

# COMMISSION OF THE EUROPEAN COMMUNITIES

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Brussels, 30 August 1991

Amended proposal for a  
COUNCIL DIRECTIVE

relating to the coordination of procedures on the award  
of public service contracts

(presented by the Commission pursuant to Article 149(3)  
of the EEC Treaty)

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AMENDED PROPOSAL

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I. STATE OF PROCEDURE

1. In June 1990, the Commission presented its initial proposal for this Directive (1).
2. The Economic and Social Committee adopted its opinion on 29 May 1991(2).
3. On 15 May 1991, Parliament adopted its opinion on the proposal, including a number of amendments(3). The majority of Parliament's amendments aim at clarifying the proposal, inter alia as regards its scope, as well as simplifying certain provisions of the Directive. Parliament's amendments also concern a number of important issues such as exclusions of contracts for certain services and the coverage of others; thresholds; concessions; variants; the nature of bidders (natural or legal persons); statistics; or the treatment of non-EC tenders.
4. The Commission has accepted the majority of Parliament's amendments, in particular those that aim at a higher degree of clarity and simplicity, although in certain cases modifying them as appropriate in the context of the Directive. In particular as regards the provisions on concessions, further changes were necessary in the interests of clarity.

II. Comments on Parliament's amendments not retained in the amended proposal

5. As regards the indicative notices provided for in Article 16, the Commission is of the opinion that more flexibility is needed than Parliament's amendment would allow. Experience with the corresponding requirements under the other Directives suggests

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(1) OJ. No. C 23, 31.1.1991

(2) OJ. No. C

(3) OJ. No. C

that contracting authorities should be allowed to choose the descriptive headings which correspond to their own practice and that an exhaustive listing would not be helpful. However, the Commission will continue to reflect on this proposal in the light of experience being gained with the Supplies and Public Works Directives.

6. As regards the provision on abnormally low offers the Commission considers that this should be aligned on the provisions of the other Directives which relate to public authorities, notably the Public Works Directive (71/305/EEC)<sup>(4)</sup>, and not on that of the "Utilities Directive" (90/531/EEC)<sup>(5)</sup> which relates to different entities.
7. The Commission has not retained a number of amendments which were adopted by Parliament and which seek to ensure a closer supervision of the respect by bidders of their obligations under social and environmental legislation. In the Commission's view the supervision of such obligations is better carried out in the context of the relevant social or environmental legislation. To use EC procurement rules for this purpose would reduce their effectiveness in meeting their principal goal of ensuring the non-discriminatory award of public contracts.

### III. THE AMENDED PROPOSAL

8. Changes compared to the initial proposal are underlined. The following explanations take the Articles in their order.

- (a) Changes which do not alter the substance of the proposal

9. Following the opinion of the Parliament, the Commission, in its amended proposal, has replaced the term "supplier" by "service provider". It has also, at a number of places, inserted

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(4) OJ. No. L 185, 16.8.1971

(5) OJ. No. L 297, 29.10.1990

texts where previously there had been a cross reference to a text in the Public Works Directive. This applies to Art 1(b) (contracting authorities); Art 8(8) (calculation of thresholds); Art 20 (variants); Art 31 (lists of recognized suppliers). While constituting no change of substance, the Commission accepts the Parliament's view that this will assist understanding by making the text more readable. It further has introduced minor changes in the Articles 1, 2, 13, 14, 15, 18, 19, 22, 26, 27, 29, 30, 33, 39, 40, and in Annexes IA, IB, IIIB, C, D, E. It had to renumber the Articles because of the deletion of Articles as a consequence of explained modifications.

(b) Definition of public service contracts

10. The provisions of Article 1(a) have been changed in two respects:

- the text aims to make it clear that contracts for financial services are covered by the Directive, irrespective of the fact that they may be awarded in connection with contracts in connection with land, buildings, or immovable property (subparagraph (II)), which are themselves excluded;
- the exclusion of contracts awarded by the "utilities", which was included in the initial proposal as Article 6, has been inserted in Article 1(a) (VIII).

(c) Concessions

11. The amended proposal brings together all the provisions relating to the award of public service concessions in

- Article 1(h) (definition), and
- Article 4 (award of concessions; rules applicable to the award of contracts by concessionaires).

12. The definition in Article 1(h) aims to distinguish, in the field of concessions which are intended to ensure that a service is made available to the public, between "public service concessions" which are covered in Article 4 of this Directive and "public works concessions", which are covered by the provisions of the Public Works Directive. The principle is that any concession which includes provision for works to be carried out should be considered to be a public works concession. All others should be public services concessions.

13. Article 4 provides the conditions under which public service concessions should be awarded (paragraph 1 and 2); the conditions under which a concessionaire which is a public authority should award its own contracts (paragraph 3); and the conditions under which their concessionaires should award their own contracts (paragraph 4).

14. The principle which is applied to the award of public service concessions is one of publicity where the turnover involved is ECU 200.000 or more per year. This provision, which is the same, apart from the threshold, as that applied to the award of public works concessions in the Public Works Directive, ensures that

Interested service providers will be made aware that a concession is being awarded. However, it also, implicitly, recognizes the differences between concessions and public service contracts.

15. A public service concession concerns the provision of a service to the public, while a public service contract involves the provision of a service to the public authority. A concessionaire accepts the financial risk in providing a public service, in return for the chance of profit while a contractor seeks his profit in the more limited context of the price for delivering of a particular service.
16. For this reason, the award of public service concessions (like public works concessions under the Public Works Directive) is not subject to the detailed requirements which are considered appropriate for public service contracts. The rules of the Treaty do, of course, apply. Nevertheless, in parallel with the Public Works Directive, provision is made for contracting authorities to impose, should they so wish, certain requirements concerning the extent to which concessionaires award contracts to third parties.
17. Public authorities which are concessionaires do not, thereby, escape from their obligations under the Directives on the award of public supply contracts, public works contracts or public service contracts.

In order to ensure that the use of concessions does not limit the scope for the development of the internal market concessionaires which are not public authorities or which are not covered by the Utilities Directive are to be required to publicize their supplies, works and services contracts. This

requirement is, however, set aside when the conditions for award without publicity laid down in the relevant Directives apply and when the contract is awarded to an undertaking which is a member of the group to which the concession has been awarded, or to one of its affiliates.

18. In presenting the provisions relating to the award of public service concessions in this way, the Commission has followed the substance of the relevant amendments of the European Parliament. It has, however, gone somewhat further in bringing together all the texts relating to concessions. In this way it has sought to meet the Parliament's desire for the clearest possible text.

(d) Thresholds

19. The Commission also follows Parliament on the provisions of Article 8. This article should be considered also in the light of Article 2, which provides for a distinction on the basis of majority content between supplies contracts and services contracts. Contracts in practice often contain a mixture of supplies and services. Further, the distinction between many supplies (for example in cases of rental) and services can be rather fine. For this reason, and in order to avoid creating a potential source of conflict as to the correct classification of contracts, it is proposed to apply the same threshold to service contracts as to supplies contracts awarded by the same entity. To this effect, the threshold is ECU 200.000 except for those authorities which are subject to the GATT Government Procurement Agreement, for which the threshold is ECU 130.000. Special thresholds for particular types of services, as the discussions in Parliament have shown, risk creating uncertainties and disputes. Given that the way in which service providers are remunerated may vary, additional provisions are made relating to calculation of the contract value.

(e) Priority and residual services

20. The amended proposal maintains the concept of two-tier-application of the Directive, as laid down in Articles 9 to 11. However, following the Parliament's opinion and in the light of discussion with the sectors concerned, all types of financial services covered by the Directive are now listed in category 6 of Annex IA including those which were previously listed in category 21 of Annex IB.

(f) Contents of indicative notices

21. Article 16 has been amended in consequence of the modification to Article 8 (thresholds). Contracting authorities have to publish the intended total procurement in each of the service categories listed in Annex IA which they envisage awarding during the next twelve months where the estimated value reaches ECU 750.000.

