II

(Acts whose publication is not obligatory)

COUNCIL

COUNCIL DIRECTIVE

of 21 December 1976

coordinating procedures for the award of public supply contracts

(77/62/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament (1),

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

Whereas restrictions on the free movement of goods in respect of public supplies are prohibited by the terms of Articles 30 *et seq.* of the Treaty;

Whereas that prohibition should be supplemented by the coordination of the procedures relating to public supply contracts in order, by introducing equal conditions of competition for such contracts in all the Member States, to ensure a degree of transparency allowing the observance of this prohibition to be better supervised;

Whereas access to public supply contracts for products originating in countries other than the Member States is the subject of the Council resolution of 21 December 1976 (3) and of the Commission statement of 21 December 1976 (4);

Whereas, in the case of public works contracts, coordination was based on certain principles relating to the prohibition of technical specifications having a discriminatory effect, to the advertising of contracts throughout the Community, to the fixing of objective criteria as to entitlement to compete for contracts and the introduction of a joint supervision procedure to ensure observance of these principles; whereas this method and these principles should be applied likewise to public supply contracts with adjustments to take account of the individual character of the contracts in question;

Whereas this Directive does not prevent the application, in particular, of Articles 36 and 223 of the Treaty;

Whereas the bodies currently administering transport services in the Member States are governed in some cases by public law, in others by private law;

(1) OJ No C 46, 9. 5. 1972, p. 34.
(2) OJ No C 30, 25. 3. 1972, p. 17.
(3) OJ No C 11, 15. 1. 1977, p. 1.
(4) OJ No C 11, 15. 1. 1977, p. 2.

whereas, in accordance with the objectives of the common transport policy equality of treatment should be ensured not only between separate undertakings concerned with the same mode of transport but also between such undertakings and undertakings concerned with other modes of transport;

Whereas, pending the drafting of measures for coordinating the procedures applicable to transport bodies and in view of the said special circumstances, those authorities referred to above, which by reason of their legal status would fall within it, should be excluded from the scope of the Directive;

Whereas it is necessary to avoid subjecting the production, distribution and transmission or transport services for water and energy and telecommunications services to different supply contract systems, depending on whether they come under the State, regional or local authorities or other legal persons governed by public law or whether they have separate legal personality; whereas it is therefore necessary to exclude from the scope of the Directive those services referred to above which by reason of their legal status would fall within its scope until such time as a final solution can be adopted in the light of experience;

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

Whereas supply contracts of less than 200 000 European units of account can be exempted, inasmuch as their impact on competition is limited;

Whereas by Decision No 3289/75/ECSC of 18 December 1975 [1] the Commission, with the assent of the Council, defined a European unit of account which represents an average value of the variations in the currencies of the Member States; whereas the value of this unit of account in each of the currencies of the Member States is determined daily; whereas its use for the purposes of the Directive requires that a reference date be fixed;

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 suppliers 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 about the goods to be supplied; whereas, more particularly in restricted procedures, advertisement is intended to enable suppliers 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 the Member States, be given in the contract documents for each contract or in an equivalent document;

Whereas, as indicated in the Council resolution of 21 December 1976 [2], the Directive will be reviewed and may be revised,

HAS ADOPTED THIS DIRECTIVE:

TITLE I

General provisions

Article 1

For the purpose of this Directive:

(a) 'public supply contracts' shall be contracts for pecuniary consideration concluded in writing between a supplier (a natural or legal person) and one of the contracting authorities defined in (b) below for delivery of the products. Such delivery may in addition include siting and installation operations;

(b) 'contracting authorities' shall be the State, regional or local authorities and the legal persons governed by public law or, in Member States where the latter are unknown, bodies corresponding thereto as specified in Annex I;

(c) a supplier who submits a tender shall be designated by the term 'tenderer', and one who has sought an invitation to take part in a restricted procedure by the term 'candidate'.

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[1] OJ No L 327, 19. 12. 1975, p. 4.

[2] OJ No C 11, 15. 1. 1977, p. 3.

Article 2

1. In awarding public supply contracts, the contracting authorities shall apply their national procedures, adapted to this Directive.

2. This Directive shall not apply to:

(a) public supply contracts awarded by bodies which administer transport services;

(b) public supply contracts awarded by bodies which administer production, distribution and transmission or transport services for water or energy and telecommunications services.

3. When the State, a regional or local authority or one of the legal persons governed by public law or corresponding bodies specified in Annex I grants to a body other than the contracting authority — regardless of its legal status — special or exclusive rights to engage in a public service activity, the instrument granting this right shall stipulate that the body in question must observe the principle of non-discrimination by nationality when awarding public supply contracts to third parties.

Article 3

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

(a) pursuant to an international agreement concluded between a Member State and one or more non-member countries and covering supplies intended for the joint implementation or exploitation of a project by the signatory States; every agreement 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) See page 15 of this Official Journal.

