to the Commission may generally take years.[18] Nor is this method very effective, in our view, since there is no guarantee that the Commission will take a complaint into consideration at all.

Looking at the first alternative in the Dutch system, a complaint to the Ministry also fails to meet the effectiveness criterion. The result is merely referral to another instance. As for the external complaint procedure, a complaint to the ombudsman fails to satisfy the speed criterion because under Dutch law there is no mandatory response time.

This leaves the internal complaint procedure, which does seem to provide for rapid and effective remedies. Under Dutch law, an administrative body is in principle required to respond within six weeks. Given the long periods of time necessary to prosecute regular public procurement proceedings in the civil courts, this is indeed a rapid result in comparison. (But on the other hand, once a decision to award a contract is made, a six-week wait can seem to be a very long time to the contracting authority and the economic operator that has won the tender.) Given the fact that the decision made in the complaint procedure are generally complied with by the administrative body, the procedure also qualifies as effective.

As explained further below, we think this internal complaint procedure provides a good basis for the introduction of an integrated complaint procedure.

INTRODUCTION OF AN INTEGRATED COMPLAINT PROCEDURE

In the absence of an EU-wide non-judicial review process that is both rapid and effective, we suggest that an integrated complaint procedure be introduced into the public procurement process as a "best

[18] Only if a serious infringement is committed can the Commission use the corrective mechanism of article 3 of the Remedies Directives and demand a response from the Member State within 21 calendar days.

practice". The inclusion of such a complaint procedure is explicitly referred to in the amended Remedies Directives.[19]

We envision a procedure in which complaints may be made at four different stages during the procurement process: (i) on publication of the contract notice, (ii) on the issuance of a separate selection decision, (iii) on the provision of the tender documents, and (iv) on the contract award decision. Because a restricted complaint procedure is suitable at all four stages, we therefore use a restricted procedure as an example of how an integrated complaint procedure may be introduced into the system.

For a contracting authority, a system in which it can make a complaint at all four stages of the procurement process might be considered costly or inefficient. If this is felt to be generally the case, the system could be set up so that a complaint procedure may be commenced only at two stages: (i) on the publication of the contract notice and (iii) on provision of the tender documents.

A description of the proposed procedure is outlined below.

Complaint by Bidding Contractor on Publication of the Contract Notice

Contracting authorities are required to publish a contract notice.[20] Candidates are able to complain if they perceive the contract notice as containing discriminatory, subjective or unclear selection criteria. In the notice, the contracting authority sets a time limit for submitting a complaint about the notice to the relevant contracting authority. (This is currently the practice in the Dutch internal complaint procedure.)

If a complaint is submitted within this time period, the contracting authority is required to consider the complaint submitted. First, the contracting authority attempts to find an informal solution. If this fails, the contracting authority has a reasonable period of time to issue a written, reasoned decision in which the contracting party agrees to re-tender the contract or amend the tender documents. In this event, the

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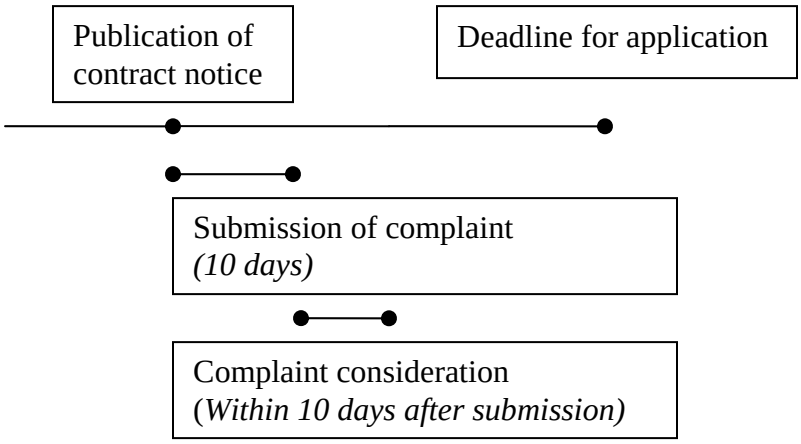
[19] Directives 89/665/EEC and 92/13/EEC as amended by Directive 2007/66/EC, article 1(5).

[20] Article 35(2) of Directive 2004/18/EC requires the publication of a contract notice.

contracting authority publishes its decisions in order to comply with the principle of equality.