(g) The nature of tenderers (natural or legal persons)

22. In accordance with the amendment of the European Parliament, the Commission has amended and rearranged its proposal on the nature of tenderers with a view to its clarification (Article 22).
23. In certain service sectors national regulations prohibit the establishment of service operators as legal persons, only allow particular forms of legal persons, or require the owners to be members of a particular profession. Such requirements, which are of general application, could constitute a major obstacle to the liberalization of public procurement of services, for example if contracting authorities could reject tenderers from other Member States for the sole reason that they are legal persons.

24. The European Court of Justice has repeatedly stated, notably in its judgement of 17. December 1981 (Webb)<sup>(6)</sup>, that the provisions of the Treaty on the freedom to provide services imply that the rules of the country where the service is provided can only be applied to the provision of services across frontiers insofar as they are justified in the public interest, and the subject matter is not covered by equivalent rules in the country of establishment. Further, the rules of the country where the service is performed may only be applied to cross frontier service activities insofar as they are proportionate, necessary and appropriate to solve the subject matter.

25. In order to implement these principles for public procurement of services, the proposal contains two provisions:

- in accordance with the principle of home-country regulation, status as a natural or a legal person is not, of itself, to be a ground for rejection of a bidders;
- the contracting authority is, however, permitted to establish the names and qualifications of those who will work on a project.

(h) Abnormally low tenders

26. In accordance with the general approach of the Parliament, the Commission has aligned its provision on abnormally low offers as far as possible on the Public Works Directive.

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(6) Case 279/80, Webb, [1981] ECR 3304.

(i) Preference schemes

27. The modified proposal no longer contains provisions covering preferential award criteria (Arts 33(3) and 35 of the initial proposal). These deletions are in line with Parliament's amendments, recent decisions of the European Court of Justice<sup>(7)</sup> and the Commission's views regarding the compatibility of preference systems with Article 30 of the Treaty. Further, it is now clear that the directive will not enter with force before 31 December 1992, the date on which the provisions of Art 35 would have ceased to apply.

(j) Statistical reports

28. Pursuing the objectives of the European Parliament, the amended proposal aligns the provisions of Article 35 on those of the Public Works Directive in order to provide a coherent set of rules for all types of contracts.

(k) Non-EC tenders

29. The provisions of the Directive regarding third countries provide for a combination of erga omnes opening of contracts with a problem-solving mechanism to deal with any trade problems that may arise.

Thus Article 37 provides, in its paragraphs 1 and 2, for the exchange of information between Member States, Commission and Council regarding relations with third countries in the field of public service contracts.

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(7) Case 21/88, Du Pont de Nemours, Judgement of 20.3.1990, not yet reported in ECR.

Paragraph 3 provides for the Commission to seek to resolve, by negotiation, situations where Community undertakings do not receive effective access, national treatment or most favoured nation status.

Paragraph 4 provides for corrective measures to be taken, as rapidly as may be necessary, where one of the problems referred to in paragraph 3 arises.

Amended Proposal for a

COUNCIL DIRECTIVE

relating to the coordination of procedures  
on the award of public service contracts

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57(2), 66, 100a and 113 thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament<sup>(1)</sup>,

Having regard to the opinion of the Economic and Social Committee<sup>(2)</sup>,

Whereas the European Council has concluded in successive meetings on the need to complete the internal market;

Whereas measures aimed at progressively establishing the internal market during the period up to 31 December 1992 need to be taken; whereas the internal market is an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured;

Whereas these objectives require the coordination of the procurement procedures on the award of public service contracts;

Whereas the White Paper on the completion of the internal market contains an action programme and a timetable for opening up public procurement markets, including in the field of services insofar as this is not already covered by Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts<sup>(3)</sup>, as last amended by Directive 90/531/EEC<sup>(4)</sup>, and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts<sup>(5)</sup>, as last amended by Directive 88/295/EEC<sup>(6)</sup>;

Whereas this Directive should be applied by all contracting authorities in the sense of the aforementioned Directives;

Whereas service providers may be natural or legal persons, without prejudice to the national rules of their country of establishment that are compatible with the Treaty;

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- (1) OJ No C  
(2) OJ No C  
(3) OJ No L 185, 16.08.1971, p. 5  
(4) OJ No L 297, 29.10.1990, p. 1  
(5) OJ No L 13, 15.1.1977, p. 1  
(6) OJ No L 127, 20.5.1988, p. 1

Whereas the field of services is best described, for the purpose of application of procurement rules, and for monitoring purposes, by subdividing it into categories corresponding to particular positions of the Central Product Classification (CPC);

Whereas the provision of services is covered by this Directive only insofar as it is based on contracts; whereas the provision of services on other bases, such as law or regulations, or employment contracts, is not covered;

Whereas as far as research and development (R&D) is concerned, this Directive only covers R&D services whose results accrue exclusively to the contracting authority;

Whereas, in order to ensure coherent award procedures, public service concessions should be covered by this Directive;

Whereas contracts relating to the acquisition or rental of immovable property have particular characteristics, which make the application of procurement rules inappropriate;

Whereas the award of contracts for certain audio-visual services in the broadcasting field is governed by considerations which make the application of procurement rules inappropriate;

Whereas arbitration and conciliation services are usually provided by bodies or individuals which are agreed on, or selected, in a manner which cannot be governed by procurement rules;

Whereas the financial services sector includes activities in connection with the application of instruments of monetary policy; the particular characteristics of this area require their exclusion from this Directive;

Whereas in the field of services the same derogations as in the aforementioned Directives should apply, as regards State security or secrecy and the priority of other procurement rules such as those pursuant to international agreements, the stationing of troops, or the rules of international organisations;

Whereas this Directive does not prejudice the application of, in particular, Articles 55, 56 and 66 of the Treaty;

Whereas the rules concerning service contracts as contained in Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors should remain unaffected by this Directive;

Whereas contracts with a designated single source of supply may under certain conditions be fully or partly exempted from this Directive;

Whereas this Directive should not apply to small contracts below a certain threshold, in order to avoid unnecessary formalities; whereas the threshold may in principle be the same as that for public supply contracts; whereas the calculation of contract value, the publication and the method of adaptation of the thresholds should be the same as in the other Community procurement directives;

Whereas, to eliminate practices that restrict competition in general and participation in contracts by other Member States' nationals in particular, it is necessary to improve the access of service providers to procedures for the award of contracts;

Whereas full application of the Directive must be limited, for a transitional period, to contracts for those services where its provisions will enable the full potential for increased cross-frontier trade to be realised; whereas contracts for other services need to be monitored for a certain period before taking a decision on the full application of the Directive; whereas the mechanism for such monitoring needs to be set up by the Directive; whereas it should at the same time enable those interested to share the relevant information;

Whereas the rules for the award of public service contracts should be as close as possible to those concerning public supply contracts and public works contracts;

Whereas the procurement rules contained in Directives 71/305/EEC and 77/62/EEC can be applied, with necessary adaptations so as to take into account special aspects of procurement of services such as the choice of the negotiated procedure, design contests, variants, the legal form under which the service providers operate, the reservation of certain activities to certain professions, registration and quality assurance matters;

Whereas use may be made of the negotiated procedure with prior publication of a notice when the service to be provided cannot be specified with sufficient precision, particularly in the field of intellectual services, with the result that the contract cannot be awarded by selection of the best tender in accordance with the rules governing the open and restricted procedures;

Whereas the relevant Community rules on mutual recognition of diplomas, certificates or other evidence of formal qualifications apply when evidence of a particular qualification is required for participation in an award procedure or a design contest;

Whereas the objectives of this Directive do not require any changes in the current state at national level, as regards the admission, or regulation, of price competition between service providers of certain services;

Whereas contracting authorities must be able to reject tenders which, because they are based on State aids, are unreliable; whereas tenders

which are submitted by public bodies may create the risk of distortions of competition when they are influenced by the availability of public financing; whereas contracting authorities shall, under particular conditions, inform the Commission of their attitude towards such tenders; whereas this Directive does not prejudice the application of Articles 92 et seq. of the Treaty;

Whereas Community undertakings should be granted access to the award of public service contracts and concessions in non-Community countries; whereas negotiations may be initiated to that effect when such access, in law or in fact, is found to be restricted; whereas the possibility should exist under certain conditions to take measures as regards access, by undertakings originating in the non-Community country concerned, to public service contracts and concessions awarded by the contracting authorities who are subject to this Directive;

