

EUROPEAN COMMISSION

**THE RULES GOVERNING THE PROCEDURE IN THE AWARD
OF PUBLIC PROCUREMENT CONTRACTS**

CONTENTS

PART ONE: THE CONTEXT

1.	The political context	4
2.	The economic importance of public procurement	5
3.	The Community legal context	5
4.	International agreements on public procurement	9

PART TWO: THE DIRECTIVES ON PUBLIC SUPPLIES, WORKS AND SERVICES

1.	Scope of contracts	11
2.	Contracting authorities	12
3.	Value thresholds	13
4.	Specific features of the Services Directive	14
5.	Who can participate?	15
6.	Information	16
7.	Selection criteria	19
8.	Special conditions for participation	20
9.	Award criteria	20
10.	Variants	21
11.	Technical specifications	21

PART THREE: THE DIRECTIVE ON THE PROCUREMENT PROCEDURES OF ENTITIES OPERATING IN THE WATER, ENERGY, TRANSPORT AND TELECOMMUNICATIONS SECTORS

1.	The situation at the outset	22
2.	Determination of scope: entities concerned	22
3.	Award procedures	24
4.	Minimum periods to be allowed under the procedures	26
5.	Criteria for qualitative selection	26
6.	Technical specifications	27
7.	Award criteria	27
8.	Third country clauses	27

PART FOUR: THE PROBLEM OF ENSURING COMPLIANCE WITH THE DIRECTIVES

1. Problems to be tackled 29
2. Action being taken or under consideration 32

Address for further information 38

PART ONE: THE CONTEXT

1. THE POLITICAL CONTEXT

Completing the single market and ensuring that it functions properly is one of the urgent, priority tasks which the European Union has set itself. This objective will, however, be achieved only when all firms can compete on an equal footing for contracts awarded by public and private bodies.

The Treaty of Rome embodied the initial public procurement rules which prohibit any discrimination on grounds of nationality and any restriction in the choice of supplies or services. Nevertheless, these obligations were too general and imprecise to be easily applied. The first public procurement Community directives provided a more specific framework enshrining the basic rules applicable to public procurement procedures. The basic principles embodied in the Rome Treaty remain applicable to all procurement outside the scope of application of the directives.

After the publication of the White Paper¹ on completing the internal market, the existing procedures ensuring **transparency** in public procurement and the opening-up of the sector to **effective competition** were improved. The objective of all these actions is to allow public and semi-public bodies to buy goods and services of a better quality and at a better price thus contributing concretely to economic growth by stimulating competition.

The opening-up of public procurement is thus a genuine challenge, not only for public or semi-public entities, which will have to bring their procurement practices into line with the Community rules, but also for enterprises, which demonstrate their interest in open procurement.

2. THE ECONOMIC IMPORTANCE OF PUBLIC PROCUREMENT

The figures speak for themselves. In 1995, the volume of public procurement was ECU 900 billion, or 12% of Community Gross Domestic Product of the 15 member States. Clearly, all these contracts cannot be effectively opened up to Community-wide competition, since, for example, some of them relate to products that are **too specific** or purchased in **too small quantities**.

¹The "White Paper" on completing the internal market was published on 14th June 1985.

Another striking feature of the importance of public procurement is the constant rise of the number of tender notices which are being published in the Official Journal. 19,000 tender notices were published in 1988, as against 100 000 in 1994 , which represents a 40% increase every year.

3. THE COMMUNITY LEGAL CONTEXT

3.1. The Treaty of Rome

The Treaty of Rome of 25th March 1957 does not lay down any specific rule relating to public procurement

It does, however, establish four fundamental principles that apply to public contracts whatever their value:

- 3) **no discrimination** on grounds of **nationality** (Article 6 of EC treaty);
- 2) **free movement of goods** and the prohibition of quantitative restrictions on imports and exports and measures having equivalent effect (Articles 30 et seq.);
- 3) **freedom of establishment** (Articles 52 et seq.);
- 4) **freedom to provide services** (Articles 59 et seq.).

3.2. Legislative provisions

The rules enshrined in the Treaty prohibit certain unfair practices, but do not establish any positive obligation ensuring transparency and competition in contract award procedures.

Legislative action was thus called for at Community level.

Such action was, and is, all the more necessary as a response to the major concerns voiced by the enterprises interested in public procurement, which revolve around the need for:

-the best possible information to enable firms to prepare their tenders properly and satisfy the legitimate requirements of public purchasers;

- the greatest possible transparency in public procurement so that decisions are taken by public purchasers in a balanced fashion throughout the Community;
- gradual reform of procurement practices.

Concerning "public works" contracts and "public supply" contracts, the initial directives were adopted in 1971² and 1977³. They were amended several times and are now consolidated in two Directives:

- Directive 93/36/EEC coordinating procedures for the award of public supply contracts and consolidating Directives 80/767/EEC and 88/295/EEC (OJ No L 199 of 9th August 1993);
- Directive 93/37/EEC coordinating the procedures for the award of public works contracts and consolidating Directives 71/305/EEC and 89/440/EEC (OJ No. L 199 of 9th August 1993);

For public service contracts, a specific Directive, the Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts (OJ No L 209 of 24 July 1992), entered into force on 1st July 1993.

The Directive 89/665/EEC harmonizes review procedures for public supply, public works and public service contracts (OJ No L 395 of 30th December 1989).

²Directive 71/305/CEE on public works contracts (OJ No L185 of 16th August 1971) Directive 89/440/EECon public works contracts, amending Directive 71/305/CEE (OJ No L 210 of 21th july 1989).

