II

(Acts whose publication is not obligatory)

COUNCIL

COUNCIL DIRECTIVE

of 22 March 1988

amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC

(88/295/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 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 the measures aimed at progressively establishing the internal market during the period up to 31 December 1992 need to be taken; whereas the internal market consists of an area without internal frontiers in which free circulation of goods, persons, services and capital is guaranteed;

Whereas successive European Councils, from Brussels on 29 and 30 March 1985 to London on 5 and 6 December 1986, have drawn conclusions concerning the internal market;

Whereas the White Paper on the completion of the internal market fixes in particular a timetable and an action programme for the opening up of public supply contracts;

Having regard to the report on the application of Directive 77/62/EEC (4), as last amended by the Act of Accession of Spain and Portugal and Directive 80/767/EEC (5), submitted by the Commission to the Council on 14 December 1984 in reply to the Council resolution of 21 December 1976;

Whereas it is necessary to improve and extend the scope of the Directives by increasing the transparency of procedures and practices for the award of public supply contracts, and to make possible stricter enforcement of the prohibition of restrictions on the free movement of goods, which constitutes the basis of these Directives;

Whereas it is necessary to amend these Directives in order to incorporate changes to the GATT Agreement on Government Procurement of December 1986;

Whereas it is necessary to develop the conditions of effective competition for public supply contracts and the economic, budgetary and industrial benefits which result from it;

Whereas it is necessary to that end to define the extent of the exemptions by sector in order to ensure, in view of the divergent interpretations, that the imbalances in the application of the Directives between Member States do not increase;

(1) OJ No C 173, 11. 7. 1986, p. 4, OJ No C 161, 19. 6. 1987, p. 10 and OJ No C 303, 13. 11. 1987, p. 3.
(2) OJ No C 13, 18. 1. 1988, p. 66.
(3) OJ No C 68, 16. 3. 1987, p. 7.
(4) OJ No L 13, 15. 1. 1977, p. 1.
(5) OJ No L 215, 18. 8. 1980, p. 1.

Whereas the arrangements applicable to contracts awarded by contracting authorities in the defence sector need to be clarified by reference to the provisions of the Treaty;

Whereas it is appropriate to lay down the applicable thresholds, including the GATT-related threshold, in a single provision;

Whereas the open procedure best assures the establishment of equal conditions for participating in public contracts in all the Member States; whereas it is necessary to make the use of this procedure the rule, with the use of other procedures requiring a justification and the establishment of reports relating to it;

Whereas in order to limit the use of the single-tender procedure it is appropriate to create a negotiated procedure, which already exists in the practice of certain Member States, and in addition to define the conditions where extreme urgency can be invoked and the period during which additional deliveries can be carried out;

Whereas the negotiated procedure shall be considered as exceptional and therefore only be applied in certain specified cases;

Whereas it is necessary to adapt the common rules in the technical field to the new Community policy in respect of standardization;

Whereas all the operations and procedures related to the supply activities of the contracting authorities should be made more transparent; whereas to this end it is appropriate that the public buyers make known their purchasing programmes by means of advance information notices at Community level and that contracting authorities which use non-competitive tendering should permit other potential suppliers to establish and show their interest in such purchases and that information on the conditions under which contracts have been awarded should also be made public by the same method in order to stimulate more interest and participation on the part of a greater number of suppliers at Community level in public supply contracts;

Whereas it is necessary to fix certain time limits in order to avoid delays in the transmission of advance information notices and notices on contracts awarded;

Whereas the time limits for the receipt of requests for participation and tenders in the framework of public supply contracts should be extended in order to improve access and participation by a greater number of suppliers;

Whereas it is desirable for national provisions on the award of public supply contracts in favour of regional development to be included in the Community's objectives;

Whereas the Kingdom of Spain has recently adopted internal legislation to implement Directive 77/62/EEC; whereas, since further changes at this stage would adversely affect the adaptation of the private sector in that country, it is appropriate to allow the Kingdom of Spain additional time to implement the present Directive in its entirety;

Whereas the Portuguese Republic needs a transitional period for similar reasons;

Whereas the Hellenic Republic is in the process of adapting the national law to Directive 77/62/EEC and the incorporation at this stage of further Community rules would adversely affect the public supply contract sector, in particular with regard to certain economically significant factors, such as stability, transparency and the maintenance, in the medium term, of trading conditions;

Whereas, following the conclusions of the said European Councils and of the White Paper, and having regard to the said report, Directive 77/62/EEC should be amended and certain provisions of Directive 80/767/EEC repealed,

HAS ADOPTED THIS DIRECTIVE:

TITLE I

Amendments to Directive 77/62/EEC

Article 1

Directive 77/62/EEC is hereby amended in accordance with the provisions of this Title.

