

THE OPENING-UP OF PUBLIC PROCUREMENT



**COMMISSION
OF THE EUROPEAN
COMMUNITIES**

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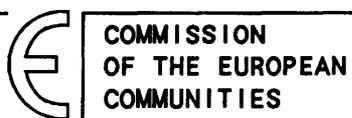
COMMISSION OF THE EUROPEAN COMMUNITIES

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DOCUMENT

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Directorate-General
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III/B/4

THE OPENING-UP OF PUBLIC PROCUREMENT

CONTENTS

PART ONE: THE CONTEXT

1.	The political context	1
2.	The economic importance of public procurement	2
3.	The Community legal context	3

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

1.	Scope of contracts	7
2.	Contracting authorities	8
3.	Value thresholds	9
4.	Specific features of the Services Directive	11
5.	Who can participate?	12
6.	Information	13
7.	Selection criteria	16
8.	Special conditions for participation	17
9.	Award criteria	18
10.	Variants	19

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

1.	The situation at the outset	20
2.	Determination of scope: entities concerned	21
3.	Award procedures	23
4.	Minimum periods to be allowed under the procedures	26
5.	Criteria for qualitative selection	26
6.	Award criteria	26
7.	Third country clauses	27
8.	Technical specifications and standards	28

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	40
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THE OPENING-UP OF PUBLIC PROCUREMENT

Commission of the European Communities, Unit III/B/4

PART ONE: THE CONTEXT

1. THE POLITICAL CONTEXT

The White Paper on completing the internal market which the Commission published on 14 June 1985 identifies transparency in public procurement and the opening-up of the sector to effective competition as one of the priority objectives in the drive to establish the single market by 31 December 1992.

Public procurement is a powerful economic policy instrument. For the public authorities, it is not only a means of securing the physical

resources they need to carry out their tasks, but also a tool for stimulating economic activity which has an impact in a number of areas: industrial policy, employment, regional policy, R&D, standards policy and the promotion of small businesses.

The opening-up of public procurement as part of the 1992 process 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 should demonstrate their interest in open procurement by adopting a dynamic approach.

2. THE ECONOMIC IMPORTANCE OF PUBLIC PROCUREMENT

In 1986, procurement by public administrations in the narrow sense was equivalent to approximately 9% of Community gross domestic product. If procurement by public and semi-public enterprises is included, the figure rises to 15% of Community GDP (1986: ECU 530 billion).

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.

Nevertheless, the volume of public procurement that could be opened up to competition can be estimated at ECU 240-340 billion, or 7-10% of Community gross domestic product. In 1986, however, intra-Community trade in the sector amounted to no more than ECU 500 million (0.14% of Community GDP).

3. THE COMMUNITY LEGAL CONTEXT

3.1. The Treaty of Rome

The Treaty of Rome of 25 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:

- 1) no discrimination on grounds of nationality (Article 7);
- 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 Treaties 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.

The Council of the European Communities has thus adopted the following Community Directives:

- Directive 71/305/EEC on public works contracts (Official Journal ("OJ") No L 185 of 16 August 1971);
- Directive 77/62/EEC on public supply contracts (OJ No L 13 of 15 January 1977);
- Directive 80/767/EEC amending Directive 77/62/EEC (OJ No L 215 of 18 August 1980);
- Directive 88/295/EEC amending Directive 77/62/EEC (OJ No L 127 of 20 May 1988);

- Directive 89/440/EEC amending Directive 71/305/EEC (OJ No L 210 of 21 July 1989);
- Directive 89/665/EEC on review procedures for public supply and public works contracts (OJ No L 395 of 30 December 1989);
- Directive 90/531/EEC on works and supply contracts in the water, energy, transport and telecommunications sectors (OJ No L 297 of 29 October 1990);
- Directive 92/13/EEC on review procedures for contracts in the water, energy, transport and telecommunications sectors (OJ No L 76 of 23 March 1992);
- Directive 92/50/EEC on public service contracts (OJ No L 209 of 24 July 1992).