³Directive 77/62/EEC on public supply contracts (OJ No L 13 of 15th January 1977); Directive 80/767/EEC, on public supply contracts, amending Directive 77/62/EEC (OJ No L 215 of 18th August 1980);and Directive 88/295/EEC, on public supply contracts, amending Directive 77/62/EEC (OJ No L 127 of 20th May 1988);

PUBLIC AUTHORITIES

SUPPLIES	WORKS	SERVICES	REMEDIES
77/62/EEC	71/305/EEC		
80/767/EEC	89/440/EEC		
88/295/EEC		92/50/EEC	89/665/EEC
93/36/EEC	93/37/EEC		

-Concerning the utilities, (entities operating in the water, energy, transport and telecommunication sectors), as a result of political, economic and legal consideration, a specific Directive was adopted, Directive 90/531/EEC (OJ No L 297 of 29th October 1990). This Directive was consolidated by Directive 93/38/EEC (OJ No L 199 of 9th August 1993). A specific Directive on review procedures for contracts in the water, energy, transport and telecommunications sectors was adopted, the Directive 92/13/CEE (OJ No L 76 of 23rd March 1992).

UTILITIES

SUPPLIES, WORK	SUPPLIES, WORK AND SERVICES	REMEDIES
-----------------------	--	-----------------

90/531/EEC	=>	93/38/EEC	92/13/EEC
------------	----	-----------	-----------

It should be stressed that **the aim of these Directives is not to harmonize all national rules on public procurement.** It is to coordinate national contract award procedures by introducing a minimum body of common rules for contracts above a given threshold. These common rules are the following:

- 1) rules defining the type of public purchaser and the scope of contracts subject to the Directives;
- 2) rules defining the type of contract award procedure which public purchasers should normally use;
- 3) rules on technical specifications, whereby preference is to be given to Community standards, and discriminatory technical requirements are banned from the contract documents;
- 4) advertising rules, whereby tender notices must be published in the Official Journal of the European Communities, must comply with specific requirements concerning time-limits and must be drawn up in accordance with pre-established models;
- 5) common rules on participation, comprising objective criteria for qualitative selection and for the award of contracts (either the lowest price or the most economically advantageous tender, at the contracting authority's choice);
- 6) obligations as regards statistical reporting allowing the Commission to have a practical knowledge concerning the functioning of these rules.

4. INTERNATIONAL AGREEMENTS ON PUBLIC PROCUREMENT

4.1. THE "GPA" (GOVERNMENT PROCUREMENT AGREEMENT) PLURILATERAL AGREEMENT.

1 Signing and coverage of the agreement

On 15th April 1994, simultaneously with the conclusion of the Uruguay Round, the EU signed a new agreement with its partners⁴ aimed at the opening up of public procurement to effective competition. The new agreement, due to enter into force on 1 January 1996, is more ambitious than the previous 1979 GATT agreement, which it will replace. The new agreement will cover, in addition to supplies, works and services. Furthermore, it will no longer be limited to procurement by central state authorities, but will also cover contracts awarded by public authorities at regional and local level. The "GPA" will also cover the ports, airports, water, electricity and urban transport sectors. The new "GPA" will open up government contracts to international bidding worth around 350 billion ECU every year (a ten-fold increase on the value of the 1979 agreement).

The "GPA" is built on the general principles of national treatment, non-discrimination and transparency and follows the EU Directives closely. The new agreement obliges each signatory to provide non-discriminatory and transparent procurement procedures. The "GPA" also provides for a system of thresholds which trigger these obligations, a prohibition on discriminatory technical specifications, an obligation to publish tender notices and an obligation to use objective and non-discriminatory criteria to contract selection and award. The "GPA" also provides for challenge procedures for aggrieved suppliers as well as a dispute settlement mechanism for the parties.

2 Consequences of the GPA agreement on Community Directives.

Even though the "GPA" is based on the EU public procurement Directives, the Directives themselves will have to be slightly modified in order to avoid reverse discrimination penalising EU undertakings. Notably thresholds and time limits will have to be modified.

Two proposals for Directives have been adopted by the Commission and have been submitted to the Council and to the Parliament.

⁴The other contracting parties to this agreement are the USA, Japan, Canada, Norway, Switzerland, Israël and South Korea (Austria, Finland and Sweden have since acceded to the European Union).

4.2. The EU/USA BILATERAL AGREEMENT.

On 15th April 1994, in parallel to the "GPA" the European Union concluded a bilateral agreement on procurement with the USA. Most of this agreement has been integrated into the "GPA" in the form of amendments to the schedule of commitments granted by the EU and the USA. It is estimated that the EU-US bilateral agreement will open around 200 billion ECU of public contracts to competitive bidding.

Thanks to this agreement, contracts awarded by state governments in the US will be open to bidders from the EU. Procurement of goods, works and services at state and city levels will be open to EU firms above designated threshold values, as well as procurements by certain ports and airports. Contracts financed by the Rural Electrification Administration will also be open to Community undertakings.

4.3. OTHER AGREEMENTS.

The Commission promotes the extension of the "GPA" to other countries. The Commission has already had preliminary contacts with China and Taiwan.

The Commission is also looking to expand commitments vis-à-vis the EU of countries that have already signed the GPA. Negotiations are under way with Switzerland, Korea and Israel. Discussions with Canada are also due shortly.

PART TWO

THE DIRECTIVES ON PUBLIC SUPPLIES, WORKS AND SERVICES FOR PUBLIC AUTHORITIES

The Works Directive (89/440/EEC) had to be transposed by 19th July 1990 (in the case of Greece, Spain and Portugal, the deadline was 1st March 1992) .Directive (93/37/EEC) formed a consolidation of the former Directives and did not change this date.

The deadline for transposing the Services Directive (92/50/EEC) was 1st July 1993 for all Member States.

The Consolidated Supplies Directive (93/36/EEC) had to be transposed into the internal legal order of Member States by 14th June 1994 .