Whereas the operation of this Directive should be reviewed at the latest three years after the date for compliance of national procurement rules; whereas the review should extend in particular to the possibility of making the Directive fully applicable to a wider range of service contracts;

HAS ADOPTED THIS DIRECTIVE:

TITLE I

General provisions

Article 1

For the purpose of this Directive:

(a) "public service contracts" are contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, which are not

(i) public supply contracts within the meaning of Article 1(a) of Directive 77/62/EEC or public works contracts within the meaning of Article 1(a) of Directive 71/305/EEC;

(ii) contracts for the acquisition or rental, by whatever financial means, of land, existing buildings, or other immovable property or concerning rights thereon; nevertheless, financial service contracts (leasing, loans, leasing or hire purchase contracts, with or without option to buy) concluded at the same time as, before or after, the contract of acquisition or rental, in whatever form, shall be subject to this Directive;

(iii) contracts for the acquisition of programme material by broadcasters within the meaning of Council Directive 89/552/EEC (7), and contracts for broadcasting time;

(iv) contracts for voice telephony, telex, radiotelephony, paging and satellite services;

(v) contracts for arbitration and conciliation services;

(vi) public service concessions in the sense of point (h);

(vii) contracts concerning primary issues of government bonds and other activities in the area of public debt management;

(viii) contracts awarded by contracting entities within the meaning of Article 2(1) of Directive 90/531/EEC which correspond at the same time to the definition of contracting authorities pursuant to article 1(b) of this Directive;

(b) "contracting authorities" (hereafter "authorities") shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law and all other bodies listed in Annex I to Directive 80/767/EEC.

A body governed by public law means any body:

- 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 other bodies governed by the public law; 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.

The lists of bodies or of categories of such bodies governed by public law which fulfil the criteria referred to in the second subparagraph are set out in Annex I to Directive 71/305/EEC.

- (c) "Service providers" are natural or legal persons, including public bodies which offer services. A service provider who submits a tender shall be designated by the term "tenderer", and one who has sought an invitation to take part in a restricted or negotiated procedure by the term "candidate";
- (d) "open procedures" are those national procedures whereby all interested service providers may submit a tender;
- (e) "restricted procedures" are those national procedures whereby only those service providers invited by the authority may submit a tender;
- (f) "negotiated procedures" are those national procedures whereby authorities consult service providers of their choice and negotiate the terms of the contract with one or more of them;
- (g) "design contests" are those national procedures which aim at providing the authority with a plan or design, mainly in the fields of area planning, town planning, architecture and civil engineering, or data processing, and which are selected by a jury on the basis of competition with or without the award of prizes;
- (h) a "public service concession" is a contract other than a public works concession within the meaning of Article 1(d) of Directive 71/305/EEC, concluded between an authority and another entity of its choice whereby the former transfers the execution of a service to the public lying within its responsibility to the latter and the latter agrees to provide the activity in return for the right to exploit the service or this right together with payment. If the concession contract covers even partially either the implementation or the joint implementation and design of works in connection with one of the activities referred to in Annex II of Directive 71/305/EEC or the type of work defined in Article 1(c) of Directive 71/305/EEC or the carrying out, by whatever means, of work in accordance with precise specifications laid down by the contracting authority, only Directive 71/305/EEC shall apply, even if the contract falls partly within the definition of a public service concession. Contracts for the award of rights to perform broadcasting activities are excluded from this definition.

Article 2

If a public contract is intended to cover both products within the meaning of Directive 77/62/EEC and services within the meaning of Annexes IA and IB of this Directive, it shall fall within the scope of this Directive if the value of the services in question exceeds that of the products covered by the contract.

Article 3

1. Member States shall take the necessary measures to ensure that authorities comply with this Directive when they award public service contracts or public service concessions, or hold design contests.
2. Authorities shall ensure that there is no discrimination between different service providers.
3. Member States shall take the necessary measures to ensure that the authorities comply or ensure compliance with this Directive where they subsidize directly by more than 50% service contracts awarded by an entity other than themselves in connection with works contracts to which Article 1a(2) of Directive 71/305/EEC relates.

Article 4

1. Where the authorities intend to award a public service concession, the advertising rules set out in Article 16(3), Article 17 (1) and (2) and Article 18 shall apply when the value of the concession, defined as the concessionaire's turnover in carrying out the contract, equals or exceeds ECU 200.000 a year, excluding VAT.
2. Where authorities intend to award a concession, they may
  - either require the concessionaire to award contracts representing a minimum of 30% of the total value of the services for which the concession is to be awarded, to third parties, at the same time providing the option for candidates to increase this percentage. This minimum percentage shall be specified in the concession contract,
  - or request the candidates for a concession to specify in their tenders the percentage, if any, of the total value of the concession which they intend to assign to third parties.
3. When a concessionaire is an authority within the meaning of Article 1(b), it shall comply, in the award of contracts to third parties, with the provisions of:
  - this Directive in the case of service contracts;
  - Directive 77/62/EEC in the case of supply contracts;
  - Directive 71/305/EEC in the case of works contracts.

4. When a concessionaire is not an authority within the meaning of Article 1(b), or a contracting entity within the meaning of Article 2 of Directive 90/531/EEC, Member States shall take the necessary steps to ensure that it shall comply, in the award of contracts to third parties, with the provisions of:
- the advertising rules as set out in Articles 17, 18 and 19 of this Directive in the case of service contracts listed in Annex IA, when the value of the contract exceeds the thresholds fixed in Article 8(1), and unless the conditions of Article 12(3) apply;
  - the advertising rules as set out in Articles 9 to 16 of Directive 77/62/EEC in the case of supply contracts, when the value of the contract exceeds the thresholds fixed in Article 5(1) (a) and unless the conditions of Article 6(4) of that Directive apply;
  - the advertising rules as set out in Articles 12 to 19 of Directives 71/305/EEC in the case of works contracts, when the value of the contract exceeds the thresholds fixed in Article 4a and unless the conditions of Article 5(3) of that Directive apply.
5. Undertakings which have formed a group in order to obtain the concession, or undertakings affiliated to them, shall not be regarded as third parties within the meaning of paragraph 4 under the conditions specified in Article 1b(4) of Directive 71/305/EEC.

#### Article 5

1. This Directive shall apply to service contracts awarded by authorities in the field of defence, except for contracts to which the provisions of Article 223 of the Treaty apply.
2. This Directive shall not apply to services which are declared secret or the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or when the protection of the basic interests of that State's security so requires.

#### Article 6

This Directive shall not apply to contracts governed by different procedural rules and awarded:

- (a) pursuant to an international agreement concluded between a Member State and one or more non-member countries and covering services intended for the joint implementation or exploitation of a project by the signatory States; every agreement shall be communicated to the Commission, which may consult the Advisory Committee for Public Contracts set up by Council Decision 71/306/EEC<sup>(8)</sup>;
- (b) to undertakings in a Member State or a non-member country in pursuance of an international agreement relating to the stationing of troops;
- (c) pursuant to the particular procedure of an international organisation.

#### Article 7

The provisions of this Directive shall not apply to the award of public service contracts which authorities have to award to an entity which is itself a contracting authority within the meaning of Article 1(b) pursuant to an exclusive right established by a published law, regulation or administrative provision which is compatible with the Treaty.

#### Article 8

1. The provisions of this Directive shall apply to service contracts whose estimated value net of VAT is not less than ECU 200.000 or, in the case of the contracting authorities included in Annex I to Council Directive 80/767/EEC<sup>(9)</sup>, ECU 130.000.
2. For the purposes of calculating the estimated value of the contract, the authority shall include the estimated total remuneration of the service provider, taking account of the provisions of paragraphs 3 to 8.
3. The selection of the valuation method shall not be used with the intention of avoiding the application of this Directive, nor shall any procurement requirement for a given amount of services be split up with the intention of avoiding the application of this Article.
4. In assessing the estimated contract value for the following types of services account shall be taken of, where appropriate:
  - as regards insurance services, the premium payable;
  - as regards banking and other financial services, fees, commissions and interests as well as other types of remuneration;
  - as regards contracts which involve design, the fee or commission payable.

