



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 30.06.1997
COM(97) 290 final

95/0080 (COD)

OPINION OF THE COMMISSION

pursuant to Article 189 b (2) (d) of the EC Treaty,
on the European Parliament's amendments
to the Council's common position regarding the

proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

amending Council Directive 93/38/EEC of 14 June 1993
coordinating the procurement procedures of entities operating in the water, energy, transport
and telecommunications sectors.

AMENDING THE PROPOSAL OF THE COMMISSION

pursuant to Article 189 a (2) of the EC Treaty

I State of the file

The proposal was forwarded to the European Parliament and the Council on 30.3.1995.

The Economic and Social Committee adopted its opinion on 5.7.1995.

The European Parliament adopted its opinion in first reading on 22.10.1996.

The amended proposal was transmitted to the Council on 25.11.1996.

The Common position was adopted by the Council on 19 December 1996.

The European Parliament adopted its opinion in second reading on 14.5.1997.

II -Purpose of the Directive

The Government Procurement Agreement (GPA or, in French, AMP), which entered into force in the Community on 1 January 1996 as stipulated in its Article XXIV, forms an integral part of the legal order of the Community through Council Decision 94/800/EEC of 22 December 1994, which approves the agreements reached in the Uruguay Round multilateral negotiations. This does not, however, entail that its provisions can be directly invoked before the jurisdictions of the Community and the Member States (last recital of Decision 94/800/EEC).

The Commission has proposed a series of amendments to the Directive aimed at inserting some provisions of the GPA in order to:

- a) **avoid discrimination** against Community companies and give them the same advantages that third country companies enjoy pursuant to the GPA; and
- b) **ensure coherence** between the two legal regimes. This way contracting entities, which are subject to both the directive and the GPA, will be able to conform to the GPA by applying the provisions of the amended Directive. They would otherwise be obliged to know both legal regimes perfectly, to highlight the differences between them and to draw the correct consequences of these differences. That would seem to be a difficult process which could lead to significant differences in the application of Community law in the different Member States.

III The Commission's position on the amendments adopted by the European Parliament

A Amendments accepted by the Commission

Recital 13 (technical dialogue - amendment n. 6)

The part of amendment 6, which was adopted by the European Parliament, is acceptable to the Commission given that it is simply a positive formulation of Article VI (4) of the GPA. In fact, whereas the GPA provision states that "entities **shall not** seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement", the text of the European Parliament provides that "contracting authorities **may** seek or accept advice which may be used in the preparation of specifications for a specific procurement, provided that such advice **does not have** the effect of precluding competition".

Recital 13 a (new) (training and information in favour of SMEs - amendment n. 2)

Although a recital to the public procurement directives, which is not mirrored in the Directive itself, is not the most appropriate and efficient means of reaching the legitimate goal pursued, the Commission can also accept this amendment, through which the European Parliament aims at favouring the access of SMEs to public procurement by placing appropriate training and information facilities at their disposal.

B Amendments rejected by the Commission

Article 1 (11) - (Article 41 (3) of Directive 93/38/EEC - obligation to inform participants of decisions on contract awards)

As the amendment limits this obligation solely to the public contracting entities, thus breaking the fundamental principle of equal treatment of public and private entities, it is unacceptable to the Commission.

Article 1 (11) - (Article 41 (4) of Directive 93/38/EEC - obligation to state the reasons for a rejection and the characteristics of the winning tender)

This amendment also excludes private contracting entities operating on the basis of special or exclusive rights from its scope and is therefore unacceptable to the Commission for the reason mentioned above.

Article 1 (12) - (Article 42 (1a) of Directive 93/38/EEC - statistical obligations)

The same limitation to public contracting entities only would equally be introduced through this amendment, which - although less important than the two preceding amendments in terms of significance for the liberalisation of public procurement - is likewise unacceptable to the Commission.

**AMENDED PROPOSAL FOR A
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE**

amending

**Directive 93/38/EEC coordinating the procurement procedures of entities operating in the
water, energy, transport and telecommunications sectors**

(presented by the Commission pursuant to Article 189 a (2) of the EC-Treaty)

1. Recital 13 is amended as follows:
"Whereas contracting authorities may seek or accept advice which may be used in the preparation of specifications for a specific procurement, provided that such advice does not have the effect of precluding competition;"

2. Recital 13 a is inserted:
"Whereas the Commission shall make available to small and medium-sized undertakings the training and information materials they need to enable them to participate fully in the changed procurement market;"

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