In general, we think that a total period of 20 calendar days from publication of the contract notice to issuance of the written decision (with reasons) is a reasonable period (Figure 1). The complainant has ten days to file its complaint; the contracting authority has ten days to reach its decision and issue it. During this period, the contracting authority does not have to suspend its procurement procedure and can await any complaints from the candidates.

FIGURE 1
The Integrated Complaint Procedure after Publication of the Contract Notice



Complaint by Bidding Contractor on Selection

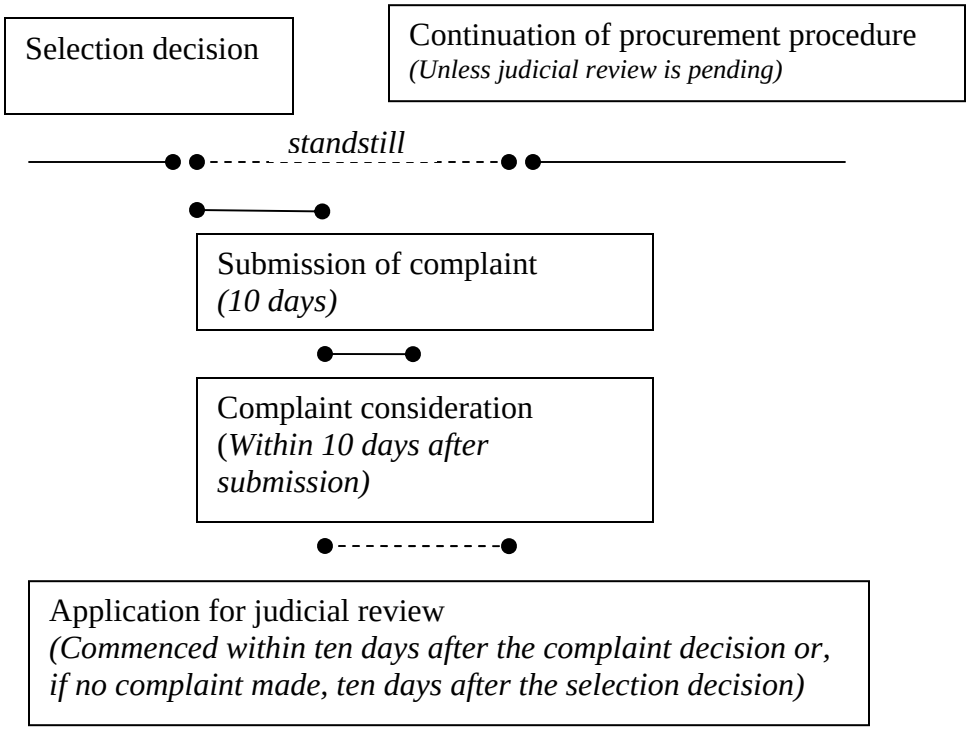
After a number of candidates are selected from those bidding, the rejected candidates are able to submit a complaint about the selection. The same integrated complaint procedure described above applies *mutatis mutandis* to this separate selection decision except that, in addition, the complaint is considered only by someone other than those who made the original selection decision. During the process of handling

the complaint, the contracting authority suspends the procurement process until it reaches a decision on the complaint.

The contracting authority continues with the procurement process if the complaint is dismissed. If the complaint is upheld, the contracting authority amends the procurement documents or re-tenders the contract (which is not that serious an issue when done at an early stage). To comply with the principle of equality, the contracting authority informs all candidates.

The same time periods applicable to the publication complaint process (20 calendar days) seems reasonable. An extension of this period would delay the procurement process considerably and therefore not be feasible. A longer period might also lead to abuse of the complaint process, e.g. a candidate may submit a complaint to intentionally delay the process. Obviously, this has to be avoided (Figure 2).

FIGURE 2
The Integrated Complaint Procedure after the Selection Decision



Furthermore, the contracting authority may extend the length of the complaint process by including a time limit for seeking judicial review of matters related to the selection decision. The amended Remedies Directives explicitly provide for setting a time limit of at least ten days for seeking judicial review.[21] This also includes selection decisions. We suggest that this time limit should start on the day on which the decision on a complaint is made or (if no complaint is made) ten days after the selection decision. This would ensure the effectiveness of the complaint procedure, although it is not required by the Remedies Directives.