Where the services are subdivided into several lots, each one the subject of a contract, the value of each lot must be taken into account for the purpose of calculating the amount referred to above. Where the value of the lots is not less than the amount referred to above, the provisions of this Directive shall apply to all lots. Authorities shall be permitted to depart from the provisions of paragraph 1 for lots which have an estimated value net of VAT of less than ECU 80.000, provided that the total estimated value of all the lots exempted does not, in consequence, exceed 20% of the total estimated value of all lots.

5. In the case of contracts which do not specify a total price, the basis for calculating the estimated contract value shall be:
  - in the case of fixed term contracts, the total contract value for its duration;
  - in the case of the contracts for an indefinite period or in cases where there is doubt as to the duration of the contracts, the monthly instalment multiplied by 48.

(9) OJ No L 215, 18.8.1980, p. 1

6. In the case of regular contracts or of contracts which are to be renewed within a given time, the contract value may be established on the basis of:
  - either the aggregate cost of similar contracts for the same categories of services awarded over the previous fiscal year or 12 months, adjusted, where possible, for anticipated changes in quantity or value over the subsequent 12 months;
  - or the estimated aggregate cost during the 12 months following first performance or during the term of the contract, where this is greater than 12 months.
7. In cases where a proposed contract specifies option clauses, the basis for calculating the contract value shall be the highest possible total inclusive of the option clauses.
8. The value of the thresholds in national currencies shall be revised every two years with effect from 1 January 1994. The calculation of these values shall be based on the average daily values of these currencies in terms of the ecu over the 24 months terminating on the last day of October immediately preceding the 1 January revision. The values shall be published in the Official Journal of the European Communities at the beginning of November.

The method of calculation referred to in the preceding subparagraph shall be examined, on the Commission's initiative, within the Advisory Committee for Public Contracts in principle two years after its initial application.

TITLE II

Two-tier application

Article 9

Contracts which have as their object services listed in Annex IA shall be awarded in accordance with the provisions of Titles III to VI.

Article 10

Contracts which have as their object services listed in Annex IB shall be awarded in accordance with Articles 16 and 18.

Article 11

Contracts which have as their object services listed in both Annexes IA and IB shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex IA is greater than the value of the services listed in Annex IB. Where this is not the case, they shall be awarded in accordance with Articles 16 and 18.

TITLE III

Choice of award procedures; and rules on design contests

Article 12

1. In awarding public service contracts the authorities shall apply the procedures defined in Article 1 (d), (e) and (f), adapted to this Directive.
2. The authorities may award their public service contracts by negotiated procedure, with prior publication of a tender notice in the following cases:
  - (a) In the event of irregular tenders in response to an open or restricted procedure or in the event of tenders which are unacceptable under national provisions that are in accordance with the provisions of Articles 19 to 24, insofar as the original terms of the contract are not substantially altered. The authority need not publish a tender notice where it includes in such negotiated procedure all the tenderers satisfying the criteria of Articles 25 to 31 which, during the prior open or restricted procedure, have submitted tenders in accordance with the formal requirements of the tendering procedure;
  - (b) In exceptional cases, when the nature of the services or the risks attaching thereto do not permit overall pricing;

(c) when the nature of the services to be procured, in particular in the case of intellectual services and services falling within category 6 of Annex IA, is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selecting the best tender according to the rules governing open or restricted procedures.

3. The authorities may award public service contracts by negotiated procedure without prior publication of a tender notice, in the following cases:

(a) in the absence of tenders or of appropriate tenders in response to an open or restricted procedure insofar as the original terms of the contract are not substantially altered and provided that a report is communicated to the Commission at its request;

(b) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the services may only be provided by a particular service provider.

(c) when the contract concerned is part of the follow-up to a design contest and must, according to the relevant national rules, be awarded to one of the winners of that contest provided that all the winners are included in the procedure;

(d) insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the authorities in question, the time-limit for the open, restricted or negotiated procedures referred to in Article 18 cannot be kept. The circumstances invoked to justify extreme urgency must not in any event be attributable to the authorities;

(e) for additional services not included in the project initially considered or in the contract first concluded but which have, through unforeseen circumstances, become necessary for the carrying out of the service described therein, on condition that the award is made to the service provider carrying out such service;

- when such services cannot be technically or economically separated from the main contract without great inconvenience to the authorities;

- or when such services, although separable from the execution of the original contract, are strictly necessary for its later stages.

However, the aggregate estimated value of contracts awarded for additional services may not exceed 50% of the amount of the main contract;

- (f) for new services consisting of the repetition of similar services entrusted to the service provider to which the same authorities awarded an earlier contract, provided that such services conform to a basic project for which a first contract was awarded according to the procedures referred to in paragraph 4. As soon as the first project is put up for tender, notice must be given that this procedure might be adopted and the total estimated cost of subsequent services shall be taken into consideration by the authorities when they apply the provisions of Article 8. This procedure may be applied solely during the three years following the conclusion of the original contract.
4. In all other cases, the authorities shall award their public service contracts by the open procedure or by the restricted procedure.

### Article 13

1. The authority shall, within 15 days of the date on which the request is received, inform any eliminated candidate or tenderer who so requests in writing of the reasons for rejection of his application or his tender, and, in the case of a tender, the name of the successful tenderer.
2. The authority shall inform candidates or tenderers who so request in writing of the grounds on which it decided not to award a contract in respect of which a prior call for competition was made, or to recommence the procedure. It shall also inform the Office for Official Publications of the European Communities of that decision.
3. For each contract awarded the authorities shall draw up a written report which shall include at least the following:
  - its name and address, 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 for his tender having been selected and, if known, any share of the contract the successful tenderer may intend to subcontract to a third party;
  - for negotiated procedures, the circumstances referred to in Article 12 which justify the use of these procedures.

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

#### Article 14

1. Design contests shall be subject to the rules set out below. When design contests are held as a separate procedure, these rules are applicable only when the total amount of contest prizes and payments to participants is not less than ECU 200 000.
2. The admission of participants to design contests shall not be limited by reference to the territory or part of the territory of a Member State.
3. In the case of design contests with a limited number of participants, authorities shall apply the rules laid down in Article 23.
4. The jury shall be composed only of persons who have no financial connections or special relationships with participants in the contest. Whenever a particular professional qualification is required from participants in a contest, the majority of the jury members shall have the same qualifications.  
  
The jury shall be autonomous in its decisions. It shall take its decisions based on projects presented in an anonymous way, and solely on the grounds of the criteria indicated in the invitation for projects in the sense of Annex IV.
5. Member States may oblige authorities to award subsequent contracts to one of the winners of a design contest.

#### TITLE IV - Common rules in the technical field

##### Article 15

1. The technical specifications defined in Annex II shall be given in the general documents or the contractual documents relating to each contract.
2. Without prejudice to the legally binding national technical rules and insofar as these are compatible with Community law, such technical specifications shall be defined by the authorities by reference to national standards implementing European standards or by reference to European technical approvals or by reference to common technical specifications.
3. An authority may depart from paragraph 2 if:
  - a) the standards, European technical approvals or common technical specifications do not include any provisions for establishing conformity, or technical means do not exist for establishing satisfactorily the conformity of a product to these standards, European technical approvals or common technical specifications;

- b) the application of paragraph 2 would prejudice the application of Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment<sup>(10)</sup>, or Council Decision 87/95/EEC of 22 December 1986 on standardisation in the field of information technology and telecommunications<sup>(11)</sup> or other Community Instruments in specific service or product areas;
  - c) use of these standards, European technical approvals or common technical specifications would oblige the authority to acquire products or materials incompatible with equipment already in use or would entail disproportionate costs or disproportionate technical difficulties, but only as part of a clearly defined and recorded strategy with a view to change-over, within a given period, to European standards, European technical approvals or common technical specifications;
  - d) the project concerned is of a genuinely innovative nature for which use of existing European standards, European technical approvals or common technical specifications would not be appropriate.
4. Authorities invoking paragraph 3 shall record, wherever possible, the reasons for doing so in the tender notice published in the Official Journal of the European Communities or in the contract documents and in all cases shall record these reasons in their internal documentation and shall supply such information on request to Member States and to the Commission.
5. In the absence of European standards or European technical approvals or common technical specifications, the technical specifications:
- (a) shall be defined by reference to the national technical specifications recognised as complying with the basic requirements listed in the Community directives on technical harmonisation, in accordance with the procedures laid down in those directives, and in particular in accordance with the procedures laid down in Council Directive 89/106/EEC<sup>(12)</sup>;
  - (b) may be defined by reference to national technical specifications relating to design and method of calculation and execution of works and use of materials;
  - (c) may be defined by reference to other documents.

