I

(Acts whose publication is obligatory)

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE 97/52/EC

of 13 October 1997

amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively

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 referred to in Article 189b of the Treaty [3],

(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 to 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 liberalization and expansion of world trade; whereas the Agreement has no direct effect;

(2) Whereas Directives 92/50/EEC [5], 93/36/EEC [6] and 93/37/EEC [7] coordinated the national procedures relating to public service, public supply and public works contracts respectively, in order to introduce equal conditions of competition for such contracts in all the Member States;

(3) Whereas the contracting authorities covered by the Agreement which comply with Directives 92/50/EEC, 93/36/EEC and 93/37/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, in the case of Directive 92/50/EEC, include service contracts listed in Annex I B thereto, R&D service contracts mentioned in category 8 of Annex I A thereto, telecommunications service contracts mentioned in category 5 of Annex I A

(1) OJ C 138, 3. 6. 1995, p. 1.
(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 29 February 1996 (OJ C 78, 18. 3. 1996, p. 18), Council common position of 20 December 1996 (OJ C 111, 9. 4. 1997, p. 1) and Decision of the European Parliament of 14 May 1997 (OJ C 167, 2. 6. 1997). Council Decision of 24 July 1997.
(4) OJ L 336, 23. 12. 1994, p. 1.
(5) Council Directive 92/50/EEC of 18 June 1992, relating to the coordination of procedures for the award of public service contracts (OJ L 209, 24. 7. 1992, p. 1). Directive as last amended by the 1994 Act of Accession.
(6) Council Directive 93/36/EEC of 14 June 1993, coordinating procedures for the award of public supply contracts (OJ L 199, 9. 8. 1993, p. 1). Directive as last amended by the 1994 Act of Accession.
(7) Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ L 199, 9. 8. 1993, p. 54). Directives as last amended by the 1994 Act of Accession.

thereto, whose CPC numbers are 7524, 7525 and 7526, and financial service contracts mentioned in category 6 of Annex I A thereto in connection with the issue, sale, purchase or transfer of securities or 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 Directives 92/50/EEC, 93/36/EEC and 93/37/EEC;

(6) Whereas, when contracts are awarded by contracting authorities within the meaning of the Agreement, the opportunities for access to public service, public supply and public works contracts available pursuant to 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 pursuant to 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 Directives 92/50/EEC, 93/36/EEC and 93/37/EEC;

(8) Whereas the application of these Directives must be simplified and the balance which has been reached in the current Community legislation in the field of public procurement must be maintained as far as possible;

(9) Whereas it is therefore necessary to extend the applicability of certain of the adaptations of Directive 92/50/EEC to all the services covered by this Directive;

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

(11) 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,

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 applicable to tenderers and products from signatory third countries and the current scope of which does not, in the case of Directive 92/50/EEC, include service contracts listed in Annex I B thereto, research and development (R&D) service contracts mentioned in category 8 of Annex I A thereto, telecommunications service contracts mentioned in category 5 of Annex I A thereto, the common product classification (CPC) references of which are 7524, 7525 and 7526, and financial service contracts mentioned in category 6 of Annex I A thereto in connection with the issue, purchase, sale or transfer of securities or other financial instruments, and central bank services, Directive 92/50/EEC is hereby amended as follows:

1. In Article 7:

(a) paragraphs 1 and 2 shall be replaced by the following:

'1. (a) This Directive shall apply to:

— public service contracts referred to in Article 3 (3), public service contracts concerning the services referred to in Annex I B, the services in category 8 in Annex I A and the telecommunications services in category 5 of Annex I A under CPC references 7524, 7525 and 7526, awarded by the contracting authorities referred to in Article 1 (b), where the estimated net value of value-added tax (VAT) is not less than ECU 200 000,

— public service contracts concerning the services referred to in Annex I A with the exception of the services in category 8 and the telecommunications services in category 5 under CPC references 7524, 7525 and 7526:

(i) awarded by the contracting authorities listed in Annex I to Directive 93/36/EEC where the estimated value net of VAT is not less than the equivalent in ecus of 130 000 special drawing rights (SDRs);

(ii) awarded by the contracting authorities listed in Article 1 (b) other than those referred to in Annex I to Directive 93/36/EEC and where the estimated value net of VAT is not less than the equivalent in ecus of 200 000 SDRs.