The following proposals for Community Directives are under discussion at the Council and the European Parliament:

- a proposal for a Directive on service contracts in the water, energy, transport and telecommunications sectors (OJ No C 337 of 31 December 1991 and OJ No C 34 of 12 February 1992) modifying and consolidating Directive 90/531/EEC;
- a proposal for a Directive consolidating the Directives on public works contracts (OJ No C 46 of 20 February 1992);
- a proposal for a Directive consolidating the Directives on public supply contracts and aligning them on Directives 89/440/EEC (works) and 92/50/EEC (services).

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.

PART TWO

THE DIRECTIVES ON PUBLIC SUPPLIES, WORKS AND SERVICES

Note

The Supplies Directive (88/295/EEC) had to be transposed into national law by 1 January 1989 and the Works Directive (89/440/EEC) by 19 July 1990 (in the case of Greece, Spain and Portugal, the deadline was 1 March 1992 for both Directives).

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

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; the concept of delivery encompasses 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, i.e. project development and management tasks.

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 fulfill an economic and technical function.

- 1.4. Public service contracts are contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of:
- public supply and public works contracts;
 - contracts awarded in the water, energy, transport or telecommunications sectors (see Part Three);
 - other contracts referred to in Article 1(a) of Directive 92/50/EEC.

2. CONTRACTING AUTHORITIES

2.1. The following are regarded as contracting authorities:

- the State;
- regional or local authorities (town councils, municipalities, Länder, regional administrations);
- legal persons governed by public law (Supplies Directive) or bodies governed by public law (Works and Services Directives);
- associations formed by regional or local authorities.

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

- 2.3. The Works and Services Directives define the concept of bodies governed by public law; there is no corresponding definition of legal persons governed by public law in the Supplies Directive.

Bodies governed by public law are defined by the Works and Services Directives according to a set of cumulative criteria. 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. The list is given for guidance only, unlike the list of legal persons governed by public law annexed to the Supplies Directive, which is exhaustive.

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 80/767/EEC, a lower threshold of ECU 125 576 applies to certain public supply contracts covered by the GATT Agreement.

The ECU 125 576 threshold thus applies in 1992 and 1993 (it is revised every two years) to public supply contracts awarded by central government and certain central entities listed in an annex to Directive 80/767/EEC.

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

The Works Directive allows a work to be subdivided into several lots, each one the subject of a contract.

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

- 3.4. Where a contract is subdivided into several lots, the value of each lot 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 and Services Directives, but certainly applies mutatis mutandis to supply contracts too.

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 million 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, a similar provision applies to service contracts worth not less than ECU 200 000 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, maintenance and repair services, insurance, data processing, accounting, market research, advertising, architecture, street cleaning and refuse collection;
- 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.
In the light of the experience thus gained, it will be possible to determine at a later stage whether the scope of the Directive should be extended;
 - b) compliance with common rules in the technical field.
Other services include, for example, legal services, staff placement, hotel and catering services and education and vocational training.

The Directive also lays down rules for the organization of 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 contracts, the open procedure is THE RULE. The restricted procedure may be used only in justified cases.

Where contracts are awarded by restricted or negotiated procedure, the contracting authority must draw up a written report justifying the use of that procedure and including a number of particulars such as the name and address of the contracting authority, the value, quantity and nature of products purchased, the number of requests to participate received and the number of candidates invited to submit an offer.

In the case of works and services, on the other hand, no hierarchy is established between open and restricted procedures.

5.3. It should be stressed that in open and restricted procedures, all negotiation with candidates or tenderers on fundamental aspects of contracts, and in particular on prices, is ruled out; however, discussions with candidates or tenderers may be held but only 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.

Let us look at these three lines of action in detail.

a) Prior information

The Directives require contracting authorities to publish an indicative notice in the Official Journal summarizing their forthcoming procurement programmes.

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:

	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; it places concessionaires under the same obligation in respect of contracts they intend to award to third parties.
- 6.4. The 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.

For each contract awarded, contracting authorities also have to draw up a written report setting out 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.

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 not to demarcate the national authorities' powers to set the standards for participation in contracts, but to determine what references or evidence can be required for the purpose of establishing that the standards are met.

8. SPECIAL CONDITIONS FOR PARTICIPATION

8.1. Subcontracting

The 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 three Directives thus all refer to price, delivery or completion date and technical merit.

The Supplies and Services Directives also mention quality, aesthetic and functional characteristics, after-sales service and technical assistance.

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 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.