In this case, it is appropriate to make reference in order of preference to:

- (1) national standards implementing international standards accepted by the country of the authority;

(10) OJ No L 217, 5.8.1986, p. 21

(11) OJ No L 36, 7.2.1987, p.31

(12) OJ No L 40, 11.2.1989, p. 12

(II) other national standards and national technical approvals of the country of the authority;

(III) any other standard.

6. Unless it is justified by the subject of the contract, Member States shall prohibit the introduction into the contractual clauses relating to a given contract of technical specifications which mention products of a specific make or source or of a particular process and which therefore favour or eliminate certain undertakings. In particular, the indication of trade marks, patents, types, or of specific origin or production shall be prohibited. However, if such indication is accompanied by the words "or equivalent", it shall be authorised in cases where the authorities are unable to give a description of the subject of the contract using specifications which are sufficiently precise and intelligible to all parties concerned.

TITLE V

Common Advertising rules

Article 16

1. Authorities shall make known, by means of an indicative notice to be published as soon as possible after the beginning of their budgetary year, the intended total procurement in each of the service categories listed in Annex IA which they envisage awarding during the coming 12 months where the total estimated value, taking account of the provisions of Article 8, is equal to or greater than ECU 750 000.
2. Authorities who wish to award a public service contract by open, restricted or, under the conditions laid down in Article 12, negotiated procedure, shall make known their intention by means of a notice.
3. Authorities who wish to award a public service concession shall make known their intention by means of a notice.
4. Authorities who wish to carry out a design contest shall make known their intention by means of a notice.

Article 17

1. Authorities who have awarded a contract or a public service concession, or which have held a design contest shall send a notice of the results of the award procedure to the Office for Official Publication of the European Communities.
2. In cases of public service contracts for services listed in Annex IA, public service concessions and design contests, the notice shall be published in accordance with the provisions referred to in Article 18.
3. In the case of public service contracts for services listed in Annex IB, the authorities shall indicate in the notice whether they agree on its publication.
4. The Commission shall draw up the rules for establishing regular reports on the basis of the notices referred to in paragraph 3, and for the publication of such reports in accordance with the procedure laid down in Article 36(3).
5. Insofar as release of information on the contract award would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of a particular enterprise, public or private, or might prejudice fair competition between service providers, such information may not be published.

Article 18

1. The notices shall be drawn up in accordance with the models set out in Annexes III, IV and V, and shall specify the information requested in those models. The authorities may not require any conditions but those specified in Articles 27 and 28 when requesting information concerning the economic and technical standards which they require of service providers for their selection (Point 13 of Annex III B, point 12 of Annex III C, and point 11 of Annex III D).
2. The following provisions of Directive 71/305/EEC shall apply:
  - (i) Article 12(6) and (8) to (13) concerning publication of notices;
  - (ii) Articles 13 to 15 concerning minimum time-limits for the phases of award procedures and communications between authorities and candidates;
  - (iii) Articles 15a and 15b concerning minimum time-limits for the award of public service concessions and contracts to be awarded by concessionnaires;
  - (iv) Article 19 concerning voluntary publication of notices in the Official Journal of the European Communities.
3. The conditions for the establishment, transmission, reception, translation, accumulation and distribution of the notices referred to in paragraphs 1 and 2 and in Articles 16 and 17, and of the statistical reports provided for in Articles 17(4) and 35 and the reference in the notices to particular CPC positions within the categories of services listed in Annexes IA and IB may be modified in accordance with the procedure laid down in Article 36(3).

TITLE VI

Chapter 1

Common rules on participation

Article 19

Contracts shall be awarded on the basis of the criteria laid down in Chapter 3, taking into account Article 20, after the suitability of the service providers not excluded under Article 25 has been checked by the authorities in accordance with the criteria referred to in Articles 27 and 28.

Article 20

1. Where the criterion for the award of the contract is that of the economically most advantageous tender, authorities may take account of variants which are submitted by a tenderer and meet the minimum specifications required by the authorities. The authorities shall state in the contract documents the minimum specifications to be respected by the variants and any specific requirements for their presentation. They shall indicate in the tender notice whether variants will be considered.

Authorities may not reject the submission of 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 or to common technical specifications referred to in Article 15(2) or again by reference to national technical specifications referred to in Article 15(5) (a) and (b).

2. Authorities which have admitted variants pursuant to paragraph 1 may not reject a variant on the sole grounds that it would lead, if successful, to a supply contract rather than a public service contract within the meaning of this Directive.

Article 21

In the contract documents, the authority may ask the tenderer to indicate in his tender any share of the contract he may intend to sub-contract to third parties.

This indication shall be without prejudice to the question of the principal service provider's liability.

Article 22

1. Tenders may be submitted by groups of service providers. These groups may not be required to assume a specific legal form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract.
2. Candidates or tenderers, who under the law of the Member State in which they are established, are entitled to carry out the relevant service activity, shall not be rejected on the sole grounds that, under the law of the Member State in which the contract is awarded, they would have been required to be either a natural or a legal person.
3. Legal persons may be required to indicate in the tender or the request for participation the names and relevant professional qualifications of the staff to be responsible for the performance of the service.

Article 23

1. In restricted and negotiated procedures the authorities shall, on the basis of information given relating to the service provider's position as well as to the information and formalities necessary for the evaluation of the minimum conditions of an economic and technical nature to be fulfilled by him, select from among the candidates with the qualifications required by Article 25 to 31 those whom they will invite to submit a tender or to negotiate.
2. Where the authorities award a contract by restricted procedure, they may prescribe the range within which the number of providers of services which they intend to invite will fall. In this case the range shall be indicated in the contract notice. The range shall be determined in the light of the nature of the service to be provided. The range must number at least five service providers and may be up to twenty.  
  
In any event, the number of candidates invited to tender shall be sufficient to ensure genuine competition.
3. Where the authorities award a contract by negotiated procedure as referred to in Article 12, the number of candidates admitted to negotiate may not be less than three, provided that there is a sufficient number of suitable candidates.
4. Each Member State shall ensure that authorities issue invitations without discrimination to those nationals of other Member States who satisfy the necessary requirements and under the same conditions as to its own nationals.

Article 24

1. The authority may state in the contract documents, or be obliged by a Member State to do so, the authority or authorities from which a candidate may obtain the appropriate information on the obligations relating to the employment protection provisions and the working conditions which are in force in the Member State, region or locality in which the services are to be performed and which shall be applicable to the services provided on site during the performance of the contract.
2. The authority which supplies the information referred to in paragraph 1 shall request the tenderers or those participating in the contract procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are in force in the place where the service is to be carried out. This shall be without prejudice to the application of the provisions of Article 33 concerning the examination of abnormally low tenders.

CHAPTER 2

Criteria for qualitative selection

Article 25

Any service provider may be excluded from participation in the contract who:

- (a) is bankrupt or is being wound up, whose affairs are being administered by the court, who has entered into an arrangement with creditors, who has suspended business activities or who is in any analogous situation arising from a similar procedure under national laws and regulations;
- (b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or for an arrangement with creditors or of any other similar proceedings under national laws or regulations;
- (c) has been convicted of an offence concerning his professional conduct by a judgement which has the force of res judicata;
- (d) who has been guilty of grave professional misconduct proven by any means which the authorities can justify;
- (e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the authority;
- (f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country of the authority;
- (g) is guilty of serious misrepresentation in supplying or failing to supply the information that may be required under this chapter.

Where the authority requires of the service provider proof that none of the cases quoted in (a), (b), (c), (e), or (f) applies to him; it shall accept as sufficient evidence:

- for (a), (b), or (c), the production of an extract from the 'judicial record' or, failing this, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or in the country whence that person comes showing that these requirements have been met,
- for (e) or (f), a certificate issued by the competent authority in the Member State concerned.