These three Directives had to be transposed into the internal legal order of the three new Member States by 1st July 1994 as a consequence of their EEA membership.

1. SCOPE OF CONTRACTS

1.1. Public contracts are defined as contracts for pecuniary interest concluded in writing between a supplier, contractor or service provider and a public purchaser, termed a "contracting authority" in the Directives.

1.2. **Public supply contracts** relate to the **delivery of products**. It includes **purchase, lease, rental** or **hire purchase**, with or without option to buy.

1.3. **Public works contracts** cover:

-the execution of works;

-the execution and design of works;

-the execution by whatever means of a work corresponding to the requirements specified by the contracting authority,

Works must relate to one of the activities covered by **Class 50** of the General Industrial Classification of Economic Activities within the European Communities (**NACE**). These are listed in Annex II to the Directive.

A work is defined by the Directive as the outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an economic and technical function. Contracting authorities frequently choose to rely on a general contractor who designs the works according to their requirements and coordinates execution of the entire project, or else prefer to conclude a project development or management contract whereby the work is financed and executed entirely by the contractor, whom they then of course reimburse.

1.4. **Public service contracts** are defined very broadly by the Directive 92/50/CEE. The definition covers all contracts for pecuniary interest concluded in writing between a service provider and a contracting authority for the execution of these services, to the exclusion of:

-public supply and public works contracts;

-contracts awarded in the water, energy, transport, or telecommunications sectors (see Part Three);

We can state among others: studies, consultants' services, advertising services, transport services, maintenance and repair services, engineering services, financial services, computer services, legal services...

2. CONTRACTING AUTHORITIES

2.1. The following are regarded as contracting authorities:

-the State;

-regional or local authorities (town councils, municipalities, Länder, regional administrations);

-bodies governed by public law ;

-associations formed by regional or local authorities.

2.2. A list of legal persons governed by public law and subject to the GATT agreement is annexed to the Supplies Directive.

2.3. The Public Supplies, Works and Services Directives define in the same way the concept of bodies governed by public law. Bodies governed by public law are defined by the Works and Services Directives according to a set of cumulative criteria:

-established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

-having legal personality, and

-financed, for the most part by the State, or regional or local authorities, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

A list of bodies and categories of bodies governed by public law is annexed to the Works Directive and may be amended by the Commission on the basis of any changes notified by Member States. This list is also applicable to the Supplies and Services Directives. The list is given for guidance only.

3. VALUE THRESHOLDS

3.1. **The threshold above which public supply contracts are subject to the Community rules is ECU 200.000, except that, under Directive 93/36/EEC, a lower threshold of ECU 128.771 applies to certain public supply contracts covered by the GATT Agreement.**

The ECU 128.771 threshold thus applies from 1st January 1994 (it is revised every two years) to **public supply contracts awarded by central government and certain central entities listed in Annex I of Directive 93/36/EEC.**

3.2. **In the case of public works contracts, the threshold is ECU 5 million.**

3.3. **The Services Directive applies to contracts worth not less than ECU 200 000**

NB: the thresholds of the Directives will have to be modified by 1st January 1996 to comply with the "GPA" (see pages 9 and 10 of this brochure, point 4.1.2)

3.4. **Where a contract is subdivided into several lots,** the total value of all the lots must be taken into account for the purpose of determining whether the threshold specified in the relevant directive is reached. This rule is laid down explicitly in the Works, Services and Supplies Directives.

No procurement requirement for a given quantity of supplies or services, and no work or contract may be split up with the intention of keeping it outside the scope of the Directives.

3.5. Subsidized works or service contracts

Member States must take the necessary measures to ensure that contracting authorities comply or ensure compliance with the Works Directive where they subsidize directly by more than 50% a works contract worth not less than ECU 5 million⁵ awarded by an entity other than themselves. This rule applies, however, only to contracts covered by Class 50, Group 502 of NACE and relating to building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes.

In the Services Directive, the same provision applies to service contracts worth not less than ECU 200.000⁶ and awarded in connection with a subsidized works contract as defined above.

4. SPECIFIC FEATURES OF THE SERVICES DIRECTIVE

The Directive divides services into two categories:

-"priority services" for which it lays down comprehensive rules along the lines of those applicable to public works and public supply contracts and described in points 5 to 9 below. This category includes, for example, financial services (insurance services and banking and investment services) maintenance and repair services, insurance, data processing, accounting, market research, advertising, architecture, street cleaning and refuse collection;

-all other services, for which it requires merely:

a)basic transparency, generating information for future use. Contracting authorities thus have to send the Office for Official Publications of the European Communities a contract award notice (see point 6.2(c) below), indicating whether they agree to it being published.

b)compliance with common rules in the technical field

⁵See NB above concerning the modification of the thresholds for the 1st January 1996, in the context of the "GPA"

⁶See NB above

Other services include, for example, legal services, staff placement, hotel and catering services and education and vocational training.

The Directive also lays down the rules of a new procedure ensuring competition: **design contests** (publication of a notice in the "S" Supplement to the Official Journal, etc.).

Design contests are defined as those national procedures which enable the contracting authority to **acquire**, mainly in the fields of area planning, town planning, architecture and civil engineering, or data processing, **a plan or design selected by a jury after being put out to competition with or without the award of prizes.**

5. WHO CAN PARTICIPATE?

5.1. The Directives provide for three types of award procedure that contracting authorities can use:

1) **open procedure:**

all interested suppliers, contractors or service providers may submit tenders;

2) **restricted procedure:**

only those suppliers, contractors or service providers invited by the contracting authority may submit tenders;

3) **negotiated procedure:**

the contracting authority consults suppliers, contractors or service providers of its choice and negotiates the terms of the contract with one or more of them.

There are two types of negotiated procedure:

a) negotiated procedure **with** publication of a notice in the Official Journal;

b) negotiated procedure **without** publication of a notice.