Article 2

In Article 1:

1. Point (a) is replaced by the following:

'(a) "public supply contracts" shall be contracts for pecuniary interest concluded in writing involving the purchase, lease, rental or hire purchase, with or without option to buy, of products between a supplier (a natural or legal person) and one of the contracting authorities defined in (b) below. The delivery of such products may in addition include siting and installation operations.'

2. The following points are added:

'(d) "open procedures" are those national procedures whereby all interested suppliers can present an offer;

(e) "restricted procedures" are those national procedures whereby only those suppliers invited by the contracting authorities may submit tenders;

(f) "negotiated procedures" are those national procedures whereby contracting authorities consult suppliers of their choice and negotiate the terms of the contract with one or several of them.'

Article 3

In Article 2:

1. Paragraph 1 is deleted.

2. Paragraph 2 is replaced by the following:

'2. This Directive shall not apply to:

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

(b) public supply 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, nor to those contracting authorities whose principal activity is to offer telecommunications services;

(c) supplies which are declared secret or when their delivery 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 require.'

Article 4

The following Article is inserted:

'Article 2a

Without prejudice to Articles 2, 3 and 5 (1), this Directive shall apply to all products within the meaning of Article 1 (a), including those covered by contracts awarded by contracting authorities in the field of defence, except for the products to which the provisions of Article 223 (1) (b) of the Treaty apply.'

Article 5

Article 4 is deleted.

Article 6

Article 5 is replaced by the following:

'Article 5

1. (a) Titles II, III and IV and Article 6 shall apply to public supply contracts:

— awarded by the contracting authorities referred to in Article 1 (b) including contracts awarded by the contracting authorities in the field of defence listed in Annex I to Directive 80/767/EEC, in so far as the products not listed in Annex II to the said Directive are concerned, provided that the estimated value net of VAT is not less than 200 000 ECU,

— awarded under the terms and conditions of Directive 80/767/EEC by the contracting authorities listed in Annex I to the said Directive and whose estimated value net of VAT is not less than 130 000 ECU; in the case of contracting authorities in the field of defence, this shall apply only to contracts involving products covered by Annex II to the said Directive;

(b) the Directive shall apply to public supply contracts for which the 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 of the thresholds in national currencies and the threshold of the GATT Agreement expressed in ECU shall in principle be revised every two years with effect from 1 January 1988. The calculation of these values shall be based on the average daily values of these currencies expressed in ECU and of the ECU expressed in SDRs over the 24 months terminating on the last day of October immediately preceding the 1 January revision. These values shall be published in the *Official Journal of the European Communities* at the beginning of November;

(d) the method of calculation laid down in subparagraph (c) shall be examined, on the Commission's initiative, by the Advisory Committee for Public Contracts, in principle two years after its initial application.

2. In the case of contracts for the lease, rental or hire purchase of products, the basis for calculating the estimated contract value shall be:

— in the case of fixed-term contracts, where their term is 12 months or less, the total contract value for its duration, or, where their term exceeds 12 months its total value including the estimated residual value,

— in the case of contracts for an indefinite period or in cases where there is doubt as to the duration of the contracts, the monthly value multiplied by 48.

3. In the case of regular supply contracts or of contracts which are to be renewed within a given time, either the aggregate cost of similar contracts concluded over the previous fiscal year or 12 months adjusted, where possible, for anticipated changes in quantity or value over the subsequent 12 months or the estimated aggregate cost during the 12 months following first delivery or during the term of the contract where this is greater than 12 months must be taken as the basis for the application of paragraph 1. The selection of the valuation method shall not be used with the intention of avoiding the application of this Article.

4. If a proposed procurement of supplies of the same type may lead to contracts being awarded at the same time in separate parts, the estimated value of the total sum of these parts must be taken as the basis for the application of paragraphs 1 and 2.

5. In the cases where a proposed procurement specifies option clauses, the basis for calculating the estimated contract value shall be the highest possible total of the purchase, lease, rental, or hire-purchase permissible, inclusive of the option clauses.

6. No procurement requirement for a given quantity of supplies may be split up with the intention of avoiding the application of this Article.'