Where the country concerned does not issue such documents or certificates, they may be replaced by a declaration on oath made by the person concerned before a judicial or administrative authority, a notary or a competent professional or trade body, in the country of origin or in the country whence that person comes.

Member States shall, within the time-limit referred to in Article 40, designate the authorities and bodies competent to issue these documents and shall forthwith inform the other Member States and the Commission thereof.

#### Article 26

1. Insofar as candidates for a public contract have to possess a particular authorisation or to be members of a particular organisation in their home country in order to be able to perform the service concerned, the authority may require them to prove that authorisation or membership.
2. Any candidate or tenderer may be requested to prove his enrollment, as prescribed in his country of establishment, in one of the professional or trade registers or to provide a declaration or certificate as described in paragraph 3 below.
3. The relevant professional and trade registers or declarations or certificates are:
  - In Belgium, the "registre du commerce - Handelsregister";
  - In Denmark, the "Erhvervs- og Selskabsstyrelsen", (the "Aktieselskabsregistret"; "Forenings-Registret", or "Handelsregistret");
  - In Germany, the "Handelsregister" and the "Handwerksrolle";
  - In Greece, a declaration on the exercise of the profession concerned made on oath before a notary may be required;
  - In Spain, the "Registro Oficial de Contratistas del Ministerio de Industria y Energia";
  - In France, the "registre du commerce", and the "répertoire des métiers";

- In Italy, the "Registro della Camera di commercio, Industria, agricoltura e artigianato" or the "Registro delle commissioni provinciali per l'artigianato";
- In Luxembourg, the "registre aux firmes" and the "rôle de la Chambre des métiers";
- In The Netherlands, the "Handelsregister";
- In Portugal, the "Comissão de Alvarás de Empresas de Obras Públicas e Particulares" (CAEOPP) or the "Registro nacional das Pessoas Colectivas";
- In the United Kingdom and Ireland, the service provider may be requested to provide a certificate from the "Registrar of Companies" or the "Registrar of Friendly Societies" or, if he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established in a specific place under a given business name.

#### Article 27

1. Proof of the service provider's financial and economic standing may, as a general rule, be furnished by one or more of the following references:
  - (a) appropriate statements from banks or evidence of relevant professional risk indemnity insurance,
  - (b) the presentation of the service provider's balance sheets or extracts therefrom, where publication of the balance sheets is required under company law in the country in which the service provider is established,
  - (c) a statement of the undertaking's overall turnover and its turnover in respect of the services to which the contract relates for the three previous financial years.
2. The authorities shall specify in the notice or in the invitation to tender which reference or references they have chosen and which references other than those mentioned under paragraph 1 are to be produced.
3. If, for any valid reason, the service provider is unable to provide the references requested by the authority, he may prove his economic and financial standing by any other document which the authority considers appropriate.

#### Article 28

1. The ability of service providers to perform services may be evaluated in particular with regard to their skills, efficiency, experience and reliability.
2. Evidence of the service provider's technical capability may be furnished by one or more of the following means according to the nature, quantity and purpose of the services to be provided:

- (a) the service provider's educational and professional qualifications and/or those of the firm's managerial staff, and in particular, those of the person or persons responsible for performing the services;
  - (b) a list of the principal services provided in the past three years, with the sums, dates and recipients, public or private, of the services performed;
    - \* where provided to authorities, evidence to be in the form of certificates issued or countersigned by the competent authority;
    - \* where provided to private purchasers, delivery to be certified by the purchaser or, failing this, simply declared by the service provider to have been effected;
  - (c) indication of the technicians or technical bodies involved, whether or not belonging directly to the service provider, especially those responsible for quality control;
  - (d) a statement of the service provider's average annual manpower and the number of managerial staff for the last three years;
  - (e) a statement of the tool, plant or technical equipment available to the service provider for carrying out the services;
  - (f) a description of the service provider's measures for ensuring quality, and his study and research facilities;
  - (g) where the services to be provided are complex or, exceptionally, are required for a special purpose, a check carried out by the authority or on its behalf by a competent official body of the country in which the service provider is established, subject to that body's agreement, on the technical capacities of the service provider and, if necessary, on his study and research facilities and quality control measures;
  - (h) indication of the share of the contract which the service provider may intend to sub-contract;
3. The authority shall specify, in the notice or in the invitation to tender, which references it wishes to receive.
4. The extent of the information referred to in Article 27 and paragraphs 1 to 3 of this Article must be confined to the subject of the contract. Authorities shall take into consideration the legitimate interests of the service providers as regards the protection of their technical or trade-related secrets.

#### Article 29

Should authorities require the production of certificates drawn up by independent bodies for attesting conformity of the provider of services to certain quality assurance standards, they shall refer to quality assurance systems based on the relevant EN 29000 European standards series certified

by bodies conforming to the EN 45000 European Standards series. Authorities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent quality assurance measures from service providers who have no access to such certificates, or no possibility of obtaining them within the relevant time limits.

#### Article 30

Within the limits of Articles 25 to 28, the authority may invite the service providers to supplement the certificates and documents submitted or to clarify them.

#### Article 31

1. Member States who have official lists of recognised service providers must adapt them to the provisions of Articles 25(a) to (d) and (g) and of Articles 26 to 28.
2. Service providers registered in these lists may, for each contract, submit to the authority a certificate of registration issued by the competent authority. This certificate shall state the references which enabled them to be registered in the list and the classification given in this list.
3. Certified registration in such lists by the competent bodies shall, for the authorities of other Member States, constitute a presumption of suitability corresponding to the service provider's classification only as regards Articles 25(a) to (d) and (g), 26, 27(b) and (c) and 28(a).

Information which can be deduced from registration in official lists may not be questioned. However, with regard to the payment of social security contributions, an additional certificate may be required of any registered service provider whenever a contract is offered.

The authorities of other Member States shall apply the above provisions only in favour of service providers who are established in the country holding the official list.

4. When registering providers of services from other Member States on such a list, no proof or statement can be required in addition to those required of national providers of services and, in any case, none in addition to those required in Articles 25 to 29.
5. Those Member States that have official lists shall be obliged to inform the other Member States of the address of the body to which applications for registration should be sent.

### CHAPTER 3

#### Criteria for the award of contracts

#### Article 32

1. Without prejudice to national law, regulation or administrative provision on the remuneration of certain services, the criteria on which the authority shall base the award of contracts may be:

- (a) when the award is made to the economically most advantageous tender, various criteria relating to the contract: for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and service, delivery date, delivery period or period of completion, price, or
  - (b) the lowest price only.
2. Where the contract is to be awarded to the economically most advantageous offer, authorities shall state in the contract documents or in the tender notice the award criteria which they intend to apply and, if possible, the intended ranking or weighting which they intend to use.

### Article 33

1. If, for a given contract, tenders appear to be abnormally low in relation to the transaction, before it may reject those tenders the authority shall request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received.

The authority may take into consideration explanations which are justified on objective grounds including the economy of the service method, or the technical solutions chosen, or the exceptionally favourable conditions available to the tenderer for the provision of the service, or the originality of the service proposed by the tenderer.

If the documents relating to the contract provide for its award at the lowest price tendered, the authority must communicate to the Commission the rejection of tenders which it considers to be too low.

2. In the case of a tender submitted by a public authority or a public enterprise, the authority shall in particular enquire whether the tender is influenced by public funds allocated for
- (a) the setting-off of operating losses;
  - (b) the provision of capital;
  - (c) non-refundable grants, or loans on privileged terms;
  - (d) the granting of financial advantages by foregoing profits or the recovery of sums due;
  - (e) the foregoing of a normal return on public funds used;
  - (f) compensation for financial burdens imposed by the public authorities.

It shall inform the Commission if it intends to award a contract to a tenderer whose tender is influenced by any of these characteristics.

3. Authorities may reject tenders which are abnormally low owing to the receipt of State aid only if they have consulted the tenderer and if the tenderer has not been able to show that the aid in question has been notified to the Commission pursuant to Article 93(3) of the Treaty or has received the Commission's approval. Authorities which reject a tender under these circumstances shall inform the Commission thereof.

