

Public Procurement

Procedure before the Tenders Review Authority

Generally

The Tenders Review Authority (TRA) was established by Law 101(1)/2003 – the Public Procurement (Supply, Projects and Services) Law. This law has been superseded by Law 12(1)/2006 which follows the EU procurement directive 2004/18/EU.

Part IV of Law 101(1)/2003 (sections 55 to 60) survives and regulates the conduct of Tender Reviews or recourses before the TRA.

Procedure for Filing the Recourse

Section 56 of Law 101(1)/2003 relates to the procedure followed in a hierarchical recourse procedure before the TRA.

It states that every interested party that has or had an interest in the award of a specific contract and who has incurred or may incur damage arising out of an act or decision of the awarding authority, which contravenes any order of the applicable law and which predates the formation of a contract, has the right to file a hierarchical recourse before the TRA.

It will be noted that the above right is not limited to a final tender procedure but extends to the formulation of tender terms, prequalification procedures, prequalification decisions and final tender award decisions.

A hierarchical recourse is an alternative to the filing of an administrative recourse before the Supreme Court. A party cannot do both. Access to the Supreme Court is limited to an administrative appeal against the decision of the TRA.

There is an initial time limit of **five (5) working** days for the instigation of a hierarchical recourse procedure.

This procedure is commenced by an aggrieved party who obtains knowledge in any manner of the act or decision of the awarding authority. The aggrieved party must send a written complaint to the awarding authority within the aforementioned time period of five working days informing the awarding authority of the alleged breach of any provision of applicable law (see above) and must send a copy of the complaint to the competent authority which is the Accountant General's office.

The awarding authority proceeds to examine the allegations of the aggrieved party and issues a reasoned decision in respect of the allegations within a period of five working days from the receipt of the written complaint.

In the event that the awarding authority does not act then the awarding authority is deemed to have rejected the allegations.

The aggrieved party has ten (10) calendar days in which to file an administrative recourse.

The said ten day period commences from the receipt of the response of the awarding authority to the allegations of the aggrieved party or, in the event that the authority does not respond, from the expiry of the five day period.

The receipt of a complaint by an awarding authority prohibits the signature of a contract for the period of time that it takes to complete the above procedure (i.e. 5 + 5 working days and 10 calendar days).

The aggrieved party is obliged to file a recourse within the aforementioned 10 day period.

The recourse is filed on a specific form and upon the payment of a prescribed fee, which relates to the value of the contract.

The aggrieved party is obliged in its recourse to state the legal and factual basis upon which its recourse is based.

The following recourse must contain the following information:

- (a) The full details of the physical or legal person filing the recourse;
- (b) The name of the awarding authority;
- (c) The details of the contract or the procurement invitation and the award of the tender if this has been sent to the tenderers.

The law states that from the date of the filing of the recourse the TRA has 30 days in order to reach its final decision. This time period is invariably not met. The TRA (and the Attorney General of Cyprus (the legal advisor of the TRA) hold the view that the said 30 day period is indicative.

Temporary Measures / Injunction

The aggrieved party may also contemporaneously with the filing of its recourse seek an injunction preventing the signature of a contract pending the final decision of the TRA upon the recourse.

In such an event the TRA will automatically award an injunction prohibiting the signature of a contract.

The injunction is valid for a period of two days and the awarding authority is invited by the TRA to appear before it and show cause why the injunction should not continue to be in force.

The TRA invariably awards and maintains the injunctions against the signature of a contract by the awarding authority.

The only circumstances in which it will not maintain an injunction are where the public interest or damage to the awarding authority clearly outweighs the interest or damage to be caused to the aggrieved party and thus militates against the maintenance of the injunction.

Response of the Awarding Authority

The awarding authority is given ten days in which to file its response to the allegations of the aggrieved party.

Once the response of the awarding authority is filed the recourse is set down for hearing before the TRA.

Procedure before the TRA – the Hearing

The recourse before the TRA is a hierarchical recourse and takes the form of an administrative review with no oral testimony or witnesses being heard or examined.

The TRA limit themselves to a review of the documents and to hearing the addresses/arguments of the parties (the aggrieved party and the awarding authority or their legal representatives).

It should be noted that interested parties (e.g. a successful tenderer or a preferred bidder) **do not have a right of audience before the TRA**. There are two Supreme Court decisions on this point (cases 959/2004 and 1482/2005).

The ratio decidendi in cases are conflicting. The former case decided that interested parties have a right of audience and the latter decided that they do not. The policy of the TRA is not to allow interested parties to appear.

Powers of the TRA

Upon the conclusion of the hearing of the recourse the TRA has the following powers:

- (a) To confirm the act or the decision of the awarding authority;
- (b) To annul the act or decision of the awarding authority if this contravenes any provision of law and precedes the signature of a contract;
- (c) To annul or amend for breach of any provision of law any provision contained in the tender announcement or the tender documents or in any other document relevant to the tender which relates to the procedure of the tender and refers to the technical, economic and financial-economic specifications.

An appeal to the Supreme Court lies against the decision of the TRA.

A recent decision of the Supreme Court has however cast doubt upon the right of the administration (government) to appeal against a decision of the TRA as the TRA is deemed to be hierarchically superior to the administration.

In the event that the act or decision of the awarding authority is annulled then the contract is not affected unless an injunction was in place (see above).

A successful party which has not applied for or secured an interim order may, however, claim compensation for the loss that it has incurred as a result of a defective tender procedure by filing an action in the District Court.

Andrew Demetriou, a.demetriou@idlaw.com.cy

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