Each Directive lists exhaustively the cases where these two types of negotiated procedure may be used.

5.2. **For public supply, works and services contracts**, the contracting authority has the choice between the open and the restricted procedures. They are both the general procedure. The negotiated procedure may be used only in justified cases and if the conditions required for its use are fulfilled.

In all cases, the contracting authority must draw up a **written report** including a number of particulars such as the name and address of the contracting authority, the subject and value of the contract; the names of the candidates or tenderers admitted and the reasons for their selection; the names of the candidates or tenderers rejected and the reasons for their rejection; the name of the successful tenderer and the reasons why his tender was selected and, if known, any share of the contract which he may intend to subcontract to third parties; and, in the case of negotiated procedures, the circumstances referred to in the relevant directive which justify the use of these procedures.

The report, or the main features of it, must be communicated to the Commission at its request.

5.3. It should be stressed that in open and restricted procedures, all negotiation with candidates or tenders on fundamental aspects of contracts, and in particular on prices, is ruled out; however, discussions with candidates or tenderers may be held but solely for the purpose of clarifying or supplementing the content of their tenders or the requirements of the contracting authorities and provided this does not involve discrimination.

6. INFORMATION

6.1. The Directives on public supplies, works and services are aimed at making procedures **more transparent**

6.2. They form part of a **major effort** to improve the flow of information through action on **three main fronts**:

- prior information** on procurement programmes;
- publication of **tender notices**;
- publication of a **contract award notice** for each contract.

The Commission has taken action to **simplify the task of drawing up tender notices** for publication in the Official Journal, by advocating the use of standard forms (see Commission recommendation 91/561/EEC of 24th October 1992, OJ No L 305 of 6th November 1991, and the standard forms published in OJ No S 217A to N of 16th November 1991). Interested firms have a better grasp of the requirements they have to satisfy in bidding for a contract, thanks to the common language which is used in the standard forms.

The Commission has set up a simplified standard tender notice applicable to all Directives. This simplified standard notice should be used as soon as the Directives have been adapted to the "GPA".

a) Prior information

The Public Works Directive requires contracting authorities to publish, before the launch of the award procedure, an **indicative notice** in the Official Journal summarizing the essential characteristics of the works contracts which they intend to award and the estimated value of which is not less than ECU 5 000 000⁷.

Directives on public supplies and services require contracting authorities to make known, as soon as as possible after the beginning of their budgetary year, by means of an indicative notice, the total procurement by product area which they envisage awarding during the subsequent 12 months where the total estimated value, is equal to or greater than ECU 750 000⁸.

Such information should enable firms to be aware of the intentions of contracting authorities at a sufficiently early stage.

b) Publication of tender notices

Contracting authorities that wish to award a public supply, works or service contract by open or restricted procedure or by negotiated procedure with publication of a notice must **make known their intention by means of a notice** drawn up in accordance with the models annexed to the Directives.

Publication of the notice marks the point when the contract award procedure proper begins.

The **minimum periods** that contracting authorities must allow under the different types of procedure are set out schematically in the following table.

⁷See NB page 13

⁸See NB page 13

	Time-limit for receipt of requests to participate		Time-limit for receipt of tenders	
	Normal	Urgent	Normal	Urgent
Open procedures	—	—	not less than 52 days (1)	—
Restricted procedures	not less than 37 days	not less than 15 days	not less than 40 days (2)	not less than 10 days
Negotiated procedures	not less than 37 days	not less than 15 days	—	—

(1) Reduced to 36 days in the case of works and service contracts where an indicative notice has been published.

(2) Reduced to 26 days in the case of works and service contracts where an indicative notice has been published.

c) Publication of a contract award notice for each contract

The Supplies, Works and Services Directives also require contracting authorities to publish in the Official Journal **details of how contracts have been awarded**

The notice must be drawn up in accordance with the **model** annexed to the Directives and must be sent **not later than 48 days** after the contract in question has been awarded.

It must give such particulars as the date of award of the contract, the award criteria, the number of offers received, the name and address of the successful tenderer(s), and the price or range of prices paid.

6.3. The Works Directive requires contracting authorities that wish to award a works **concession** contract worth not less than ECU 5 million to make known their intention by means of a notice published in the Official Journal and in the TED data bank; it places concessionaires under the same obligation in respect of contracts they intend to award to third parties.

6.4. The Supplies, Works and Services Directives also require contracting authorities to inform, within 15 days of the date on which the request is received, any eliminated candidate or tenderer who so requests of the **reasons for rejection** of his application or his tender, and, in the case of a tender, the name of the successful tenderer (in addition to the written report mentioned in point 5.2).

7. SELECTION CRITERIA

7.1. To prevent contracting authorities eliminating suppliers, contractors or service providers on grounds that are discriminatory, the three Directives list a number of possible selection criteria.

These relate to the good repute, professional qualifications, economic and financial standing and technical knowledge or ability of the supplier, contractor or service provider.

The aim of these rules is to **determine what references or evidence can be required** for the purpose of establishing professional, economic and financial capacity.

8. SPECIAL CONDITIONS FOR PARTICIPATION

8.1. Subcontracting

The Public Supplies, Works and Services Directives provide that, in the contract documents, the contracting authority may ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties.

8.2. Groups of contractors, suppliers or service providers

Under the three Directives, groups are allowed to submit tenders without having to be set up, **in advance**, in a particular legal form.

8.3. Requirements relating to working conditions at the works site or at the place where the services are to be performed

The contracting authority may supply certain information on the topic (in particular, the name and address of the authority responsible).

If so, the contractor or service provider must indicate whether he has taken the relevant requirements into account when drawing up his tender.

