II

(Acts whose publication is not obligatory)

COUNCIL

COUNCIL DIRECTIVE

of 18 July 1989

amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts

(89/440/EEC)

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,

In cooperation with the European Parliament (1),

Having regard to the opinion of the Economic and Social Committee (2),

Whereas measures aimed at progressively establishing the internal market during the period up to 31 December 1992 need to be taken; whereas the internal market is an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured;

Having regard to the conclusions drawn by successive meetings of the European Council on the need to establish such a market,

Having regard to the White Paper on completing the internal market and in particular to the timetable and programme laid down therein for the opening up of the market for public works contracts,

Having regard to the Commission's communication to the Council of 19 June 1986 on public procurement in the Community,

(1) OJ No C 167, 27. 6. 1988, p. 76 and OJ No C 69, 20. 3. 1989, p. 69.
(2) OJ No C 319, 30. 11. 1987, p. 55.

Whereas public works contracts are governed by Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (3), as last amended by the Act of Accession of Spain and Portugal, and Council Directive 72/277/EEC of 26 July 1972 concerning the details of publication of notices of public works contracts and concessions in the *Official Journal of the European Communities* (4), by the declaration of 26 July 1971 of the representatives of the Governments of the Member States, meeting within the Council, concerning procedures to be followed in the field of public works contracts (5), and by Council Decision 71/306/EEC of 26 July 1971 setting up an Advisory Committee for Public Contracts (6), as amended by Decision 77/63/EEC (7);

Whereas, in order to guarantee real freedom of establishment and freedom to provide services in the market for public works contracts, it is necessary to improve and extend the safeguards in the directives that are designed to introduce transparency into the procedures and practices for the award of such contracts, in order to be able to monitor compliance with the prohibition of restrictions more closely and at the same time to reduce disparities in the competitive conditions faced by nationals of different Member States;

Whereas this Directive does not prevent the application of, in particular, Article 36 of the Treaty;

Whereas it is to define more precisely what is meant by public works contracts in order to take account, in particular, of

(3) OJ No L 185, 16. 8. 1971, p. 5.
(4) OJ No L 176, 3. 8. 1972, p. 12.
(5) OJ No C 82, 16. 8. 1971, p. 13.
(6) OJ No L 185, 16. 8. 1971, p. 15.
(7) OJ No L 13, 15. 1. 1977, p. 15.

new forms of such contracts, and to lay down criteria for identifying all the entities which are subject to Directive 71/305/EEC;

Whereas the list of bodies and categories of bodies in Annex I should be as exhaustive as possible;

Whereas it is also necessary to extend the provisions of Directive 71/305/EEC to works that are subsidized by the State but do not come within the terms of Article 1;

Whereas, in view of the increasing importance of concession contracts in the public works area and of their specific nature, the rules concerning advertising should be brought within Directive 71/305/EEC;

Whereas it is necessary to clarify the scope of the exemptions for certain sectors in order that divergences in the application of Directive 71/305/EEC due to divergent interpretations of the exemptions in different Member States do not increase;

Whereas the threshold value from which contracts are subject to Directive 71/305/EEC was set in 1971 at ECU 1 million and whereas, in view of the rise in the cost of construction work and the interest of small and medium-sized firms in bidding for medium-sized contracts, this threshold should now be set at ECU 5 million;

Whereas, to eliminate practices that restrict competition in general and participation in contracts by other Member States' nationals in particular, it is necessary to improve the access of contractors to procedures for the award of contracts;

Whereas it is desirable to introduce provision for a negotiated procedure such as already exists in the practice of some Member States, in order to curtail the use of the exceptional procedure provided for in Article 9 of Directive 71/305/EEC;

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

Whereas contracting authorities should be required to inform rejected candidates and tenderers of the reasons for rejection in their application or bid and to draw up a report on the conduct of the proceedings leading up to each award;

Whereas it is necessary to adapt the common rules in the technical field to the new Community policy on standards;

Whereas, to create the necessary conditions for efficient Community-wide competition for contracts so that firms from other Member States can bid on comparable terms to domestic firms and a greater level of interest and participation in contracts is aroused from a larger number of contractors, all the operations and procedures involved in the competitive tendering for contracts should be made more transparent; whereas contracting authorities should also be required, to announce forthcoming public works projects throughout the Community, and to publish, in the same way, all relevant details of how contracts have been awarded;

Whereas, in order to improve access to contracts and allow a larger number of contractors to complete and to prepare their bids in reasonable time, especially for large projects which are generally of considerable technical and organizational complexity, the time limits for the receipt of applications to bid and tenders should be lengthened;

Whereas it is in the general interest to encourage technical advances in the construction and public works sector so that transfer of technology and know-how from one Member State to another benefits not only the general public but also the construction industry;

Whereas work is under way in the Community on methods of framing specifications in terms of performance requirements instead of as detailed technical prescriptions and contractors in the Community should immediately be given the opportunity to submit variants under certain conditions;

Whereas, to ensure transparency as to how contractors propose to carry out a contract, it must be made possible for contracting authorities to be informed of any part of the contract the tenderer intends to subcontract to third parties;

Whereas it could prove useful to provide for greater transparency as to the requirements regarding the protection and conditions of employment applicable in the Member State in which the works are to be carried out;

Whereas it is appropriate that national provisions for regional development requirements to be taken into consideration in the award of public works contracts should be made to conform to the objectives of the Community and be in keeping with the principles of the Treaty;

Whereas adequate statistical provision should be included in Directive 71/305/EEC in order to improve, and to put on a more systematic basis, information on the way in which contracting authorities award their contracts;

