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*(Acts whose publication is obligatory)*

## DIRECTIVE 98/4/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**of 16 February 1998**

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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the Economic and Social Committee [2],

Acting in accordance with the procedure laid down in Article 189b of the Treaty [3], in the light of the joint text approved by the Conciliation Committee on 26 November 1997,

(1) Whereas the Council, by its Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) [4], approved on behalf of the Community, *inter alia*, the Agreement on Government Procurement, hereinafter referred to as 'the Agreement', the purpose of which is to establish a multilateral framework of balanced rights and obligations with respect to government procurement with a view to achieving liberalisation and expansion of world trade; whereas the Agreement has no direct effect;

(2) Whereas Directive 93/38/EEC [5] coordinated the national procedures relating to the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, in order to introduce equal conditions of competition for such contracts in all the Member States;

(3) Whereas the contracting entities covered by the Agreement which comply with Directive 93/38/EEC, as amended by this Directive, and which apply the same provisions as regards contractors, suppliers and providers of services of third countries signatory to the Agreement are therefore in conformity with the Agreement;

(4) Whereas, in view of the international rights and commitments devolving on the Community as a result of the acceptance of the Agreement, the arrangements to be applied to tenderers and products from signatory third countries are those defined by the Agreement, the scope of which does not include contracts awarded by contracting entities referred to in Article 2(1)(b) of Directive 93/38/EEC, contracts awarded by contracting entities carrying out activities referred to in Annexes III, IV, V, VI and X of that Directive, service contracts listed in Annex XVI B thereto, R&D service contracts mentioned in Category 8 of Annex XVI A thereto, telecommunications service contracts mentioned in Category 5 of Annex XVI A thereto, whose Common Products Classification (CPC) numbers are 7524, 7525 and 7526 and financial service contracts mentioned in Category 6 of Annex XVI A thereto, in connection with the issue, sale, purchase or transfer of securities or

[1] OJ C 138, 3.6.1995, p. 49 and OJ C 28, 29.1.1997, p. 4.
[2] OJ C 256, 2.10.1995, p. 4 and OJ C 212, 22.7.1996, p. 13.
[3] Opinion of the European Parliament of 22 October 1996 (OJ C 347, 18.11.1996, p. 25), Council Common Position of 20 December 1996 (OJ C 111, 9.4.1997, p. 65) and Decision of the European Parliament of 14 May 1997 (OJ C 167, 2.6.1997, p. 53). Decision of the European Parliament of 16 December 1997 and Decision of the Council of 15 December 1997.
[4] OJ L 336, 23.12.1994, p. 1.
[5] OJ L 199, 9.8.1993, p. 84. Directive as last amended by the 1994 Act of Accession.

other financial instruments, and central bank services;

(5) Whereas certain provisions of the Agreement introduce more favourable conditions for tenderers than those laid down in Directive 93/38/EEC;

(6) Whereas, when contracts are awarded by contracting entities within the meaning of the Agreement, the opportunities for access to public service, public supply and public works contracts available under the Treaty to undertakings and products from the Member States must be at least as favourable as the conditions of access to public contracts within the Community accorded under the arrangements contained in the Agreement to undertakings and products from third countries which are signatories to the Agreement;

(7) Whereas it is therefore necessary to adapt and supplement the provisions of Directive 93/38/EEC;

(8) Whereas the need to ensure a real opening-up of the market and a fair balance in the application of procurement rules in these sectors continues to require that the entities to be covered must be identified on a basis other than by reference to their legal status;

(9) Whereas the amendments made to Directive 93/38/EEC should not prejudice the equal treatment of contracting entities operating in the public sector and in the private sector;

(10) Whereas it must be ensured, in keeping with Article 222 of the Treaty, that the rules in Member States governing the system of property ownership are not to be prejudiced;

(11) Whereas the application of Directive 93/38/EEC must be simplified and the balance which has been reached in the current Community legislation in the field of public procurement in these sectors must be maintained as far as possible;