8.4. Conditions not covered by the Directives

A contracting authority may lay down conditions of this nature provided that they comply with the principles of the Treaty as listed in Part One, point 3.1., and are mentioned in the tender notice.

9. AWARD CRITERIA

9.1. Supply, works and service contracts may be awarded on the basis of one of two criteria: either **the lowest price** or **the most economically advantageous tender**.

9.2. For the purpose of determining the most economically advantageous tender, the Directives give a **non-exhaustive** list of **criteria** that may be applied:

the price, delivery or completion date, technical merit, quality, aesthetic and functional characteristics, running costs, cost-effectiveness, after-sales service and technical assistance. In this case, the contracting authority shall state in the contract notice all the criteria they intend to apply to the award, where possible in descending order of importance.

9.3. If a tender appears to be **abnormally low**, a contracting authority is not free to reject it automatically. The three Directives establish a procedure in which the contracting authority has to request, in writing, details of the constituent elements of the tender and verify them in the light of the explanations received.

10. VARIANTS

The Public Supplies, Works and Services Directives provide that, where the criterion for the award of the contract is that of the most economically advantageous tender, contracting authorities may consider **variants** which are submitted by a tenderer and meet their minimum specifications.

The Directive leaves it to the discretion of contracting authorities to decide whether they wish to authorize or prohibit variants and to establish what type of variants they are prepared to consider and the conditions for the submission of such variants, they may, for instance, require firms to submit a basic tender along with the variant (all this information must be specified in the contract notice).

11. TECHNICAL SPECIFICATIONS

The common rules relating to technical specifications have been adapted to the new standard Community policy and to the improvements made by it. Without prejudice to the legally binding national technical rules, in so far as these are compatible with Community law, the technical specifications shall be defined by the contracting authorities, by priority, by reference to national standards implementing European standards, or by reference to European technical approvals or by reference to common technical specifications.

PART THREE

THE DIRECTIVE ON THE PROCUREMENT PROCEDURES OF ENTITIES OPERATING IN THE WATER, ENERGY, TRANSPORT AND TELECOMMUNICATIONS SECTORS

1. THE SITUATION AT THE OUTSET

The scope of the "traditional" Directives on supplies, works and services excludes those works, supply and services contracts awarded by "utilities" (entities operating in the water, energy, transport and telecommunications sectors). This exclusion clause is in response to a number of political, strategic, economic, industrial and legal considerations (the entities operating in the four sectors are governed by either public or private law according to the Member State in question).

Directive (90/531/EEC, OJ No L 297 of 29th October 1990), codified by Directive 93/38 EEC (OJ No 199/84 of 9th August 1993) established for the utilities sector a more flexible legal framework than the one for the traditional public procurement sectors. The deadline to implement this Directive into national law was 1st July 1994, except in the case of Spain (from 1st January 1997) and Greece and Portugal (1st January 1998).

2. DETERMINATION OF SCOPE: ENTITIES CONCERNED

2.1. THE DEFINITION GIVEN IN THE UTILITIES DIRECTIVE IS NOT CONFINED TO A SIMPLE DISTINCTION BETWEEN "PUBLIC" AND "PRIVATE" ENTITIES

It goes beyond the distinction between the public and private sectors and places on an equal footing situations that are fundamentally identical, despite any differences of legal form that there may be between them.

2.2. CONTRACTING ENTITIES

The Utilities Directive applies to:

-public authorities, i.e. the State, regional or local authorities, bodies governed by public law, or associations formed by one or more such authorities or bodies governed by public law;

-public undertakings, i.e. any undertakings over which the public authorities may exercise, directly or indirectly, a dominant influence by virtue of ownership, financial participation or regulation;

-entities which are neither public authorities nor public undertakings, but have been granted special or exclusive rights in respect of one of the activities covered by the Directives.

2.3. **The activities falling within the scope of the Directive** belong to two categories:

A) Cases where a service is provided to the public **via a technical network whose very existence restricts competition**. Where such a system is introduced, there is in practice **little likelihood** of competition from another network or from new market entrants. **No competition is possible** where the monopoly or oligopoly is legally established through the granting of special or exclusive rights as machinery for official authorization which creates barriers to entry.

The Directive thus covers the provision or operation of networks which provide a service to the public in connection with the production, transport or distribution of drinking water, electricity, gas, heat or telecommunications, and railway, tramway and bus networks;

B) Cases where an entity exploits **a geographical area for a particular purpose subject to a government concession** or authorization.

Such purposes are:

a)exploring for, or extracting, oil, gas, coal or other solid fuels; **or**

b)the provision or airport, maritime or inland port or other terminal facilities to carriers by air, sea or inland waterway.

C)**article 3** establishes a possibility of derogation for one specific type of procurement. Member States may request the Commission that public procurements concerning the exploitation of geographical areas for the purpose of exploring oil, gas, coal, or other solid fuels shall be subject to more flexible competitive procurement rules than the ones of the utilities Directive. This authorisation is requested by a Member State who wishes to allow some entities to benefit from the derogation. If the conditions of article 3 are satisfied, the authorisation of the Commission excludes these contracts from the scope of application of the Directive.

2.4. SCOPE OF CONTRACTS

The Directive covers:

- the supply of products;
- building or civil engineering works
- the provision of services as defined in the second Directive 93/38/EEC, mentioned in point 1 above.

2.5. VALUE THRESHOLDS

The Utilities Directive apply to contracts whose estimated value is not less than:

- ECU 400.000 in the case of supply or service contracts awarded by entities carrying on an activity in the transport, drinking water or energy sectors, as defined in Article 2 of Directive 90/531/EEC;
- ECU 600.000 in the case of supply or service contracts awarded by entities carrying on an activity in the telecommunications sector, as defined in Article 2 of Directive 90/531/EEC;
- ECU 5 million in the case of works contracts.

