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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)

Amended by:

		Official Journal		
		No	page	date
►**M1**	European Parliament and Council Directive 97/52/EC of 13 October 1997	L 328	1	28.11.1997
►**M2**	Commission Directive 2001/78/EC of 13 September 2001	L 285	1	29.10.2001

Amended by:

►**A1**	Act of Accession of Austria, Sweden and Finland	C 241	21	29.8.1994
	(adapted by Council Decision 95/1/EC, Euratom, ECSC)	L 1	1	1.1.1995
►**A2**	Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded	L 236	33	23.9.2003

Corrected by:

►**C1** Corrigendum, OJ L 111, 30.4.1994, p. 115 (93/37/EEC)

►**C2** Corrigendum, OJ L 214, 9.8.2002, p. 1 (2001/78/EC)

NB: This consolidated version contains references to the European unit of account and/or the ecu, which from 1 January 1999 should be understood as references to the euro — Council Regulation (EEC) No 3308/80 (OJ L 345, 20.12.1980, p. 1) and Council Regulation (EC) No 1103/97 (OJ L 162, 19.6.1997, p. 1).

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COUNCIL DIRECTIVE 93/37/EEC

of 14 June 1993

concerning the coordination of procedures for the award of public works contracts

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

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

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

In cooperation with the European Parliament ([2]),

Having regard to the opinion of the Economic and Social Committee ([3]),

Whereas Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts ([4]) has been amended substantially and on a number of occasions; whereas, for reasons of clarity and better understanding, the said Directive should be consolidated;

Whereas the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State, or regional or local authorities or other bodies governed by public law entails not only the abolition of restrictions but also the coordination of national procedures for the award of public works contracts;

Whereas such coordination should take into account as far as possible the procedures and administrative practices in force in each Member State;

Whereas this Directive does not apply to certain works contracts which are awarded in the water, energy, transport and telecommunication sectors covered by Directive 90/531/EEC;

Whereas, in view of the increasing importance of concession contracts in the public works area and of their specific nature, rules concerning advertising should be included in this Directive;

Whereas works contracts of less than ECU 5 000 000 may be exempted from competition as provided for under this Directive and it is appropriate to provide for their exemption from coordination measures;

Whereas provision must be made for exceptional cases where measures concerning the coordination of procedures need not be applied, but such cases must be expressly limited;

Whereas the negotiated procedure should be considered to be exceptional and therefore only applicable in certain limited cases;

Whereas it is necessary to provide common rules in the technical field which take account of the Community policy on standards and specifications;

Whereas, to ensure development of effective competition in the field of public contracts, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community; whereas the information contained in these notices must enable contractors established in the Community to determine whether the proposed contracts are of interest to them; whereas, for this purpose, it is appropriate to give them adequate information on the works undertaken and the conditions attached thereto; whereas, more particularly, in restricted procedures advertisement is intended to

([1]) OJ No C 46, 20. 2. 1992, p. 79.
([2]) OJ No C 125, 18. 5. 1992, p. 171 and OJ No C 305, 23. 11. 1992, p. 73.
([3]) OJ No C 106, 27. 4. 1992, p. 11.
([4]) OJ No L 185, 16. 8. 1971, p. 15; Directive as last amended by ►C1 Directive 93/4/EEC (OJ No L 38, 16. 2. 1993, p.31). ◄

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enable contractors of Member States to express their interest in contracts by seeking from the contracting authorities invitations to tender under the required conditions;

Whereas additional information concerning contracts must, as is customary in Member States, be given in the contract documents for each contract or else in an equivalent document;

Whereas it is necessary to provide common rules for participation in public works contracts, including both qualitative selection criteria and criteria for the award of the contract;

Whereas it would be appropriate to enable certain technical conditions concerning notices and statistical reports required by this Directive to be adapted in the light of changing technical requirements; whereas Annex II to this Directive refers to the General Industrial Classification of Economic Activities within the European Communities (NACE); whereas the Community may, as required, revise or replace its common nomenclature and whereas it is necessary to make provision for the possibility of adapting the reference made to the NACE nomenclature in the said Annex II accordingly;

Whereas this Directive should not affect the obligations of the Member States concerning the deadlines for transposition into national law and for application indicated in Annex VII,

HAS ADOPTED THIS DIRECTIVE:

TITLE I

GENERAL PROVISIONS

Article 1

For th purpose of this Directive:

(a) ‘public works contracts’ are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority;

(b) ‘contracting authorities’ shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

A ‘body governed by public law’ means any body:

— established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

— having legal personality, and

— financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law;

The lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in the second subparagraph are set out in Annex I. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 35. To this end, Member States shall periodically notify the Commission of any changes of their lists of bodies and categories of bodies;