Complaint by Bidding Contractor on Provision of the Tender Documents

The invitations to the selected candidates are accompanied by tender documents.[22] Sometimes these tender documents are the subject of complaints by the bidding contractors. An integrated complaint process similar to the complaint process described above for the publication of the contract notice applies. Complaints may be made only about issues that could not have been the subject of a complaint or judicial review proceedings at an earlier stage. If the contracting authority amends the tender documents as a result of its decision on a complaint, it has to send this information to all selected candidates not less than six days before the deadline for the tender submission.[23] The complaint procedure does not prevent the selected candidates from asking questions of the contracting authority (Figure 3).

Complaint by Bidding Contractor on Award of the Contract

Finally, when the contract is awarded, the contracting authority allows the parties to make a complaint about the final decision and sets a time limit for doing so. Bidding contractors that have not yet been definitively excluded may complain to the contracting authority within this time limit. Complaints may be made only about issues that could not have been the subject of a complaint or judicial review proceedings at an earlier stage. The complaint is taken into consideration by persons other than those who reached the original award decision (Figure 4).

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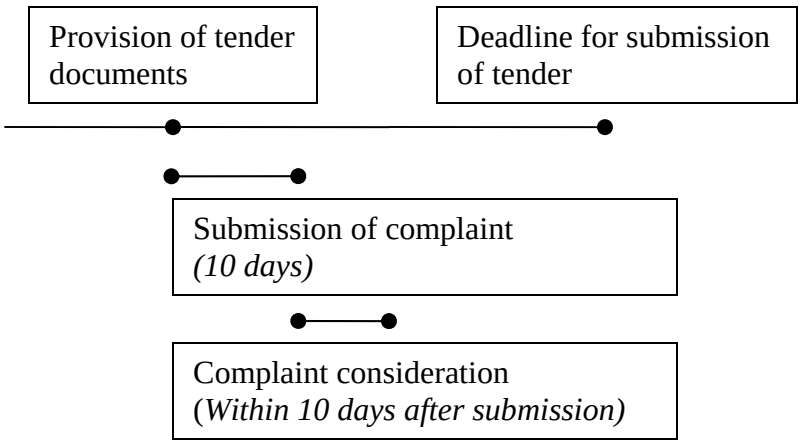
[21] Directive 2007/66/EC, article 2c.

[22] As required by article 40 of Directive 2004/18/EC.

[23] Directive 2004/18/EC, article 40(4).

FIGURE 3
The Integrated Complaint Procedure after the Provision of the Tender Documents



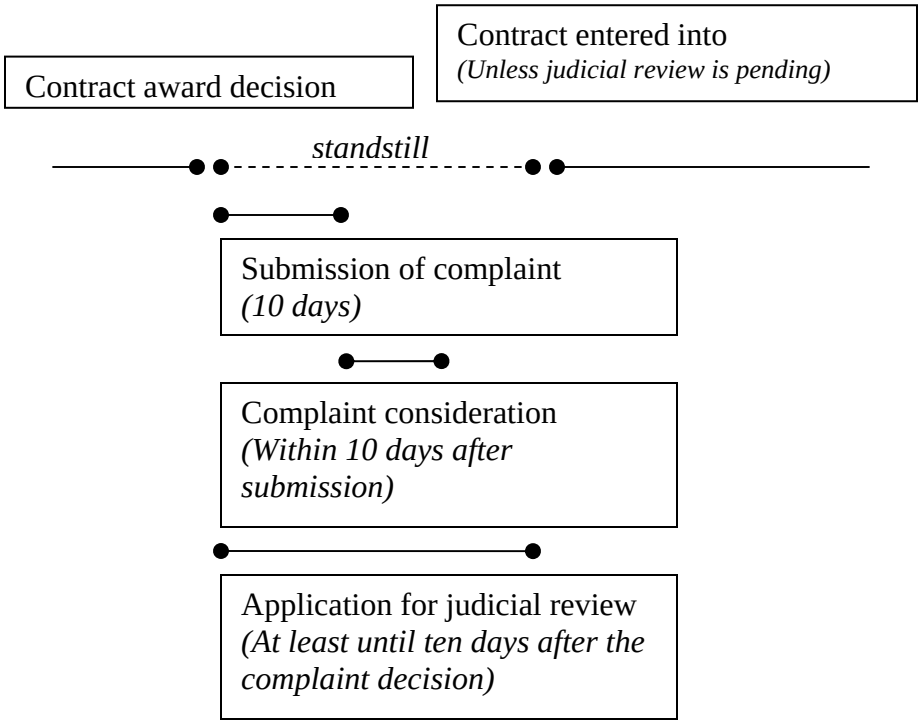
After the written decision is issued, a ten-day standstill period is in effect. The contracting authority does not enter into the contract before the end of that period.[24] During this period the complainant is able to challenge the decision (or the lack thereof).[25] The reason for this standstill period is that the contracting authority's decision about the complaint must be "capable of being subject of judicial review, so as to guarantee an adequate review."[26]