These thresholds will have to be modified in the context of the "GPA" for 1st January 1996 (see pages 9 and 10 point 4.1.2).

3. AWARD PROCEDURES

Contracting entities have a **free choice** between open, restricted and negotiated procedures, which are defined in exactly the same way as in the traditional Directives on supply, works and service contracts, provided that a call for competition has been made through publication in the Official Journal of:

- a tender notice for each contract; or
- a periodic indicative notice for each group of products, set of works or category of services; or
- a notice on the existence of a qualification system.

3.1. Periodic indicative notice

This is similar to the indicative notices provided for by the traditional Supplies, Works and Services Directives.

However, where it is used as a means of calling for competition:

-the notice must refer specifically to the supplies, works or services which will be the subject of the contract to be awarded;

-it must invite interested undertakings to express their interest in writing;

-the contracting entity must subsequently invite all candidates to confirm their interest in the contract concerned before beginning the selection of tenderers.

3.2. Qualification system

Under the Directive, contracting entities that so wish may establish and operate a system for the qualification of suppliers, contractors or service providers.

a)The system, which may involve different qualification stages, must operate on the basis of objective rules and criteria to be established by the contracting entity.

Contracting entities may not:

-impose administrative, technical or financial conditions on some firms and not others;

-require tests or proof that duplicate objective evidence already available.

b)The rules and criteria for qualification must be made available on request to interested suppliers, contractors or service providers.

c)Contracting entities must inform applicants of their decision as to qualification within a reasonable period.

d)Applicants whose qualification is refused must be informed of that decision and the grounds for refusal; those grounds must be based on the qualification criteria.

e)Contracting entities may bring the qualification of a supplier, contractor or service provider to an end only for reasons based on the qualification criteria. The intention to bring qualification to an end must be notified in writing to the supplier, contractor or service provider beforehand, together with the reason or reasons justifying the proposed action.

f)The qualification system must be the subject of a notice indicating its purpose and the availability of the rules concerning its operation.

4. MINIMUM PERIODS TO BE ALLOWED UNDER THE PROCEDURES

a) Open procedures with a prior call for competition

Time-limit for receipt of tenders: not less than 52 days from the date of dispatch of the tender notice;

b) Restricted procedures and negotiated procedures with a prior call for competition

Time-limit for receipt of requests to participate: as a general rule, at least five weeks, but in any event not less than 22 days (15 days in case of urgency and if the notice has been sent to the office by electronic mail, telex or telefax).

Time-limit for receipt of tenders: to be fixed by mutual agreement between the contracting entity and the selected candidates, the time-limit being identical for all candidates; where agreement cannot be reached, as a general rule at least three weeks and, at all events, not less than ten days from the date of the invitation to tender.

5. CRITERIA FOR QUALITATIVE SELECTION

Unlike the traditional Directives on supply, works and service contracts, the Utilities Directive do not lay down any qualitative selection criteria and thus allow contracting entities some discretion here. However, the criteria adopted must be objective and made available to all interested firms.

6. TECHNICAL SPECIFICATIONS AND STANDARDS

As in the case of the traditional Directives on supply, works and service contracts, the contracting entities concerned here must give priority to national standards implementing European standards, or to European technical approvals or to common technical specifications.

7. AWARD CRITERIA

The award criteria are identical to those laid down in the traditional Directives on supply, works and service contracts.

8. THIRD COUNTRY CLAUSES

a) Directive 93/38/EEC provides that any tender made for the award of a supply contract may be rejected by the contracting authority where the proportion of products originating in a third country with which no agreement ensuring effective and comparable access for EU undertakings has been concluded exceeds 50% of the total value of the products constituting the tender.

Furthermore, where two or more tenders are equivalent in the light of the award criteria, preference must be given to the tender or tenders which have not been rejected in accordance with the above provision. Preference is not to be given, however, where acceptance of the tender concerned would oblige the contracting entity to acquire material having technical characteristics different from existing material and which would result in incompatibility or technical difficulties in operation and maintenance or disproportionate costs.

b) As far as services are concerned, Member States must inform the Commission of any general difficulties encountered by their businesses in winning service contracts in third countries.

The Commission is to report periodically to the Council on the opening-up of service procurement in third countries.

Where Community firms have difficulty in gaining access to service contracts in a third country, the Commission must endeavour to remedy the situation with the country concerned; it may propose that the Council suspends or restricts, in Member States, the award of service contracts to certain types of firm, in particular firms subject to the law of the third country concerned.

PART FOUR

THE PROBLEM OF ENSURING COMPLIANCE WITH THE DIRECTIVES

Given the size of public procurement as a proportion of GNP, the award of procurement by the public or semi-public sector can have a decisive impact on the economic power and development of an enterprise, sector or region.

The role that can be played by public purchasers, enterprises, the courts and the Commission in ensuring that contracts are awarded on an objective basis and in conditions of effective competition is extremely important, but also a particularly difficult one.

1. PROBLEMS TO BE TACKLED

1.1. Implementation of Directives into national law

Member States are under the obligation to adopt binding rules in order to transpose the Directives into their national law. Actually, Member States very often don't implement the Directives before the deadline. Moreover, the implementing rules are often at variance with the spirit of the Directives, in both form and substance. Problems of interpretation and of incorporation of the national measures implementing the Directives arise frequently.