(12) Whereas it is therefore necessary to extend the applicability of certain of the adaptations of Directive 93/38/EEC to all the contracting entities and sectors covered by this Directive;

(13) Whereas contracting entities may seek or accept advice which may be used in the preparation of specifications for a specific procurement, provided that such advice does not have the effect of precluding competition;

(14) Whereas the Commission shall make available to small and medium-sized undertakings the training and information materials they need to enable them to participate fully in the changed procurement market;

(15) Whereas the opening-up of contracts in the sectors covered by this Directive might have adverse effects upon the economies of the Hellenic Republic and the Portuguese Republic, which will have to endure considerable strain; whereas it is appropriate that these member States be granted adequate additional periods to implement this Directive,

HAVE ADOPTED THIS DIRECTIVE:

*Article 1*

Without prejudice to the international rights and commitments devolving on the Community as a result of the acceptance of the Agreement, which defines the arrangements to be applied to tenderers and products from third countries which are signatories to the Agreement, the current scope of which does not include contracts awarded by contracting entities referred to in Article 2(1)(b) of Directive 93/38/EEC, contracts awarded by contracting entities carrying out activities referred to in Annexes III, IV, V, VI and X of that Directive, service contracts listed in Annex XVI B thereto, development service contracts mentioned in Category 8 of Annex XVI A thereto, telecommunications service contracts mentioned in Category 5 of Annex XVI A thereto, whose Common Product Classification (CPC) numbers are 7524, 7525 and 7526, and financial service contracts mentioned in Category 6 of Annex XVI A thereto in connection with the issue, sale, purchase or transfer of securities or other financial instruments, and central bank services, Directive 93/38/EEC is hereby amended as follows:

1. in Article 14

(a) paragraph 1 shall be replaced by the following:

'1. This Directive shall apply to:

(a) contracts awarded by contracting entities carrying out activities referred to in Annex X([1]), provided that the estimated value, net of value added tax (VAT), is not less than:

(i) ECU 600 000 in the case of supply and service contracts;

(ii) ECU 5 000 000 in the case of works contracts;

(b) contracts awarded by contracting entities carrying out activities referred to in Annexes I, II, VII, VIII and IX([2]), provided that the estimated value, net of VAT, is not less than:

(i) the equivalent in ECU of 400 000 special drawing rights (SDR) for supply contracts and for the service contracts listed in Annex XVI A,

except for the R&D services mentioned in Category 8 and Category 5 telecommunications services, the CPC reference numbers of which are 7524, 7525 and 7526;

(ii) ECU 400 000 in the case of service contracts other than those mentioned in (i);

(iii) the equivalent in ECU of 5 000 000 SDR for works contracts;

(c) contracts awarded by contracting entities carrying out activities referred to in Annexes III, IV, V, and VI([3]), provided that the estimated value, net of VAT, is not less than:

(i) ECU 400 000 in the case of supply and service contracts;

(ii) ECU 5 000 000 in the case of works contracts.

([1]) Annex X: contracting entities in the telecommunications sector.

([2]) Annex I: entities in the sectors covering the production, transport or distribution of drinking water.

Annex II: entities in the sectors covering the production, transport or distribution of electricity.

Annex VI: entities in the field of urban railway, tramway, trolleybus or bus services.

Annex VIII: entities in the field of airport facilities.

Annex IX: entities in the field of maritime or inland port or other terminal facilities.

([3]) Annex III: entities in the sectors covering the transport or distribution of gas or heat.

Annex IV: entities in the sectors covering the exploration for and extraction of oil or gas.

Annex V: entities in the sectors covering the exploration for and extraction of coal or other solid fuels.

Annex VI: entities in the field of railway services.';

(b) the following paragraphs shall be added:

'14. The value in national currencies of the thresholds laid down specified in paragraph 1 shall, in principle, be revised every two years with effect from 1 January 1996. The calculation of such value shall be based on the average daily values of those currencies expressed in ecus over the 24 months terminating on the last day of August preceding the revision with effect from 1 January. These values shall be published in the *Official Journal of the European Communities* at the beginning of November.