Contracting authorities must state in the contract documents the minimum specifications to be satisfied by variants and any specific requirements for their presentation. They must indicate in the tender notice if variants are not allowed.

Contracting authorities may not reject a variant on the sole grounds that it has been drawn up with technical specifications defined by reference to national standards transposing European standards, to European technical approvals, to common technical specifications or to national technical specifications, the latter two types of document being understood as indicated in the relevant articles of the Directives.

PART THREE

THE DIRECTIVES 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 contracts awarded by carriers operating land, air, sea or inland waterway transport services and by entities engaged in the production, transport and distribution of drinking water and the production and distribution of energy; neither does it cover supply or service contracts awarded by contracting entities whose main activity is in the telecommunications sector.

The decision to exclude those sectors was taken for a number of political, strategic, economic, industrial and legal reasons (the entities operating in the four sectors are governed by either public or private law according to the Member State in question).

A specific Directive (90/531/EEC, OJ No L 297 of 29 October 1990) relating to works and supply contracts awarded by entities operating in the four sectors was adopted on 17 September 1990. The national measures implementing it have to apply from 1 January 1993, except in the case of Spain (from 1 January 1996) and Greece and Portugal (1 January 1998). From these dates, works contracts awarded by telecommunications entities are no longer subject to Directive 71/305/EEC as amended by Directive 89/440/EEC, but come under Directive 90/531/EEC.

Service contracts awarded by entities operating in the four sectors are covered by another Directive modifying and consolidating Directive 90/531/EEC, and which is due to enter into force on 1 July 1994 (1 January 1997 in Spain and 1 January 1998 in Greece and Portugal). As with "traditional" contracting authorities, services are divided into two categories (see Part Two, point 4).

The two Directives are referred to below as the 'Utilities Directives'.

2. DETERMINATION OF SCOPE: ENTITIES CONCERNED

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

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

2.2. CONTRACTING ENTITIES

The Utilities Directives apply 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 Directives 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 or through machinery for official authorization which creates barriers to entry.

The Directives thus cover 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 of airport, maritime or inland port or other terminal facilities to carriers by air, sea or inland waterway.

2.4. SCOPE OF CONTRACTS

The Directives cover:

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

2.5. VALUE THRESHOLDS

The Utilities Directives 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.

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 Directives, 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;

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 Directives 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. AWARD CRITERIA

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

7. THIRD COUNTRY CLAUSES

- a) Directive 90/531/EEC provides that any tender made for the award of a supply contract may be rejected where the proportion of products originating in third countries 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 may not be rejected in accordance with the above requirement. Such 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 those of existing material, resulting 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 and on the state of negotiations on the topic, particularly within the GATT framework.

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 suspend or restrict, 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.

8. 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, when defining the technical specifications, to European standards. Technical specifications must not contain any discriminatory requirements, such as clauses which mention goods of a specific make or source or of a particular process.

PART FOUR

THE PROBLEM OF ENSURING COMPLIANCE WITH THE DIRECTIVES

Given the size of public procurement as a proportion of GNP, the award of contracts 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. Transposition 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; however, those rules are often at variance with the spirit of the Directives, in both form and substance, and do not have the desired effect.

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:

- deliberate splitting of contracts;
- failure to supply interested firms with full and accurate information;
- inclusion of discriminatory requirements in the contract documents;
- failure to comply with the advertising rules:
 - misinterpretation of the scope of the Directives;
 - improper use of private contracting (see the judgment delivered by the Court of Justice of the European Communities on 18 March 1992 in Commission v Spain "extension of Madrid University");
- 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 22 September 1988 in Commission v Ireland "Dundalk pipeline");
 - requirement of tests and certification by a domestic laboratory;
- 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;
- 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 Great Belt case pending before the Court of Justice);
 - 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 22 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

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.

- 1.4. 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.
- 1.5. Firm's lack of eagerness to bid for contracts put up for competition in Member States other than their own does not contribute to effective application of the Directives: cold feet or ignorance of the Community rules entitling them to participate in award procedures?

1.6. Business services that can provide support for small and medium-sized enterprises and help them become more competitive on Community markets are scarce or non-existent in the Member States.

1.7. 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.

Few contracts for which a tender notice is published in the Official Journal are subdivided into lots.

