

In the utilities sector, the Council has adopted a Directive (92/13/EEC, OJ No L 76 of 23 March 1992) harmonising review procedures for the purpose of ensuring correct application of the Utilities Directives. The national measures transposing it entered into force on 1 January 1993 (derogations: for Spain 30 June 1995, for Greece and Portugal 30 June 1997).

It provides, along the lines of the other Review Procedures Directive, swift and effective review procedures that make it possible to:

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

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

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

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

ACTION BY THE COMMISSION AGAINST MEMBER STATES UNDER ARTICLE 169 OF THE EEC TREATY

While conflicts are to be settled primarily at national level, any supplier, contractor or service provider who considers that they have been harmed by an unlawful decision taken by a contracting authority is free to submit a complaint to the Commission. Complaints may be made at the same time as proceedings are instituted before a national court, but are in no way conditional on such legal action. Complaints can be handled confidentially, and there is no administration fee. To ensure that the Commission's action is effective, complaints should be lodged before the contract is signed, at the latest when tenders are being compared. Where a public contract has already been awarded or signed, it is in the interests of injured firms to apply to national courts for damages even before lodging a complaint with the Commission.

The national administrations have a leading role to play in ensuring effective application of the public procurement rules.

It would be desirable for them to:

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

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

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

The Commission, when it thinks fit, can propose the advisory Committee on the Opening-up of Public Procurement that they adopt the policy guidelines.

The following policy guidelines have been adopted:

- the obligation to refer to European standards
- the defining of the term 'product area'
- the contracts awarded by separate units of a contracting entity under the Utilities Directive

Concerning SMEs, on 7 May 1990 the Commission adopted a communication on promoting their participation in public procurement in the Community. This communication was followed by two further communications to the Council on this topic. The first one (1 June 1990), is of a general nature (SME participation in public procurement); the other (5 June 1990) is specifically concerned with the potential problems of enterprises supplying the utilities sectors in the structurally

disadvantaged regions of the Community, once public procurement is opened up. The communication of 1 June reviews the problems as perceived by SMEs and the progress made in pursuing the objectives of the communication of 7 May 1990. Most of the problems highlighted are not confined to SMEs but these experience more important barriers to market entry.

Thanks to a new series of Community Initiatives (SMEs INITIATIVE 94/CI80/03 laying down guidelines for operational programmes or global grants which they are invited to propose in the framework of a Community initiative concerning the adaptation of SMEs to the single market and intention of the Commission to forward in the near future to the Council, in response to the conclusions of the European Council of Cannes, a report on measures to make it easier for SMEs to participate in public procurement contracts), new measures aimed at improving the participation of SMEs in public procurements are being set up. Given their small size and lack of sophistication, the support and advisory services will be necessary to enable SMEs to increase their effectiveness in overcoming their disadvantages. What they first require is guidance as to how to discover the extent of the potential markets in their sector of activity, the extent of potential competition, and the obstacles to be surmounted.

These measures are:

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

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

Important changes which are taking place in the field of information and telecommunication technology open new opportunities to improve the efficiency of the whole public procurement process. DG XV of the European Commission has launched the SIMAP project which brings EU-wide electronic public procurement a lot closer.

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

FOR FURTHER INFORMATION

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The Rules Governing Procedures in the Award of Public Procurement Contracts

PART TWO

VARIANTS

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

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

TECHNICAL SPECIFICATIONS

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

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

THE SITUATION AT THE OUTSET

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

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

DETERMINATION OF SCOPE: ENTITIES CONCERNED

The definition given in the Utilities Directive is not confined to a simple distinction between 'public' and 'private' entities.

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

Contracting Entities

The Utilities Directive applies to:

- public authorities, ie the state, regional or local authorities, bodies governed by public law, or associations formed by one or more such authorities or bodies governed by public law
- public undertakings, ie any undertakings over which public authorities may exercise, directly or indirectly, a dominant influence by virtue of ownership, financial participation or regulation
- entities which are neither public authorities nor public undertakings, but have been granted special or exclusive rights in respect of one of the activities covered by the Directives

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

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

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

2 Cases where an entity exploits a geographical area for a particular purpose subject to a government concession or authorisation.

Such purposes are:

- exploring for, or extracting, oil, gas, coal or other solid fuels
- the provision of airport, maritime or inland port or other terminal facilities to carriers by air, sea or inland waterway

Article 3 of the Directive establishes a possibility of derogation for one specific type of procurement. Member States may request the Commission that public procurements concerning the exploitation of geographical areas for the purpose of exploring oil, gas, coal, or other solid fuels shall be subject to more flexible competitive procurement rules than the ones of the Utilities Directive. This authorisation is requested by a Member State which wishes to allow some entities to benefit from the derogation.

If the conditions of Article 3 are satisfied, the authorisation of the commission excludes these contracts from the scope of application of the Directive.

SCOPE OF CONTRACTS

The Directive covers:

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

VALUE THRESHOLDS

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

- €400,000 in the case of supply or service contracts awarded by entities carrying on an activity in the transport, drinking water or energy sectors, as defined in Article 2 of Directive 90/531/EEC
 - €600,000 in the case of supply or service contracts awarded by entities carrying on an activity in the telecommunications sector, as defined in Article 2 of Directive 90/531/EEC
 - €5 million in the case of works contracts
- These thresholds were modified in the context of the GPA for 1 January 1996.