15. The values of the thresholds of the Agreement on Government Procurement, concluded in the framework of the Uruguay Round multilateral negotiations(*), hereinafter referred to as the "Agreement", expressed in ecus shall in principle be revised every two years with effect from 1 January 1996. The calculation of these values shall be based on the average daily value of the ecu expressed in SDR over the 24 months terminating on the last day of August preceding the 1 January revision. These values shall be published as provided for in paragraph 14.

16. The methods of calculation laid down in paragraphs 14 and 15 shall be examined pursuant to the second subparagraph of Article 5(1)(c) of Directive 93/36/EEC.

(*) Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ No L 336, 23.12.1994, p. 1).';

2. Article 21(2)(c) shall be replaced by the following:

'(c) contracting entities shall subsequently invite all candidates to confirm their interest on the basis of detailed information on the contract concerned before beginning the selection of tenderers or participants in negotiations. The information must include at least the following:

(i) the nature and quantity, including any options for further procurement and, if possible, an estimate of the timing when such options may be exercised; in the case of recurring contracts the nature and quantity and, if possible, an estimate of the timing of the subsequent calls for competition for the works, supplies or services to be procured;

(ii) whether the procedure is restricted or negotiated;

(iii) any date for starting or completing the delivery of supplies or for performing works or services;

(iv) the address and final date for submitting an application to be invited to tender, as well as the language or languages in which it must be submitted;

(v) the address of the entity awarding the contract and providing any information necessary for obtaining specifications and other documents;

(vi) any economic and technical requirements, financial guarantees and information required from suppliers, undertakings or providers of services;

(vii) the amount and terms of payment of any sum payable for the documentation relating to the procurement procedure; and

(viii) whether the entity is inviting offers for purchase, lease, rental or hire purchase, or more than one of these methods.';

3. Article 22(1)(b) shall be replaced by the following:

'(b) in the case of works contracts, the essential characteristics of the works contracts which the contracting entities intend to award, the estimated value of which is not less than:

— the threshold laid down in Article 14(1)(a)(ii) as regards contracts intended to be awarded by entities carrying out an activity referred to in Annex X,

— the threshold laid down in Article 14(1)(b)(iii) as regards contracts intended to be awarded by entities carrying out an activity referred to in Annexes I, II, VII, VIII and IX, or

— the threshold laid down in Article 14(1)(c)(ii) as regards contracts intended to be awarded by entities carrying out an activity referred to in Annexes III, IV, V and VI.';

4. Article 23(1) and (2) shall be replaced by the following:

'1. This Article shall apply to design contests organized as part of a procedure leading to the award of a service contract whose estimated value net of VAT for which is not less than:

— the threshold laid down in Article 14(1)(a)(i) as regards contracts intended to be awarded by entities carrying out an activity referred to in Annex X,

— the threshold laid down in Article 14(1)(b)(i) or (ii) as regards contracts intended to be awarded by entities carrying out an activity referred to in Annexes I, II, VII, VIII and IX, or

— the threshold laid down in Article 14(1)(c)(i) as regards contracts intended to be awarded by entities carrying out an activity referred to in Annexes III, IV, V and VI.

2. This Article shall apply to all design competitions where the total amount of competition prizes and payments to participants is not less than:

— the threshold laid down in Article 14(1)(a)(i) as regards contracts intended to be awarded by entities carrying out an activity referred to in Annex X,

— the threshold laid down in Article 14(1)(b)(i) or (ii) as regards contracts intended to be awarded by entities carrying out an activity referred to in Annexes I, II, VII, VIII and IX, or

— the threshold laid down in Article 14(1)(c)(i) as regards contracts intended to be awarded by entities carrying out an activity referred to in Annexes III, IV, V, and VI.';

5. Article 24(2) shall be replaced by the following:

'2. Information provided under Section I of Annex XV or under Annex XVIII shall be published in the *Official Journal of the European Communities*. In this connection the Commission shall respect any sensitive commercial aspects which the contracting entities may point out when forwarding this information in connection with points 6, 9 and 11 of Annex XV.';