## TITLE VII

### Final Provisions

#### Article 34

The calculation of time-limits shall be made in accordance with Council Regulation (EEC, EURATOM) No 1182/71 of 3 June 1971, determining the rules applicable to periods, dates and time limits<sup>(13)</sup>.

#### Article 35

1. In order to permit assessment of the results of applying the Directive, Member States shall forward to the Commission a statistical report on the service contracts awarded by authorities by 31 October 1995 at the latest for the preceding year and thereafter by 31 October of every second year.
2. This report shall detail at least the number and value of contracts awarded by each authority or category of authority above the threshold, subdivided as far as possible by procedure, category of service and the nationality of the service provider to whom the contract has been awarded, and in the case of negotiated procedures, subdivided in accordance with Article 12, listing the number and value of the contracts awarded to each Member State and to third countries.
3. The Commission shall determine the nature of any additional statistical information, which is required in accordance with this Directive, in accordance with the procedure laid down in Article 36(3).

#### Article 36

1. The Commission shall be assisted by the Advisory Committee for Public Contracts set up by Decision 71/306/EEC.
2. As regards procurement of telecommunications services falling within category 5 of Annex IA, the Commission shall also be assisted by the Advisory Committee on Telecommunications Procurement set up by Directive 90/531/EEC.
3. Where reference is made to the procedure laid down in this paragraph, the representative of the Commission shall submit to the Committee a draft of the measures to be taken. The Committee shall deliver its opinion on the draft within a time-limit which the chairman may lay down according to the urgency of the matter, if necessary by taking a vote.

The opinion shall be recorded in the minutes; in addition, each Member State shall have the right to ask to have its position recorded in the minutes.

(13) OJ No L 124, 8.6.1971, p.1.

The Commission shall take the utmost account of the opinion delivered by the Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.

4. The Committees shall examine, on the Initiative of the Commission or at the request of a Member State, any question relating to the application of this Directive.

#### Article 37

1. The Member States shall inform the Commission of any general difficulties encountered, in law or in fact, by their undertakings in securing the award of public service contracts or public service concessions in third countries.
2. The Commission shall report to the Council, before 31 December 1992 and then periodically, on the opening up of public service contracts and concessions in third countries and on the state of negotiations with these countries on this subject, particularly in the GATT framework.
3. Whenever the Commission establishes, either on the basis of the reports referred to in paragraph 2, or on the basis of other information, that a third country, as regards the award of public service contracts or concessions,
  - (a) does not grant Community undertakings effective access comparable to that granted by the Community to undertakings from that country,
  - (b) does not grant Community undertakings national treatment or the same competitive opportunities as available to national undertakings, or
  - (c) grants undertakings from other third countries more favorable treatment than Community undertakings,

the Commission may initiate negotiations in order to remedy the situation.

4. Under the conditions referred to in paragraph 3, the Commission may decide, in addition to action taken pursuant to that paragraph, that the award of public service contracts or concessions to
  - (a) undertakings governed by the law of the third country in question,
  - (b) undertakings affiliated to the undertakings specified in (a) and having their registered office in the Community but having no effective and continuous link with the economy of a Member State,
  - (c) undertakings submitting tenders concerning services originating in the third country in question.

may be suspended or restricted during a period to be determined in the decision.

The Commission may decide on the appropriate measures either on its own initiative or at the request of a Member State, after consulting the Member States in accordance with the procedure laid down in Article 36(3). Where the Commission is asked to take action by a Member State, it shall take a decision within a maximum period of three months of receipt of the request.

It shall notify the Council and the Member States of the decisions taken.

Any Member State may refer the Commission's decision to the Council within a maximum period of four weeks from the date of the decision. The Council, acting by qualified majority, may take a different decision within a maximum period of three months of such referral.

5. This Article is without prejudice to the obligations of the Community in relation to non-Member countries.

#### Article 38

Article 1(1) of Council Directive 89/665/EEC<sup>(14)</sup> is replaced by the following:

- "1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and .../.../EEC<sup>(15)</sup>, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law."

#### Article 39

Not later than three years after the time limit for compliance with this Directive the Commission, acting in close cooperation with the Committees referred to in Article 36, shall review the manner in which this Directive has operated including, in particular, the effects of the application of the Directive to procurement of services listed in Annex IA and the provisions concerning technical standards. It shall evaluate, in particular, the prospects for the full application of the Directive to procurement of other services listed in Annex IB, and the effects of in-house performance of services on the effective opening-up of the market in this area. It shall make the necessary proposals to adapt the Directive accordingly.

(14) OJ No L 395, 30.12.1989, p. 33.

(15) OJ No L

Article 40

Member States shall implement the laws, regulations and administrative provisions necessary to comply with this Directive by 1 March 1992. They shall forthwith inform the Commission thereof.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

Article 41

Member States shall ensure that the texts of the basic provisions of domestic law, whether laws, regulations or administrative provisions, which they adopt to implement this Directive, are communicated to the Commission.

Article 42

This Directive is addressed to the Member States.

Done at Brussels, .....

For the Council  
The President

ANNEX I A

Services in the sense of Article 9

Cat.No.:	Subject	CPC Reference No.
1	Maintenance and repair services	6112, 6122, 633, 886
2	Land transport services, including armoured car services, and courier services, except transport of mail	712 (except 71235) 7512 87304
3	Air transport services of passengers and freight, except transport of mail	73 (except 7321)
4	Transport of mail by land, except rail, and by air	71235, 7321
5	Telecommunications services	752*
6	Financial services a) Insurance services b) Banking and investment services**	ex 81 812, 814
7	Computer and related services	84
8	R&D services***	85
9	Accounting, auditing and book-keeping services	862
10	Market research and public opinion polling services	864
11	Management consulting services and related services	865, 866****
12	Architectural services; Engineering services and integrated engineering services; Urban planning and landscape architectural services; Related scientific and technical consulting services; Technical testing and analysis services	867
13	Advertising services	871
14	Building-cleaning services and property management services	874 82201, 82202
15	Publishing and printing services on a fee or contract basis	88442
16	Sewage and refuse disposal; sanitation and similar services	94

\* except voice telephony, telex, radiotelephony, paging and satellite services

\*\* except activities involving primary government bonds and activities involving public debt management

\*\*\* as defined in the ninth recital

\*\*\*\* except arbitration and conciliation services

ANNEX I B

Services in the sense of Article 10

Cat.No.	Subject	CPC	Reference No.
17	Hotel and restaurant services		64
18	Transport services by rail		711
19	Water transport services		72
20	Supporting and auxiliary transport services		74
21	Legal services		861
22	Placement and supply services of personnel		872
23	Investigation and security services (except armoured car services)		873 (except 87304)
24	Education and vocational educational services		92
25	Health and social services		93
26	Recreational, cultural and sporting services		96
27	Other services		

ANNEX II

DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS

For the purpose of this Directive the following terms shall be defined as follows:

1. **Technical specifications:** the totality of the technical prescriptions contained in particular in the tender documents, defining the characteristics required of a work, material, product or supply, which permits a work, a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the contracting authority. These technical prescriptions shall include levels of quality, performance, safety or dimensions, including the requirements applicable to the material, the product or to the supply as regards quality assurance, terminology, symbols, testing and test methods, packaging, marking or labelling. They shall also include rules relating to design and costing, the test, inspection and acceptances for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve.
2. **Standard:** a technical specification approved by a recognised standardising body for repeated and continuous application, compliance with which is in principle not compulsory.
3. **European standard:** a standard approved by the European Committee for Standardisation (CEN) or by the European Committee for Electrotechnical Standardisation (Cenelec) as "European Standards (EN)" or "Harmonisation documents (HD)" according to the common rules of these organisations or by the European Telecommunications Standards Institute (ETSI) as a "European Telecommunication Standard" (ETS).
4. **European technical approval:** a favourable technical assessment of the fitness for use of a product, based on fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of applications and use. The European agreement shall be issued by an approval body designated for this purpose by the Member State.
5. **Common technical specification:** a technical specification laid down in accordance with a procedure recognised by the Member States to ensure uniform application in all Member States which has been published in the Official Journal of the European Communities.
6. **Essential requirements:** requirements regarding safety, health and certain other aspects in the general interest, that the construction works can meet.