(c) a ‘work’ means the outcome of building or civil engineering, works taken as a whole that is sufficient of itself to fulfil an economic and technical function;

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(d) ‘public works concession’ is a contract of the same type as that indicated in (a) except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment;

(e) ‘open procedures’ are those national procedures whereby all interested contractors may submit tenders;

(f) ‘restricted procedures’ are those national procedures whereby only those contractors invited by the contracting authority may submit tenders;

(g) ‘negotiated procedures’ are those national procedures whereby contracting authorities consult contractors of their choice and negotiate the terms of the contract with one or more of them;

(h) a contractor who submits a tender shall be designated by the term ‘tenderer’ and one who has sought an invitation to take part in a restricted or negotiated procedure by the term ‘candidate’.

Article 2

1. Member States shall take the necessary measures to ensure that the contracting authorities comply or ensure compliance with this Directive where they subsidize directly by more than 50 % a works contract awarded by an entity other than themselves.

2. Paragraph 1 shall concern only contracts covered by Class 50, Group 502, of the general industrial classification of economic activities within the European Communities (NACE) nomenclature and contracts relating to building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes.

Article 3

1. Should contracting authorities conclude a public works concession contract, the advertising rules as described in Article 11 (3), (6), (7) and (9) to (13), and in Article 15, shall apply to that contract when its value is not less than ECU 5 000 000.

2. The contracting authority may:

— either require the concessionnaire to award contracts representing a minimum of 30 % of the total value of the work for which the concession contract is to be awarded, to third parties, at the same time providing the option for candidates to increase this percentage. This minimum percentage shall be specified in the concession contract,

— or request the candidates for concession contracts to specify in their tenders the percentage, if any, of the total value of the work for which the concession contract is to be awarded which they intend to assign to third parties.

3. When the concessionnaire is himself a contracting authority, as referred to in Article 1 (b), he shall comply with the provisions of this Directive in the case of works to be carried out by third parties.

4. Member States shall take the necessary steps to ensure that a concessionnaire other than a contracting authority shall apply the advertising rules listed in Article 11 (4), (6), (7), and (9) to (13), and in Article 16, in respect of the contracts which it awards to third parties when the value of the contracts is not less than ECU 5 000 000. An advertisement is not, however, required where works contracts meet the conditions laid down in Article 7 (3).

Undertakings which have formed a group in order to obtain the concession contract, or undertakings affiliated to them, shall not be regarded as third parties.

An ‘affiliated undertaking’ means any undertaking over which the concessionnaire may exercise, directly or indirectly, a dominant influence or which may exercise a dominant influence over the concessionnaire or which, in common with the concessionnaire, is

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subject to the dominant influence of another undertaking by virtue of ownership, financial participation or the rules which govern it. A dominant influence on the part of an undertaking shall be presumed when, directly or indirectly in relation to another undertaking, it:

— holds the major part of the undertaking's subscribed capital, or

— controls the majority of the votes attaching to shares issued by the undertakings, or

— can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.

A comprehensive list of these undertakings shall be enclosed with the candidature for the concession. This list shall be brought up to date following any subsequent changes in the relationship between the undertakings.

Article 4

This Directive shall not apply to:

(a) contracts awarded in the fields referred to in Articles 2, 7, 8 and 9 of Directive 90/531/EEC or fulfilling the conditions in Article 6 (2) of that Directive;

(b) works contracts which are declared secret or the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or when the protection of the basic interests of the Member State's security so requires.

Article 5

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

(a) in pursuance of an international agreement, concluded in conformity with the Treaty, between a Member State and one or more non-member countries and covering works intended for the joint implementation or exploitation of a project by the signatory States; all agreements shall be communicated to the Commission, which may consult the Advisory Committee for Public Contracts set up by Decision 71/306/EEC ([1]);

(b) to undertakings in a Member State or a non-member country in pursuance of an international agreement relating to the stationing of troops;

(c) pursuant to the particular procedure of an international organization.

Article 6

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1. This Directive shall apply to:

(a) public works contracts whose estimated value net of value-added tax (VAT) is not less than the equivalent in ecus of 5 000 000 special drawing rights (SDRs);

(b) public works contracts referred to in Article 2 (1) whose estimated value net of VAT is not less than ECU 5 000 000.

2. (a) The value in ecus and in national currencies of the threshold laid down in paragraph 1 shall in principle be revised every two years with effect from 1 January 1996. The calculation of this value shall be based on the average daily values of the ecu expressed in SDRs and of the national currencies expressed in ecus over the 24 months terminating on the last day of August preceding the 1 January revision.

([1]) OJ No L 185, 16. 8. 1971, p. 15; Decision as amended by Decision 77/63/EEC (OJ No L 13, 15. 1. 1977, p.15.