(b) The value in ecus and in national currencies of the thresholds laid down in subparagraph (a) 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 values of these currencies expressed in ecus and of the ecus expressed in SDRs over the 24 months terminating on the last day of August preceding the 1 January revision.

The method of calculation laid down in this subparagraph shall be reviewed, on a proposal from the Commission, by the advisory Committee for Public Procurement, in principle two years after its initial application.

(c) The thresholds laid down in subparagraph (a) and the values of the thresholds expressed in ecus and in national currencies shall be published in the *Official Journal of the European Communities* at the beginning of the month of November which follows the revision laid down in the first paragraph of subparagraph (b).

2. For the purposes of calculating the estimated value of the contract, the contracting authority shall include the estimated total remuneration of the service provider, taking account of the provisions of paragraphs 3 to 7.'

(b) Paragraph 8 shall be repealed.

2. Article 12 (1) and (2) shall be replaced by the following:

'1. The contracting authority shall, within 15 days of the date on which a written request is received, inform any eliminated candidate or tenderer of the reasons for rejection of his application or his tender, and any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer.

However, contracting authorities may decide that certain information on the contract award, referred to in the first subparagraph be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular undertakings, public or private, or might prejudice fair competition between service providers.

2. Contracting authorities shall promptly inform candidates and tenderers of the decisions taken on contract awards, including the reasons why they have decided not to award to a contract for which there has been an invitation to tender or to start the procedure again and, shall do so in writing if required. They shall also inform the Office for Official Publications of the European Communities of such decisions.'

3. Article 13 (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 is not less than:

— the threshold laid down in the first indent of Article 7 (1) (a), as regards the services referred to in Annex I B, the services in category 8 in Annex I A and the telecommunications services in category 5 of Annex I A under CPC references 7524, 7525 and 7526, awarded by the contracting authorities referred to in Article 1 (b), or

— the threshold laid down in (i) of the second indent of Article 7 (1) (a), as regards the services referred to in Annex I A with the exception of the services in category 8 and the telecommunications services in category 5 under CPC refernces 7524, 7525 and 7526, awarded by the contracting authorities listed in Annex I to Directive 93/36/EEC, or

— the threshold laid down in (ii) of the second indent of Article 7 (1) (a), as regards the services referred to in Annex I A with the exception of the services in category 8 and the telecommunications services in category 5 under CPC references 7524, 7525 and 7526, awarded by the contracting authorities listed in Article 1 (b) other than those referred to in Annex I to Directive 93/36/EEC.

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

— the threshold laid down in Article 7 (1) (a), first indent, as regards the services referred to in Annex I B, the services in category 8 in Annex I A and the telecommunications services in category 5 of Annex I A under CPC references 7524, 7525 and 7526, awarded by the contracting authorities referred to in Article 1 (b), or

— the threshold laid down in (i) of the second indent of Article 7 (1) (a), as regards the services referred to in Annex I A with the exception of the services in category 8 and the telecommunications services in category 5 under CPC references 7524, 7525 and 7526, awarded by the contracting authorities listed in Annex I to Directive 93/36/EEC, or

— the threshold laid down in (ii) of the second indent of Article 7 (1) (a), as regards the services referred to in Annex I A with the exception of the services in category 8 and the telecommunications services in category 5 under CPC references 7524, 7525 and 7526, awarded by the contracting authorities listed in Article 1 (b) other than those referred to in Annex I to Directive 93/36/EEC.'

4. Article 18 (2) shall be replaced by the following:

'2. The time limit for receipt of tenders laid down in paragraph 1 may be replaced by a period sufficiently long to permit responsive tendering, which, as a general rule, shall be not 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 authorities have sent the indicative notice provided for in Article 15 (1) drafted in accordance with the model in Annex III A (Prior information) 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 15 (2) was dispatched to the *Official Journal of the European Communities,* provided that the indicative notice contained, in addition, at least as much of the information referred to in the model notice in Annex III B (Open procedure) as was available at the time of publication of the notice.'

