

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

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

Prior Information

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

Directives on public supplies and services require contracting authorities to make known, as soon as possible after the beginning of their budgetary year, by means of an indicative notice, the total procurement by product area which they envisage awarding during the subsequent 12 months where the total estimated value is equal to or greater than €750,000.

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

Publication of Tender Notices

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

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

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

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

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

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

Publication of a Contract Award Notice for Each Contract

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

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

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

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

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

SELECTION CRITERIA

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

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

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

SPECIAL CONDITIONS FOR PARTICIPATION

Subcontracting

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

Groups of Contractors, Suppliers or Service Providers

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

Requirements Relating to Working Conditions at the Works Site or at the Place where the Services are to be Performed

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

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

Conditions not Covered by the Directives

A contracting authority may lay down conditions of this nature provided that they comply with the principles of the Treaty and are mentioned in the tender notice.

AWARD CRITERIA

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

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

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

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



The Rules Governing Procedures in the Award of Public Procurement Contracts

PART ONE

THE CONTEXT

The Political Context

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

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

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

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

The Economic Importance of Public Procurement

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

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

The Community Legal Context

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

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

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

Legislative Provisions

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

Legislative action was thus called for at Community level.

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

- the best possible information to enable firms to prepare their tenders properly and satisfy the legitimate requirements of public purchasers
- the greatest possible transparency in public procurement so that decisions are taken by public purchasers in a balanced fashion throughout the Community
- gradual reform of procurement practices

Concerning 'public works' contracts and 'public supply' contracts, the initial Directives were adopted in 1971 and 1977.

They were amended several times and are now consolidated in two Directives:

- Directive 93/36/EEC coordinating procedures for the award of public supply contracts and consolidating Directives 80/767/EEC and 88/295/EEC (OJ No L 199 of 9 August 1993)

- Directive 93/37/EEC coordinating the procedures for the award of public works contracts and consolidating Directives 71/305/EEC and 89/440/EEC (OJ No L 199 of 9 August 1993)

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

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

Public Authorities

Supplies	Works	Services	Remedies
77/62/EEC	71/305/EEC		
80/767/EEC	89/440/EEC		
88/295/EEC		92/50/EEC	89/665/EEC
93/36/EEC	93/37/EEC		

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

Utilities

Supplies, Works	Supplies, Works and Services	Remedies
90/531/EEC	93/38/EEC	92/13/EEC

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

These common rules are the following:

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

INTERNATIONAL AGREEMENTS ON PUBLIC PROCUREMENT

The GPA (Government Procurement Agreement) Plurilateral Agreement Signing and Coverage of the Agreement

On 15 April 1994, simultaneously with the conclusion of the Uruguay Round, the EU signed a new agreement with its partners aimed at the opening up of public procurement to effective competition. The new agreement, which entered into force on 1 January 1996, is more ambitious than the previous 1979 GATT agreement, which it replaces. The new agreement covers works and services, in addition to supplies.

Furthermore, it is no longer limited to procurement by central state authorities, but also covers contracts awarded by public authorities at regional and local levels. The GPA also covers the ports, airports, water, electricity and urban transport sectors. The new GPA has opened up government contracts to international bidding worth around €350 billion every year (a tenfold increase on the value of the 1979 agreement).

The GPA is built on the general principles of national treatment, non-discrimination and transparency and follows the EU Directives closely. The new agreement obliges each signatory to provide non-discriminatory and transparent procurement procedures. The GPA also provides for a system of thresholds which trigger these obligations, a prohibition on

discriminatory technical specifications, an obligation to publish tender notices and an obligation to use objective and non-discriminatory criteria for contract selection and award. The GPA also provides for challenge procedures for aggrieved suppliers as well as a dispute settlement mechanism for the parties.

Consequences of the GPA Agreement on Community Directives

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

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

The EU/USA Bilateral Agreement

On 15 April 1994, in parallel to the GPA, the European Union concluded a bilateral agreement on procurement with the USA. Most of this agreement has been integrated into the GPA in the form of amendments to the schedule of commitments granted by the EU and the USA.

It is estimated that the EU/US bilateral agreement will open around 6200 billion of public contracts to competitive bidding.

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

Other Agreements

The Commission promotes the extension of the GPA to other countries.

The Commission has already had preliminary contacts with China and Taiwan.

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

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

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

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

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

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

The Scope of Contracts

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

Public supply contracts relate to the delivery of products. These include purchase, lease, rental or hire purchase, with or without option to buy.

Public works contracts cover:

- the execution of works
- the execution and design of works
- the execution by whatever means of a work corresponding to the requirements specified by the contracting authority

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

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

Public service contracts are defined very broadly by Directive 92/50/CEE.

The definition covers all contracts for pecuniary interest concluded in writing between a service provider and a contracting authority for the execution of these services, to the exclusion of:

- public supply and public works contracts
- contracts awarded in the water, energy, transport, or telecommunications sectors

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

CONTRACTING AUTHORITIES

The following are regarded as contracting authorities:

- the State
- regional or local authorities (town councils, municipalities, Länder, regional administrations)
- bodies governed by public law
- associations formed by regional or local authorities

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

The Public Supplies, Works and Services Directives define in the same way the concept of bodies governed by public law

Bodies governed by public law are defined by the Works and Services Directives according to a set of cumulative criteria:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and
- having legal personality, and
- financed, for the most part by the State, or regional or local authorities, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law

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

VALUE THRESHOLDS

The threshold above which public supply contracts are subject to the Community rules is €200,000, except that, under Directive 93/36/EEC, a lower threshold of €128,771 applies to certain public supply contracts covered by the GATT Agreement.

The €128,771 threshold thus applies from 1 January 1994 (it is revised every two years) to public supply contracts awarded by central government and certain central entities listed in Annex I of Directive 93/36/EEC.

In the case of public works contracts, the threshold is €5 million.

The Services Directive applies to contracts worth not less than €200,000.

NB: the thresholds of the Directives will have to be modified by 1 January 1996 to comply with the GPA.

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

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

SUBSIDISED WORKS OR SERVICE CONTRACTS

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

In the Services Directive, the same provision applies to service contracts worth not less than €200,000 and awarded in connection with a subsidised works contract as defined above.

SPECIFIC FEATURES OF THE SERVICES DIRECTIVE

The Directive divides services into two categories:

- 'priority services' for which it lays down comprehensive rules along the lines of those applicable to public works and public supply contracts and described below. This category includes, for example, financial services (insurance services and banking and investment services) maintenance

and repair services, insurance, data processing, accounting, market research, advertising, architecture, street cleaning and refuse collection

- all other services, for which it requires merely:
 - a) basic transparency, generating information for future use. Contracting authorities thus have to send the Office for Official Publications of the European Union a contract award notice (see below), indicating whether they agree to it being published
 - b) compliance with common rules in the technical field

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

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

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

WHO CAN PARTICIPATE?

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

- 1) *open procedure*:
 - all interested suppliers, contractors or service providers may submit tenders
- 2) *restricted procedure*:
 - only those suppliers, contractors or service providers invited by the contracting authority may submit tenders
- 3) *negotiated procedure*:
 - the contracting authority consults suppliers, contractors or service providers of its choice and negotiates the terms of the contract with one or more of them

There are two types of negotiated procedure:

- a) negotiated procedure with publication of a notice in the Official Journal
- b) negotiated procedure without publication of a notice

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

For public supply, works and services contracts, the contracting authority has the choice between the open and the restricted procedures.

These are the generally applied procedures. The negotiated procedure may be used only in justified cases and if the conditions required for its use are fulfilled.

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

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

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

INFORMATION

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

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

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