1.8. 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.

2. ACTION BEING TAKEN OR UNDER CONSIDERATION

A. The Commission's role in the transposition process is of prime importance. Every provision of the measures adopted at national level will be subjected to detailed scrutiny, in close cooperation with the competent national authorities of the Member States.

Two judicial precedents are of relevance here:

- the Court's judgment of 19 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-transposition (or faulty transposition) of a directive into national law; and

- its judgment of 22 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 them.

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

B.1. The Directive harmonizing the remedies available in Member States for the purpose of ensuring correct application of the Supplied Works Directives (from 21 December 1991) and the Services Directive (from 1 July 1993).

B.1.1. 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.

B.1.2. The Directive establishes a procedure enabling the Commission to take action where a clear and manifest infringement of Community rules has taken place before a contract is concluded.

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;

B.2. The Council has adopted a Directive (92/13/EEC, OJ No L 76 of 23 March 1992) harmonizing review procedures for the purpose of ensuring correct application of the Utilities Directives. The national measures transposing it are to enter into force at the same time as for Directive 90/531/EEC (see Part Three, point 1). It provides for the following:

B.2.1. Along the lines of the other 'Review Procedures' Directive outlined in point B.1., swift and effective review procedures that make it possible:

either

- a) to take interim measures with the aim of correcting the alleged infringement or measures to suspend the contract award procedure;

to set aside unlawful decisions;

or

- b) to take, by way of interlocutory procedure, other measures with the aim of correcting the infringement or preventing further damage to the interests concerned, in particular by making an order for the payment of a sum of money equivalent to not less than 1% of the contract value, in the event that the infringement is not corrected or avoided;

and (for either of the above alternatives)

- c) to award damages to persons harmed. The person making a claim for damages must prove that an infringement has taken place and that the infringement has adversely affected his chance of being awarded the contract;

B.2.2. a system of attestations issued by sworn attestors, with a view to providing objective confirmation that an entity's procurement system is fair and non-discriminatory and complies with the applicable Community rules;

B.2.3. the same machinery for corrective action by the Commission as that established by the other 'Review Procedures' Directive;

B.2.4. a conciliation procedure operating under the Advisory Committee for Public Contracts or the Advisory Committee on Telecommunications Procurement and enabling parties, where they so wish, to settle disputes amicably and thus avoid litigation.

B.3. 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;
- assign priority to preventive checks;
- launch training schemes for the sectors concerned.

B.4. Action by the Commission against Member States under Article 169 of the EEC Treaty

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. Beyond this stage, any action that the Commission might bring before the Court of Justice (with or without a request for interim measures) would be bound to fail.

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.

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. On the information front, several projects are in hand with a view to enabling 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. To that end, a guide to public procurement in each Member State is to be published in all nine official languages. The Commission has also produced a video cassette on public procurement and is carrying out a programme of training sessions for businesses and contracting authorities.
- E. 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 24 October 1991, OJ No L 305 of 6 November 1991, and the standard forms published in OJ No S 217A to N of 16 November 1991). Interested firms will thus have a better grasp of the requirements they have to satisfy in bidding for a contract, thanks to the common language which will be used in the standard forms.
- F. The Commission adopted on 7 May 1990 a communication to the Council on promoting SME participation in public procurement in the Community.

The communication urges Member States and enterprises themselves to take the following measures in particular:

- subdivision of large contracts into lots;
- development of the different forms of association or cooperation, namely joint ventures, cooperatives, economic interest groupings, consortiums of suppliers or contractors, specialization agreements

and R&D agreements. Firms' use of the BC-Net system developed by the Commission and participation in the Europarteneriat and Prisma programmes should have a favourable impact on the development of association and cooperation schemes;

- promotion of subcontracting;
- simplification and harmonization of the documents required by public purchasers for the purpose of comparing tenders;
- creation of a trans-European electronic network for the rapid transmission of tenders;
- greater use of the Euro Info Centres by firms.
-

On 1 June 1992 the Commission adopted a second communication to the Council on SME participation in public procurement.

In addition to the above, the communication mentions in particular the problem of payment periods and the Commission's SIMAP study project on an information system for public procurement.