Whereas the Kingdom of Spain has recently adopted legislation to implement Directive 71/305/EEC; whereas, given the fact that the introduction of other amendments at this stage would adversely effect the adaptation of the private sector in that Member State, it is appropriate to grant the Kingdom of Spain an additional period to implement this Directive;

Whereas the Portuguese Republic is in need of a transitional period for similar reasons;

Whereas the Hellenic Republic will be adapting its legislation to Directive 71/305/EEC and whereas incorporation, at this stage, of other Community rules would have an adverse effect upon the public works contracts sector and in particular upon certain economically important factors such as the stability, transparency and maintenance, in the medium term, of commercial conditions;

Whereas in accordance with the conclusions of the said meetings of the European Council, of the White Paper and of the said Commission communication to the Council, Directive 77/305/EEC should be amended and Directive 72/277/EEC repealed,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 71/305/EEC is hereby amended as follows:

1. Article 1 is replaced by the following:

'*Article 1*

For the 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 or of categories of such 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 30b. To this end, Member States shall periodically notify the Commission of any changes to 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;

(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 and negotiated procedure by the term "candidate".'

2. The following Articles are inserted:

'*Article 1a*

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 NACE nomenclature

and to 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 1b

1. Should contracting authorities conclude a public works concession contract as defined in Article 1 (d), the advertising rules as described in Article 12 (3), (6), (7) and (9) to (13), and in Article 15a, shall apply to that contract when its value is not less than ECU 5 000 000.

2. The contracting authority may:

— either require the concessionaire 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 concessionaire is himself one of the authorities awarding contracts within the meaning of 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 concessionaire other than an authority awarding contracts shall apply the advertising rules listed in Article 12 (4), (6), (7), and (9) to (13), and in Article 15b, 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. Advertising rules shall not be applied where works contracts meet the conditions laid down in Article 5 (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 concessionaire may exercise, directly or indirectly, a dominant influence or which may exercise a dominant influence over the concessionaire or which, in common with the concessionaire, is 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 undertaking.'

3. Article 2 is hereby repealed.

4. Article 3 (1), (2) and (3) is hereby repealed and paragraphs 4 and 5 thereof are replaced by the following:

'4. This Directive shall not apply to:

(a) works contracts awarded by carriers by land, air, sea or inland waterway;

(b) works contracts awarded by contracting authorities, in so far as those contracts concern the production, transport and distribution of drinking water, or those contracting authorities whose principal activity lies in the production and distribution of energy;

(c) 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 that State's security so requires.'

5. Article 4 is replaced by the following:

'Article 4

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 EEC 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), as amended by Decision 77/63/EEC (2);

(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.

(1) OJ No L 185, 16. 8. 1971, p. 15.
(2) OJ No L 13, 15. 1. 1977, p. 15.'

6. The following Article is inserted:

'Article 4a

1. The provisions of this Directive shall apply to public works contracts whose estimated value net of VAT is not less than ECU 5 000 000.

2. The value of the threshold in national currencies shall normally be revised every two years with effect from 1 January 1993. The calculation of this value shall be based on the average daily values of these currencies in terms of the ecu over the 24 months terminating on the last day of October immediately preceding the 1 January revision. The values shall be published in the *Official Journal of the European Communities* at the beginning of November.

3. Where a work is subdivided into several lots, each one the subject of a contract, the value of each lot must be taken into account for the purpose of calculating the amounts referred to in paragraph 1. Where the aggregate value of the lots is not less than the amount referred to in paragraph 1, the provisions of that paragraph shall apply to all lots. Contracting authorities shall be permitted to depart from this provision for lots whose estimated value net of VAT is less than ECU 1 000 000, provided that the total estimated value of all the lots exempted does not, in consequence, exceed 20 % of the total estimated value of all lots.

4. No work or contract may be split up with the intention of avoiding the application of the preceding paragraphs.

5. When calculating the amounts referred to in paragraph 1 and in Article 5, account shall be taken not only of the amount of the public works contracts but also of the estimated value of the supplies needed to carry out the works which are made available to the contractor by the contracting authorities.'

7. Article 5 is replaced by the following:

'Article 5

1. In awarding public works contracts the contracting authorities shall apply the procedures defined in Article 1 (e), (f) and (g), adapted to this Directive.

2. The contracting authorities may award their public works contracts by negotiated procedure, with prior publication of a tender notice and after having selected the candidates according to qualitative public criteria, in the following cases:

(a) in the event of irregular tenders in response to an open or restricted procedure or in the event of tenders which are unacceptable under national provisions that are in accordance with the provisions of Title IV, in so far as the original terms of the contract are not substantially altered. The contracting authorities shall not, in these cases, publish a tender notice where they include in such negotiated procedure all the enterprises satisfying the criteria of Articles 23 to 28 which, during the prior open or restricted procedure, have submitted offers in accordance with the formal requirements of the tendering procedure;

(b) when the works involved are carried out purely for the purpose of research, experiment or development, and not to establish commercial viability or to recover research and development costs;

(c) in exceptional cases, when the nature of the works or the risks attaching thereto do not permit prior overall pricing.

3. The contracting authorities may award their public works contracts by negotiated procedure without prior publication of a tender notice, in the following cases:

(a) in the absence of tenders or of appropriate tenders in response to an open or restricted procedure in so far as the original terms of the contract are not substantially altered and provided that a report is communicated to the Commission at its request;

(b) when, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, the works may only be carried out by a particular contractor;

(c) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseen by the contracting authorities in question, the time limit laid down for the open, restricted or negotiated procedures referred to in paragraph 2 above cannot be kept. The circumstances invoked to justify extreme urgency must not in any event be attributable for the contracting authorities;

(d) for additional works not included in the project initially considered or in the contract first concluded but which have, through unforeseen circumstances, become necessary for the carrying