AWARD PROCEDURES

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

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

Periodic Indicative Notice

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

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

- the notice must refer specifically to the supplies, works or services which will be the subject of the contract to be awarded
- the notice must invite interested undertakings to express their interest in writing
- the contracting entity must subsequently invite all candidates to confirm their interest in the contract concerned before beginning the selection of tenderers

Qualification System

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

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

Contracting entities may not:

- impose administrative, technical or financial conditions on some firms and not others
- require tests or proof that duplicate objective evidence is already available

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

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

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

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

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

MINIMUM PERIODS TO BE ALLOWED UNDER THE PROCEDURES

Open procedures with a prior call for competition

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

Restricted procedures and negotiated procedures with a prior call for competition

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

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

CRITERIA FOR QUALITATIVE SELECTION

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

TECHNICAL SPECIFICATIONS AND STANDARDS

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

AWARD CRITERIA

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

THIRD COUNTRY CLAUSES

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

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

2 As far as services are concerned, Member States must inform the Commission of any general difficulties encountered by their businesses in winning service contracts in third countries. The Commission is to report periodically to the Council on the opening-up of service procurement in third countries.

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

THE PROBLEM OF ENSURING COMPLIANCE WITH THE DIRECTIVES

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

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

PROBLEMS TO BE TACKLED

Implementation of Directives into National Law

Member States are under the obligation to adopt binding rules to transpose the Directives into their national law. Actually, Member States very often don't implement the Directives before the deadline.

Moreover, the implementing rules are often at variance with the spirit of the Directives, in both form and substance. Problems of interpretation and of incorporation of the national measures implementing the Directives arise frequently.

At the different stages that make up an award procedure, the Community rules are breached by public purchasers, either deliberately or through ignorance.

Here are some examples:

- deliberate splitting of contracts
- failure to supply interested firms with full and accurate information
- inclusion of discriminatory requirements in the contract documents
- failure to comply with the advertising rules:
 - misinterpretation of the scope of the Directives
 - use of direct negotiation (see the judgment delivered by the Court of Justice of the European Communities on 18 March 1992 in Commission v Spain "extension of Madrid University")
- failure to comply with the technical rules:
 - lack of references to European standards
 - application of technical specifications that give preference to domestic production (see the Court's judgment of 22 September 1988 in Commission v Ireland "Dundalk pipeline")
 - requirement of tests and certification by a domestic laboratory
- failure to comply with the rules on selection (proof of good repute, economic and financial standing and technical capability):
 - obligation to enrol on a list of approved firms to be allowed to submit a tender
 - unfair or unreasonable requirements regarding proof which are not provided for by the Directives
- failure to comply with the rules relating to award of the contract:
 - biased use of the criterion of the most economically advantageous tender
 - negotiation in open or restricted procedures (see the Court's judgment of 22 June 1993 "Storebaelt bridge")
 - use of award criteria not revealed to tenderers
 - substantial amendment of the contract documents to eliminate certain tenders
 - treatment of reservations in tenders
 - non-objective evaluation of tenders (rigging the results)
- failure to comply with the procedure for dealing with abnormally low tenders (see the Court's judgment of 22 July 1989 in the "Fratelli Costanzo" case - formula for automatically rejecting abnormally low tenders)
- misuse of the concept of unacceptable tenders

PUBLIC PROCUREMENT IS A COMPLEX, SENSITIVE AREA

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

The drafting and reading of a contract document is not easy and it becomes even more complicated when you have to do it in a foreign language. It is also difficult to get used to the different mentalities and ways of working in the other Member States. While the size of certain contracts makes them attractive to large firms, which have the necessary economic strength and technical capacity to carry out transfrontier business, it places small and medium size enterprises (SMEs) at a disadvantage. Moreover, it is not always profitable for some undertakings to sell products or services in a wide geographic area.

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

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

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

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

All these problems are even more important for SMEs, due to their size, structure and financial capacities. The opening up of public procurement for SMEs still has to be improved. Business services that can provide for SMEs and help them to become more competitive in Community markets have to be encouraged.

ACTION BEING TAKEN OR UNDER CONSIDERATION

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

Two judicial precedents are of relevance here:

- the Court's judgment of 19 November 1991 in the "Francovich-Bonifaci" case, in which it established the principle that Member States must compensate individuals for damage caused to them by non-implementation (or faulty transposition) of a Directive into national law.
- the Court's judgment of 22 June 1989 in the "Fratelli Costanzo" case, in which it ruled that public purchasers (at central or local level) are under the obligation to apply the provisions of the Directives. These may be relied on by individuals before national courts, which must refrain from applying provisions of national law that conflict with the Directives.

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

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

Any potential contractor who considers that they have been injured by an unlawful decision on the part of a contracting authority may seek review. To ensure that everyone has the same rights, the Commission drew up the review procedures Directives.

Directive 89/665/CEE (OJ No 395 of 30 December 1989) harmonises the remedies available in Member States for the purpose of ensuring correct application of the Supplies and Works Directives and the Services Directive.

This Directive requires Member States to introduce procedures for reviewing, effectively and as swiftly as possible, decisions that have infringed Community law on public procurement or national rules implementing that law.

These review procedures must make it possible, at any stage of the contract award procedure, to:

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

The Directive established a procedure enabling the Commission, as the guardian of the EC Treaty, to take action where a clear and manifest infringement of Community rules has taken place before a contract is concluded, by bringing it to the attention of the contracting authority.

In such cases, the Commission notifies the Member State and the contracting authority of the reasons which have led it to conclude that a clear and manifest infringement has been committed and requests its correction. The Member State must reply within 21 days.

The reply must contain one of the following:

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

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