ANNEX III

Model contract notices

A. Prior Information

1. The name, address, telegraphic address, telephone, telex and facsimile numbers of the authority, and, if different, of the service from which additional information may be obtained;
2. Intended total procurement in each of the service categories listed in Annex IA;
3. Estimated date for initiating the award procedures, per category;
4. Other information;
5. Date of dispatch of the notice;
6. Date of receipt of the notice by the Office for Official Publications of the European Communities

B. Open Procedure

1. The name, address, telegraphic address, telephone, telex and facsimile numbers of the authority;
2. Category of service and description;  
CPC reference number;
3. Place of delivery;
4. (a) Indication whether the execution of the service is by law, regulation, or administrative provision reserved to a particular profession;  
(b) Reference of the law, regulation or administrative provision;  
(c) Indication whether legal persons should indicate the names and professional qualifications of the staff to be responsible for the execution of the service;
5. Indication whether suppliers can tender for a part of the services concerned;
6. Variants
  - a) Where applicable, minimum specifications,
  - b) Where applicable, desirable elements;
7. Duration of contract or time limit for completion of the service;
8. (a) Name and address of the service from which the relevant documents may be requested;  
(b) Final date for making such requests;  
(c) Where applicable, the amount and terms of payment of any sum payable for such documents;
9. (a) Persons authorised to be present at the opening of tenders;  
(b) Date, time and place of the opening;
10. Where applicable, any deposits and guarantees required.
11. The main terms concerning financing and payment and/or references to the relevant provisions.
12. Where applicable, the legal form to be taken by the grouping of suppliers winning the contract.
13. Information concerning the suppliers' own position, and information and formalities necessary for an appraisal of the minimum economic and technical standards required of the supplier.
14. Period during which the tender is bound to keep open his tender.
15. Criteria for the award of the contract and their ranking. Criteria other than that of the lowest price shall be mentioned if they do not appear in the contract documents.
16. Other information.
17. Date of dispatch of the notice.
18. Date of receipt of the notice by the Office of Official Publications of the European Communities.

C. Restricted Procedure

1. The name, address, telegraphic address, telephone, telex and facsimile number of the authority;
2. Category of service and description;  
CPC reference number;
3. Place of delivery;
4. (a) Indication whether the execution of the service is by law, regulation or administrative provision reserved to a particular profession;  
(b) Reference of the law, regulation or administrative provision;  
(c) Indication whether legal persons should indicate the names and professional qualifications of the staff to be responsible for the execution of the service;
5. Indication of whether the supplier can tender for a part of the services concerned;
6. Envisaged number of suppliers, or range, which will be invited to tender;
7. Variants
  - a) Where applicable, minimum specifications,
  - b) Where applicable, desirable elements;
8. Duration of contract, or time limit for completion of the service;
9. Where applicable, the legal form to be assumed by the grouping of suppliers winning the Acontract;
10. (a) Where applicable, justification for the use of the accelerated procedure,  
(b) Final date for the receipt of requests to participate,  
(c) Address to which they must be sent,  
(d) Language(s) in which they must be drawn up;
11. Final date for the dispatch of invitations to tender;
12. Where applicable, any deposits and guarantees required;
13. Information concerning the supplier's own position, and the information and formalities necessary for an appraisal of the minimum economic and technical standards required of him;
14. Criteria for the award of the contract and their ranking if these are not stated in the invitation to tender;
15. Other information;
16. Date of dispatch of the notice;
17. Date of receipt of the notice by the Office for Official Publications of the European Communities.

D. Negotiated Procedure

1. The name, address, telegraphic address, telephone, telex and facsimile number of the authority;
2. Category of service and description;  
CPC reference number;
3. Place of delivery;
4. (a) Indication whether the execution of the service is by law, regulation or administrative provision reserved to a particular profession;  
(b) Reference of the law, regulation or administrative provision;  
(c) Indication whether legal persons should indicate the names and professional qualifications of the staff to be responsible for the execution of the service;
5. Indication of whether the supplier can tender for a part of the services concerned;
6. Envisaged number of suppliers, or range, which will be invited to tender;
7. Variants
  - a) Where applicable, minimum specifications,
  - b) Where applicable, desirable elements;
8. Duration of contract, or time limit for completion of the service;
9. Where applicable, the legal form to be assumed by the grouping of suppliers winning the contract;
10. (a) Where applicable, justification for the use of the accelerated procedure,  
(b) Final date for the receipt of requests to participate,  
(c) Address to which they must be sent,  
(d) Language(s) in which they must be drawn up;
11. Where applicable, any deposits and guarantees required;
12. Information concerning the supplier's own position, and the information and formalities necessary for an appraisal of the minimum economic and technical standards required of him;
13. Where applicable, the names and addresses of suppliers already selected by the awarding authority;
14. Other information;
15. Date of dispatch of notice;
16. Date of receipt of the notice by the Office for Official Publications of the European Communities;
17. Date(s) of previous publications in the Official Journal of the European Communities.

E. Contract Awards

1. Name and address of the authority;
2. Award procedure chosen; In case of negotiated procedure without prior publication of a tender notice, justification (Article 13(3));  
CPC reference number;
3. Category of service and description;
4. Date of award of contract;
5. Criteria for award of contract;
6. Number of tenders received;
7. Name and address of supplier(s);
8. Price or range of prices (minimum/maximum) paid;
9. Where appropriate, value and proportion of contract likely to be subcontracted to third parties;
10. Other information;
11. Date of publication of the tender notice in the Official Journal of the European Communities;
12. Date of dispatch of the notice;
13. Date of receipt of the notice by the Office for Official Publications of the European Communities;
14. In the case of contracts for services listed in Annex IB, agreement, by the contracting authority, on publication of the notice (Article 18(3)).

ANNEX IV

Design Contest Notices

1. The name, address, telegraphic address, telephone, telex and facsimile numbers of the authority and of the service from which the relevant documents may be obtained;
2. Project description;
3. Nature of the contest: open or restricted;
4. In the case of open contests: final date for receipt of projects;
5. In the case of restricted contests:
  - a) the envisaged number of participants, or range;
  - b) where applicable, names of already selected participants;
  - c) the criteria to be applied in the selection of participants;
  - d) final date for receipt of requests to participate;
6. Where applicable, indication whether participation is reserved to a particular profession;
7. The criteria to be applied in the evaluation of projects;
8. Where applicable, names of selected members of the jury;
9. Indication whether the decision of the jury is binding for the authority;
10. Where applicable, the number and value of the prizes to be awarded;
11. Where applicable, details on payments to all participants;
12. Indication whether the prize-winners are entitled to be awarded any follow-up contracts;
13. Other information;
14. Date of dispatch of the notice.
15. Date of receipt of the notice by the office for Official Publications of the European Communities.

B. Results of Design contests

1. The name, address, telegraphic address, telephone, telex and facsimile numbers of the authority;
2. Project description;
3. Total number of participants;
4. Number of foreign participants;
5. Winner(s) of the contest;
6. Where applicable, the prize(s);
7. Other information;
8. Reference of the design contest notice;
9. Date of dispatch of the notice;
10. Date of receipt of the notice by the Office for Official Publications of the European Communities.

ANNEX V

A. Model Notice on Public Service Concessions

1. The name, address, telegraphic address, telephone, telex and facsimile numbers of the authority;
2. (a) The place of delivery;  
(b) The subject of the concession, nature and extent of the services to be provided;  
(c) Duration of contract;
3. (a) Final date for receipt of candidatures;  
(b) The address to which they must be sent;  
(c) The language or languages in which they must be drawn up;
4. Personal, technical and financial conditions to be fulfilled by the candidates;
5. The criteria for the award of the contract;
6. Where applicable, the minimum percentage of the total value of the concession contract to be awarded to third parties;
7. Other information;
8. Date of dispatch of the notice;

B. Concession awards.

1. The name, address, telegraphic address, telephone, telex and facsimile numbers of the authority;
2. The subject of the concession, nature and extent of the services to be provided;
3. Date of award of the concession;
4. Number of tenders received;
5. Name and address of the concessionnaire;
6. Other information;
7. Date of publication of the tender notice in the Official Journal of the European Communities;
8. Date of dispatch of the notice;
9. Date of receipt of the notice by the Office for Official Publications of the European Communities;

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