1.2. At the different stages that go to make up an award procedure, the Community rules are breached by public purchasers, either deliberately or through ignorance. Here are some examples:

- 1- deliberate splitting of contracts;
- 2- failure to supply interested firms with full and accurate information;
- 3- inclusion of discriminatory requirements in the contract documents;
- 4- failure to comply with the advertising rules:

-misinterpretation of the scope of the Directives;

- use of direct negotiation (see the Judgment delivered by the Court of Justice of the European Communities on 18th March 1992 in Commission v Spain "extension of Madrid University");

5- failure to comply with the technical rules:

-lack of references to European standards;

-application of technical specifications that give preference to domestic production (see the Court's judgment of 22nd September 1988 in Commission v Ireland "Dundalk pipeline");

-requirement of tests and certification by a domestic laboratory;

6- failure to comply with the rules on selection (proof of good repute, economic and financial standing and technical capability):

-obligation to enrol on a list of approved firms in order to be allowed to submit a tender;

-unfair or unreasonable requirements regarding proof which are not provided for by the Directives;

7- failure to comply with the rules relating to award of the contract:

-biased use of the criterion of the most economically advantageous tender;

-negotiation in open or restricted procedures (see the Court's judgment of 22nd June 1993 "Storebaelt bridge");

-use of award criteria not revealed to tenderers;

-substantial amendment of the contract documents to eliminate certain tenders;

-treatment of reservations in tenders;

-non-objective evaluation of tenders (rigging the results);

-failure to comply with the procedure for dealing with abnormally low tenders (see the Court's Judgment of 22nd July 1989 in the "Fratelli Costanzo" case - formula for automatically rejecting abnormally low tenders);

-misuse of the concept of unacceptable tenders.

1.3. Public procurement is a complex, sensitive area

The amount of European and national public procurement legislation has considerably increased over the last ten years. This specific legislation is complex and difficult to understand for undertakings who don't always have access to modern information networks.

The drafting and reading of a contract document is not easy and it becomes even more complicated when you have to do it in a foreign language. It is also difficult to get used to the different

mentalities and ways of workings in the other Member States. While the size of certain contracts makes them attractive to large firms, which have the necessary economic strength and technical capacity to carry on transfrontier business, it places small and medium-sized firms at a disadvantage. Moreover, it is not always profitable for some undertakings to sell products or services in a wide geographic area.

The fact that markets are shared, either tacitly or through regulatory action, in some areas of the economy and that certain firms benefit from national - and above all regional - preferences weakens application of the Community rules

Public purchasers are susceptible to pressure from local political and economic interests. Firms that have suffered from discrimination are reluctant to challenge them before the national courts, or even to stand up for their rights outside the courts, for fear of spoiling any chances they may have of winning a future contract.

Since the number of public purchasers, and consequently the number of contracts awarded, is extremely large, monitoring of compliance with the Directives by national courts and the Commission can only scratch the surface.

Experience shows that a lot of infringements of the Directives come from a poor knowledge of the rules applicable and that further information is still necessary.

All these problems are even more important for SME'S, due to their size, structure and financial capacities. The opening-up of public procurement for SME'S still has to be improved. Business services that can provide for small and medium-sized enterprises and help them to become more competitive on Community markets have to be encouraged.

2. ACTION BEING TAKEN OR UNDER CONSIDERATION

A. The Commission's role in the **implementation process** is of prime importance. Every provision of the measures adopted at national level is being subjected to detailed scrutiny, in close cooperation with the competent national authorities of the Member States. The Commission can ask the Member States to take rapid steps to correct any infringement and can, if it thinks fit, start proceedings.

Two judicial precedents are of relevance here:

-the Court's judgment of 19th November 1991 in the **"Francovitch-Bonifaci" case**, in which it established the principle that Member States must compensate individuals for damage caused to them by non-implementation (or faulty transposition) of a directive into national law; and

-its judgment of 22nd June 1989 in the "**Fratelli Costanzo**" case, in which it ruled that public purchasers (at central or local level) are under the obligation to apply the provisions of the Directives. These may be relied on by individuals before national courts, which must refrain from applying provisions of national law that conflict with the Directives.

This "direct effect" doctrine which allows individuals, if certain conditions are fulfilled, to rely directly on the provisions of a Directive before national courts, is an important contribution of the Court of Justice. This doctrine is very helpful for individuals in cases of poor or non implementation of a Directive.

B. As far as **application of the Community rules** is concerned, a number of measures are worth noting:

B.1. Any potential contractor who considers that he has been injured by an unlawful decision on the part of a contracting authority may seek review. In order to ensure that everyone has the same rights, the Commission drew up the review procedures Directives.

The Directive 89/665/CEE (OJ No 395 of the 30th of December 1989) harmonizes the remedies available in Member States for the purpose of ensuring correct application of the Supplies and Works Directives (from 21st December 1991) and the Services Directive (from 1st July 1993). This Directive requires Member States to introduce procedures for reviewing, effectively and as swiftly as possible, decisions that have infringed Community law on public procurement or national rules implementing that law. These review procedures must make it possible, at any stage of the contract award procedure, to:

- take interim measures, for example suspending any decision taken by a contracting authority;
- set aside unlawful decisions, such as discriminatory technical specifications;
- award damages to persons harmed.

The Directive established a procedure enabling the Commission, as the guardian of the Treaty, to take action where a clear and manifest infringement of Community rules has taken place before a contract is concluded, by bringing it to the attention of the contracting authority. In such cases, the Commission **notifies** the Member State and the contracting authority of the reasons which have led it to conclude that a **clear and manifest infringement** has been committed and requests its correction. The Member State must **reply within 21 days**. The reply must contain:

- confirmation that the infringement has been corrected; or
- a reasoned submission as to why no correction has been made; or
- a notice to the effect that the contract award procedure has been suspended;

When this procedure is used, it replaces the first stage (letter of formal notice) of the infringement proceedings under art 169 of the Treaty.