- G. The provision of technical assistance to firms for preparing tenders, improvement of the technical capacity of suppliers, contractors and service providers to satisfy the legitimate requirements of public purchasers, improved product quality and better marketing are essential steps in developing firms' access to public procurement in the Community and establishing a climate of confidence in their relations with public purchasers.

On 8 February 1991, the Commission launched Prisma, the aim of which is to finance operational programmes drawn up by the Member States for the purpose of implementing the above-mentioned measures.

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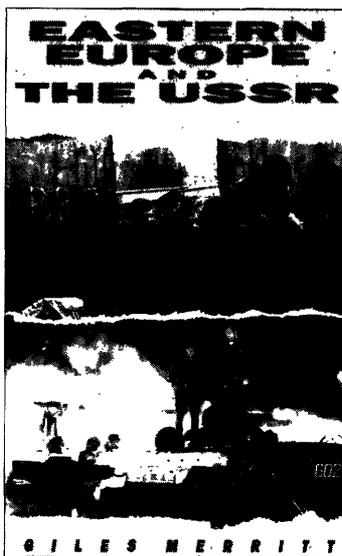
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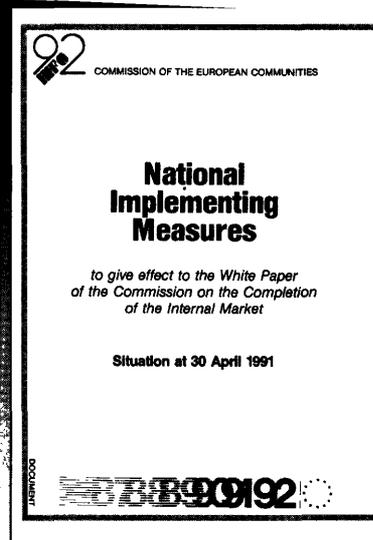
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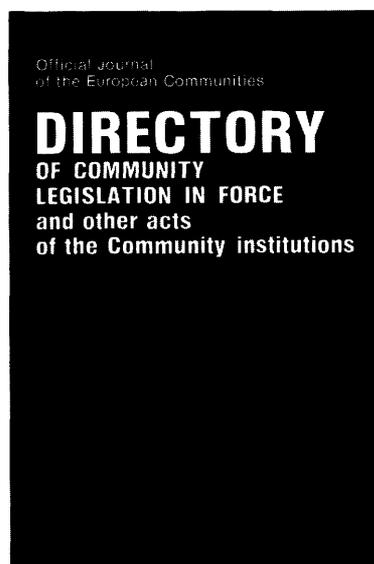
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Success in business

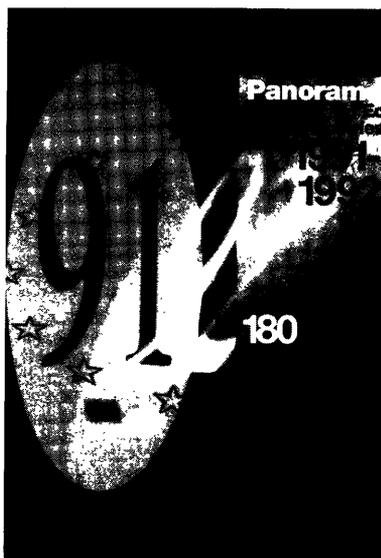
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A CHALLENGE FOR EUROPE AND THE WORLD

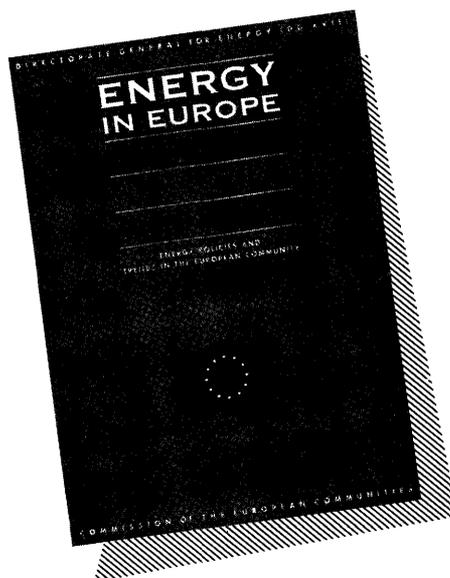
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