[24] Directives 89/665/EEC and 92/13/EEC as amended by Directive 2007/66/EC, article 1(5). The duration of the standstill period is also subject to national legislation, e.g. in the Netherlands, a standstill period of at least 15 days is required.

[25] Directive 2007/66/EC, consideration 11.

[26] Or at least review by another body which satisfies the requirements of the second subparagraph of Article 2(8) of Directive 89/665. Judgment of the Court (Sixth Chamber) of 4 February 1999. - Josef Köllensperger GmbH & Co. KG and Atzwanger AG v Gemeindeverband Bezirkskrankenhaus Schwaz, Case C-103/97, *European Court reports 1999 Page I-00551*, para. 29.

FIGURE 4
The integrated complaint procedure after the contract award decision



Evaluation of the Integrated Complaint Procedure

The introduction of an integrated complaint procedure as described above would have four main advantages: (i) there would be less risk of a loss of goodwill, (ii) the re-tendering (if necessary) would be done at a better time, (iii) the proceedings would be less expensive and (iv) there would be better compliance with the Remedies Directives.

The informal nature of a complaint submitted publication (stage 1) means that the economic operator's risk of losing goodwill is considerably lower compared to judicial review. Even if the complaint is unsuccessful, the contract authority's written decision would still be less formal and less threatening to good relations than judicial review would be.

By introducing a complaint procedure after the selection decision (stage 2), the contracting authority would prevent the problem of having to re-tender the contract after the procedure has already finished, instead of at an earlier stage. This benefit would be strengthened by introducing a time limit for commencing judicial review as well. Both these steps would have a considerable advantage over a system in which a judicial decision is sought and obtained only after the final contract has been awarded, even though it had been known as early as the selection decision that there were issues that needed to be dealt with.

Furthermore, the introduction of a complaint procedure after the publication of the contract notice (stage 1) and after the provision of the tender documents (stage 3) would reduce the risk that mistakes in the notice or in the documents would lead to disputes only after the selection decision is made or the final contract awarded.

There are three reasons why the expense of the complaint procedure proposed here would be substantially lower than those incurred in interim proceedings. First of all, economic operators would not lose any of the remedies available to them and yet both parties would be able to reduce costs. This is the result of the informal nature of the complaint procedure and the guarantee that judicial review is still possible afterwards.

Secondly, where the contracting authority essentially agrees with the complainant, this complaint procedure would avoid unnecessary litigation costs. Similarly, an economic operator is less likely to apply for judicial review after the contracting authority has dismissed a complaint.

Thirdly, although the introduction of such a complaint process would result in higher costs for the contracting authority, these costs could be reduced to a minimum if the complaint process were based on a national complaint procedure that is already in force.

The fourth advantage is that the integrated complaint procedure fits within the recently amended Remedies Directives. By providing standstill periods after the complaint decision rapid and effective remedies can be guaranteed.

CONCLUSIONS

There are three main problems with pre-contractual procurement proceedings: (i) the loss of goodwill between the parties, (ii) the ineffectiveness of the result of the judicial review, and (iii) the high expense of litigating.

At this time, there is no EU-wide solution to these problems. However, the introduction of non-judicial problem-solving methods might be the answer. We therefore have suggested the introduction of a complaint process that is integrated into the public procurement process as a "best practice". To help manage this, a contracting authority may implement time limitation periods for the submission of complaints at various stages of the procurement procedure.

After the initial informal stage, the contracting authority would have to reach a decision within a reasonably short period. Doing so, the complaint procedure will comply with the aim of the Remedies Directives by providing effective and rapid remedies.

This integrated complaint procedure demonstrates that with only little effort contracting authorities can provide effective and rapid solutions to the practical problems mentioned above. The costs for the introduction of such a procedure can be reduced to a minimum if the complaint procedure is based on proceedings and processes that are already in place at the national level.