Article 7

Article 6 is replaced by the following text:

'Article 6

1. In awarding public supply contracts the contracting authorities shall apply the procedures laid down in Article 1 (d), (e) and (f), adapted to this Directive, in the cases set out below.

2. The contracting authorities may award their supply contracts using the restricted procedure in justified cases.

Such justification may *inter alia* be constituted by:

— a need to maintain a balance between contract value and procedural costs,

— the specific nature of the products to be procured.

3. The contracting authorities may award their supply contracts by negotiated procedure in the case of irregular tenders in response to an open or restricted procedure or in the case of tenders which are unacceptable under national provisions that are in accordance with provisions of Title IV, in so far as the original terms for the contract are not substantially altered. The contracting authorities shall in these cases publish a tender notice unless they include in such negotiated procedures all the enterprises satisfying the criteria of Articles 20 to 24 which, during the prior open or restricted procedure, have submitted offers in accordance with the formal requirements of the tendering procedure.

4. The contracting authorities may award their supply contracts by negotiated procedure without prior publication of a tender notice in the following cases:

(a) in the absence of 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;

(b) when the articles involved are manufactured purely for the purpose of research, experiment, study or development, this provision does not extend to quantity production to establish commercial viability or to recover research and development costs;

(c) when, for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the goods supplied may be manufactured or delivered only by a particular supplier;

(d) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities, the time limits laid down for the open and restricted procedures cannot be met.

The circumstances invoked to justify extreme urgency must not in any case be attributable to the contracting authorities;

(e) for additional deliveries by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance. The length of such contracts as well as that of recurrent contracts may, as a general rule, not exceed three years.

5. In all other cases, the contracting authorities shall award their supply contracts by the open procedure.

6. In the case of restricted or negotiated procedures, the contracting authorities shall draw up a written report which shall contain the justification for the use of that procedure and shall include at least the name and address of the contracting authority, the value, quantity and nature of products purchased, the number of requests to participate received, the number of candidates invited to submit an offer and, where applicable, the number of candidates rejected and the reasons for their rejection. The report shall also indicate in the case of the use of negotiated tender procedures the circumstances referred to in paragraphs 3 and 4 above with due justification which have led to the use of these procedures.

This report, or the main features of it, shall be communicated to the Commission at its request.'

Article 8

Article 7 is replaced by the following:

'Article 7

1. The technical specifications defined in Annex II shall be given in the general documents or the contractual documents relating to each contract.

2. Without prejudice to the legally binding national technical rules in so far as these are compatible with Community law, such technical specifications shall be defined by the contracting authorities by reference to national standards implementing European standards, or by reference to common technical specifications.

3. A contracting authority may depart from the principle laid down in paragraph 2, if:

(a) the standards do not include provision for establishing conformity, or technical means do not exist to establish satisfactorily conformity of a product to these standards;

(b) the application of paragraph 2 would prejudice the application of Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment (1), or Council Decision 87/95/EEC of 22 December 1986 on standardization in the field of information technology and telecommunications (2) or other Community instruments in specific service or product areas;

(c) use of these standards would oblige the contracting authority to acquire supplies incompatible with equipment already in use or would entail disproportionate costs or disproportionate technical difficulties, but only as part of a clearly defined and recorded strategy with a view to changeover, within a determined period, to European standards or common technical specifications;

(d) the project concerned is of a genuinely innovative nature for which use of existing standards would not be appropriate.

4. Contracting authorities invoking paragraph 3 shall record, unless it is impossible, the reasons for doing so in the tender notice published in the *Official Journal of the European Communities* and in all cases shall record these reasons in their internal documentation and shall supply such information on request to Member States and to the Commission.

5. In the absence of European standards or common technical specifications, the technical specifications may be defined, without prejudice to the principles of equivalence and mutual recognition of national technical specifications, by reference to other documents. In this case it is appropriate to make reference in order of preference to:

(a) national standards implementing international standards accepted in the country of the contracting authority;

(b) other national standards of the country of the contracting authority;

(c) any other standard.

6. Unless such specifications are justified by the subject of the contract, Member States shall prohibit the introduction into the contractual clauses relating to a given contract of technical specifications which mention goods of a specific make or source or of a particular process and which have the effect of favouring or eliminating certain undertakings or products. In particular, the indication of trade marks, patents, types or specific origin or production shall be prohibited; however, such an indication accompanied by the words "or equivalent" shall be authorized where the subject