6. Article 26 shall be replaced by the following:

*'Article 26*

1. In open procedures the time limit for the receipt of tenders shall be fixed by contracting entities at not less than 52 days from the date of dispatch of the notice. This time limit may be replaced by one which is sufficiently long to allow those concerned to submit valid tenders and which, as a general rule, shall not be less than 36 days and in any case not less than 22 days from the date on which the contract notice was dispatched, if the contracting entities have sent the *Official Journal of the European Communities* a periodic indicative notice in accordance with Article 22(1), provided that this notice contains the information required in Parts II and III of Annex XIV, insofar as that information is available at the time of publication of the notice referred to in Article 22(1).

This periodic indicative notice must furthermore have been dispatched to the *Official Journal of the European Communities* within a minimum of 52 days and a maximum of 12 months before the

date on which the contract notice provided for in Article 21(1)(a) is dispatched to the *Official Journal of the European Communities*.

2. In restricted procedures and in negotiated procedures with a prior call for competition, the following shall apply:

(a) the time limit for receipt of requests to participate, in response to a notice published in accordance with Article 21(1)(a) or in response to an invitation from a contracting entity in accordance with Article 21(2)(c), shall, as a general rule, be at least 37 days from the date of dispatch of the notice or invitation and shall in any case not be less than the time limit for publication laid down in Article 25(3), plus 10 days;

(b) the time limit for receipt of tenders may be fixed by mutual agreement between the contracting entity and the selected candidates, provided that all tenderers are given equal time to prepare and submit tenders;

(c) where it is not possible to reach agreement on the time limit for the receipt of tenders, the contracting entity shall fix a time limit which shall, as a general rule, be at least 24 days and shall in any case not be less than 10 days from the date of the invitation to tender; the time allowed shall be sufficiently long to take account in particular of the factors mentioned in Article 28(3).';

7. in Article 28:

(a) paragraph 5 shall be replaced by the following:

'5. Requests for participation in contracts and invitations to tender must be made by the most rapid means of communication possible. When requests to participate are made by telegram, telex, fax, telephone or any other electronic means, Member States may require them to be confirmed by letter dispatched before the expiry of the time limit referred to in Article 26(2).';

(b) the following paragraph shall be added:

'6. Tenders shall be submitted in writing, directly or by mail. Member States may authorise the submission of tenders by any other means making it possible to ensure:

— that each tender contains all the information necessary for its evaluation,

— that the confidentiality of tenders is maintained pending their evaluation,

— that, where necessary for reasons of legal proof, such tenders are confirmed as soon as possible in writing or by dispatch of a certified copy,

— that tenders are opened after the time-limit for their submission has expired.';

8. Article 30(1) shall be replaced by the following:

'1. Contracting entities which so wish may establish and operate a system of qualification of suppliers, contractors or service providers.

Entities establishing or operating a qualification system shall ensure that suppliers, contractors and service providers may apply for qualification at any time.';

9. Article 35(1) shall be replaced by the following:

'1. Article 34(1) shall not apply where a Member State bases the award of contracts on other criteria, within the framework of rules in force at the time of adoption of this Directive, which are intended to give preference to certain tenderers, provided that the rules invoked are compatible with the Treaty.';

10. Article 38 shall be repealed;

11. Article 41 shall be replaced by the following:

'*Article 41*

1. Contracting entities shall keep appropriate information on each contract which shall be sufficient to permit them at a later date to justify decisions taken in connection with:

(a) the qualification and selection of contractors, suppliers or service providers and award of contracts;

(b) recourse to derogations from the use of European specifications in accordance with Article 18(6);

(c) use of procedures without prior call for competition in accordance with Article 20(2);

(d) non-application of Titles II, III and IV in accordance with the derogations provided for in Title I.

2. The information shall be kept for at least four years from the date of award of the contract so that the contracting entity will be able, during that period, to supply the necessary information to the Commission if the latter so requests.