B.2. In the utilities sector, the Council has adopted a Directive (92/13/EEC, OJ No L 76 of 23rd March 1992) harmonizing review procedures for the purpose of ensuring correct application of the Utilities Directives. The national measures transposing it had to enter into force by 1st January 1993 (derogations: for Spain 30th June 1995, for Greece and Portugal, 30th June 1997). It provides, along the lines of the other "Review Procedures" Directive outlined in point B.1., swift and effective review procedures that make it possible to:

- take interim measures, for example suspending any decision taken by a contracting authority;
- set aside unlawful decisions, such as discriminatory technical specifications;
- award damages to persons harmed.

The same machinery for corrective action as that established by the other "Review Procedures" Directive (89/665/EEC) can be used by the Commission.

Directive 92/13/EEC sets up a system of attestations issued by sworn attestors, in each Member State, who can establish that, over a given period of time, an entity's procurement system has been fair and non-discriminatory and has complied with the applicable Community rules;

A conciliation procedure supervised by a conciliator drawn from a list of independent persons accredited for this purpose by the Commission is provided to parties willing to settle disputes amicably and thus avoid litigation.

B.3. Action by the Commission against Member States under Article 169 of the EEC Treaty

While conflicts are to be settled primarily at national level, any supplier, contractor or service provider who considers that he has been harmed by an unlawful decision taken by a contracting authority is free to submit a complaint to the Commission. Complaints may be made at the same time as proceedings are instituted before a national court, but are in no way conditional on such

legal action. Complaints can be handled confidentially, and there is no administration fee. To ensure that the Commission's action is effective, complaints should be lodged **before the contract is signed**, at the latest when tenders are being compared. Where a public contract has already been awarded or signed, it is in the interests of injured firms to apply to national Courts for damages even before lodging a complaint with the Commission.

B.4. The **national administrations** have a leading role to play in ensuring effective application of the public procurement rules. It would be desirable for them to:

- increase and upgrade their monitoring resources, backing them up with effective penalties;
- give priority to preventive checks
- launch training schemes for the sectors concerned.

C. **The funding of projects and programmes by the Community's structural instruments is conditional on compliance with the Community rules on public procurement**

D. **As regard the diffusion of information**, the Commission makes constant efforts, through publications of this kind, or of guides to enable suppliers, contractors and service providers to gain a better understanding of the legal environment created by the Community and by each Member State in the public procurement field.

The Commission, when it thinks fit, can propose to the advisory Committee on the Opening-up of Public Procurement, that it adopts policy guidelines. The following policy guidelines have been adopted:

- the obligation to refer to European standards;
- the defining of the term "product area";
- the contracts awarded by separate units of a contracting entity under the utilities Directive.

E. Concerning SME, the Commission adopted on 7th May 1990 a communication on **promoting their participation in public procurement in the Community**. This communication was followed by two further communications to the Council on this topic. The first one, (1st June), is of a general nature (SME participation in public procurement), the other (5th June) is specifically concerned with the potential problems of enterprises supplying the utilities sectors in the structurally disadvantaged regions of the Community, once public procurement is opened up. The communication of 1st June reviews the problems as perceived by SME'S and the progress made in

pursuing the objectives of the communication of 7th May 1990. Most of the problems highlighted are not confined to SME'S but these experience more important barriers to market entry.

Thanks to a new series of Community Initiatives, (SME's INITIATIVE 94/C180/03 laying down guidelines for operational programmes or global grants which they are invited to propose in the framework of a Community initiative concerning the adaptation of small and medium-sized enterprises to the single market and intention of the Commission to forward in the near future to the Council, in reponse to the conclusions of the European Council of Cannes, a report on measures to make it easier for SME's to participate in public procurement contracts), **new measures aiming at improving the participation of SMEs in public procurements are being set up.** Given their small size and lack of sophistication, the support and advisory services will be necessary to enable SMEs to increase their effectiveness in overcoming their disadvantages. What they first require is guidance as to how to discover the extent of the potential markets in their sector of activity, the extent of potential competition, and the obstacles to be surmounted. These measures are:

- the promotion of partnership between SMEs in different regions or Member States to facilitate their participation in public contracts on a basis of reciprocity between countries and regions;
- the improvement of the information available, including the installation of the necessary hardware, the design and development of software and the running costs of information systems and their promotion;
- technical, legal and linguistic assistance in the preparation and follow-up of tenders, and in admission to purchasing authorities' pre-qualification lists;
- specialised training in public procurement;
- promotional and awareness-raising activities which can be carried out by various types of body active in the field of public procurement, including the existing Community network to assist SMEs (Euro-info Centres, "Bureaux de rapprochement d'entreprises", Business cooperation Network and Centres of enterprises and innovation), trade promotion organisations, regional development bodies, chambers of commerce and "ad hoc" centres. Development of such a network is naturally linked with developments in the information market within the framework of the Commission's SIMAP project (see next paragraph).

The **PRISMA** Community Initiative provides financial support for operational programmes drawn up by Member States including measures aimed at improving information, technical assistance and co-operation between SME's seeking to establish the capacity to enter public sector markets.

F. Important changes which are taking place in the field of information and telecommunication technology open new opportunities to improve the efficiency of the whole public procurement process. DG XV of the European Commission has launched the project **SIMAP** (Système

d'information pour les marchés publics) which brings EU-wide electronic public procurement a lot closer.

SIMAP will create a more open procurement market by collecting, processing and diffusing accurate and up-to date information on tender opportunities and contracts awarded, plus other information already available in the Member States such as list of standards, contact points, potential sub-contractors, electronic catalogues, etc. In future developments, SIMAP will provide means for enabling a paperless procurement process by supporting the creation and electronic exchange of tender documentation, bids, invoices, payments orders and other information exchanged between procurers and suppliers.

FOR FURTHER INFORMATION

Unit XV/B/3

Public Procurement: formulation and application
of Community law

Tel: 32-2 295.47.13.

Fax: 32-2 296.09.62

European Commission

Rue de la loi 200

B-1049 Brussels

Belgium