5. Article 19 (4) shall be replaced by the following:

'4. The time limit for receipt of tenders laid down in paragraph 3 may be reduced to 26 days if the contracting authorities have sent the indicative notice provided for in Article 15 (1) drafted in accordance with the model in Annex III A (Prior information) 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 15 (2) was dispatched to the *Official Journal of the European Communities,* provided that the indicative notice contained, in addition, at least as much of the information referred to in the model in Annex III C (Restricted procedure) or, where applicable, Annex III D (Negotiated procedure) as was available at the time of publication of the notice.'

6. In Article 23, the existing wording shall become paragraph 1 and the following paragraph shall be added:

'2. Tenders shall be submitted in writing, directly or by mail. Member States may authorize 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.'

7. The following Article shall be inserted:

'*Article 38a*

For the purposes of the award of public contracts by contracting authorities, Member States shall apply in their relations conditions as favourable as those which they grant to third countries in implementation of the Agreement on government procurement, concluded in the framework of the Uruguay Round multilatertal negotiations (*), hereinafter referred to as "the Agreement". Member States shall to this end consult each other within the Advisory Committee for Public Contracts on the measures to be taken pursuant to the Agreement.

(*) 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 to 1994) (OJ L 336, 23. 12. 1994, p. 1).'

8. Article 39 shall be replaced by the following:

'*Article 39*

1. In order to permit assessment of the results of applying this Directive, Member States shall forward to the Commission a statistical report on the service contracts awarded by contracting authorities during the preceding year not later than 31 October 1997 and thereafter not later than 31 October each year.

2. This report shall detail at least:

(a) in the case of contracting authorities listed in Annex I to Directive 93/36/EEC:

— the estimated overall value of contracts awarded below the threshold by each contracting authority,

— the number and value of contracts awarded above the threshold by each contracting authority, subdivided as far as possible by procedure, category of service according to the nomenclature used in Annex I 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 11, listing the number and value of contracts awarded to each Member State and to third countries;

(b) in the case of all other contracting authorities subject to this Directive, for each category of contracting authority, the number and value of contracts awarded above the threshold, subdivided, as far as possible, by procedure, category of service according to the nomenclature used in Annex I 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 11, listing the number and value of contracts awarded to each Member State and to third countries;

(c) in the case of contracting authorities listed in Annex I to Directive 93/36/EEC, the number and total value of contracts awarded by each contracting authority pursuant to derogations to the Agreement; in the case of all other contracting authorities subject to this Directive, the total value of contracts awarded by each category of contracting authority pursuant to derogations to the Agreement;

(d) any other statistical information, to be determined pursuant to the procedure provided for in Article 40 (3), which is required in accordance with the Agreement.

The statistical information required pursuant to this paragraph shall not concern contracts having as their object services listed in category 8 of Annex I A, the telecommunications services in category 5 of Annex I A, under CPC references 7524, 7525 and 7526, or the services listed in Annex I B, provided that their estimated value, net of VAT, is less than ECU 200 000.

3. The Commission shall determine, in accordance with the procedure laid down in Article 40 (3), the nature of any statistical information required pursuant to this Directive.'

9. Annex III shall be replaced by the text set out in Annex II to this Directive.

Article 2

Directive 93/36/EEC is hereby amended as follows:

1. In Article 5:

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

'1. (a) Titles II, III and IV and Articles 6 and 7 shall apply to public supply contracts awarded by:

(i) the contracting authorities referred to in Article 1 (b), including contracts awarded by the contracting authorities listed in Annex I in the field of defence in so far as products not covered by Annex II are concerned, where the estimated value net of value-added tax (VAT) is not less than the equivalent in ecus of 200 000 special drawing rights (SDRs);

(ii) the contracting authorities listed in Annex I whose estimated value net of VAT is not less than the equivalent in ecus of 130 000 SDRs; in the case of contracting authorities in the field of defence, this shall apply only to contracts involving products covered by Annex II.

(b) This Directive shall apply to public supply contracts whose estimated value equals or exceeds the threshold concerned at the time of publication of the notice in accordance with Article 9 (2).

(c) The value in ecus and in national currencies of the thresholds laid down in subparagraph (a) 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 values of these currencies expressed in ecus and of the ecu expressed in SDRs over the 24 months terminating on the last day of August immediately preceding the 1 January revision.

The method of calculation laid down in this subparagraph shall be reviewed, on a proposal from the Commission, by the Advisory Committee for Public Contracts, in principle two years after its initial application.

(d) The thresholds laid down in subparagraph (a) and the values of the