Article 4

1. National procedures whereby any interested supplier may tender shall be subject to the provisions relating to 'open procedures' within the meaning of this Directive (Articles 7 to 10, 13, 17, 18 and 20 to 25).

2. National procedures whereby suppliers may tender only if invited to do so by the contracting authorities shall be subject to the provisions relating to 'restricted procedures' within the meaning of this Directive (Articles 7 to 9, 11, 12, 14, 15 and 17 to 25).

3. Contracts awarded in the cases referred to in Article 6 shall be subject to the provisions of Article 7 only.

Article 5

1. (a) The provisions of Titles II, III and IV and of Article 6 shall apply, under the conditions laid down in Article 4, to public supply contracts whose estimated value net of VAT is not less than 200 000 European units of account.

(b) The European unit of account shall be that defined by Decision No 3289/75/ECSC.

(c) The exchange value in national currencies to be applied shall be the average of the daily value of these currencies over the preceding 12 months calculated on the last day of October every two years, with effect from the following 1 January. This exchange value, calculated by the Commission, shall be published in the *Official Journal of the European Communities* during the first days of November.

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

(e) This method shall in any event be reviewed once the Council has acted on the proposal for a Regulation, submitted by the Commission, applying the European unit of account (EUA) to the general budget of the European Communities and to the legal acts adopted by the institutions.

2. In the case of regular supply contracts or of contracts which are to be renewed within a given

time the 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.

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

4. No purchase requirement for a certain quantity of supplies may be split up with the intention of avoiding the application of this Article.

Article 6

1. Contracting authorities may award their supply contracts without applying the procedures referred to in Article 4 (1) and (2) in the following cases:

(a) in the absence of tenders, or in the event of irregular tenders following adoption of one of the procedures laid down in this Directive, 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 for the contract are not substantially altered;

(b) 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;

(c) where the articles involved are manufactured purely for purposes of research, experiment, study or development;

(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 limit laid down in the procedures covered by Article 4 (1) and (2) cannot be kept;

(e) for additional deliveries by the original supplier which are intended either as part replacement of normal supplies or installations, or as the extension of existing supplies or installations where a change of supplier would compel the contracting authority to purchase equipment having different technical characteristics which would result in incompatability or disproportionate technical difficulties of operation or maintenance;

(f) for goods quoted and purchased on a commodity market in the Community;

(g) when supplies are declared secret or when their delivery must be accompanied by special security measures in accordance with the provisions laid down by law, regulation or administrative action in force in the Member State concerned, or when the protection of the basic interests of that State's security so requires;

(h) for equipment supply contracts in the field of data-processing, and subject to any decisions of the Council taken on a proposal from the Commission and defining the categories of material to which the present exception does not apply. There can no longer be recourse to the present exception after 1 January 1981 other than by a decision of the Council taken on a proposal from the Commission to modify this date.

2. Before the end of June of each year, Member States shall send the Commission a statement of the number and total value of contracts awarded in the preceding calendar year on the basis of provisions (a) to (f) of paragraph 1, at least as regards contracts awarded by States, Länder, regions, provinces or departments. Member States shall, as far as possible, classify the contracts awarded according to each of the categories in the foregoing provisions.

TITLE II

Common rules in the technical field

Article 7

1. The technical specifications defined in Annex II and the description of testing, checking and acceptance methods shall figure in the general or the contractual documents relating to each contract. Such technical specifications may be defined by reference to appropriate standards.

In this case it is appropriate to make reference, in order of preference, to:

1. Community standards which are binding by virtue of an act of the Communities;

2. other Community standards (in particular ECSC standards) or European standards (in particular ESC and CENELEC standards) accepted by the country of the contracting authority;

3. international standards accepted by the country of the contracting authority (in particular ISO and IEC standards);

4. the national standards of the country of the contracting authority;

5. any other standard.

2. 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 productions shall be prohibited; however, such an indication accompanied by the words 'or equivalent' shall be authorized where the subject of the contract cannot otherwise be described by specifications which are sufficiently precise and fully intelligible to all concerned.

Article 8

When projects are put up for competition or when invitations to tender permit tenderers to submit variations on a project of the administration, the contracting authorities may not reject a tender solely on the grounds that it has been drawn up by means of different technical calculations from those used in the country where the contract is being awarded, provided that the tender accords with the terms and conditions of the contract documents. Tenderers must include with their tenders all the evidence needed for examining the project and must supply any additional explanations which the contracting authorities consider necessary.

TITLE III

Common advertising rules

Article 9

1. Contracting authorities who wish to award a public supply contract by open or restricted procedure shall make known their intention by means of a notice.

2. Such notice shall be sent as soon as possible by the most appropriate channels to the Office for Official Publications of the European Communities and shall be published in full in the *Official Journal of the European Communities* in the official languages of the Communities, the original text alone being authentic. It shall be drawn up in accordance with the models given in Annex III.

3. Under the accelerated procedure provided for in Article 12, the notice shall be published, in its original language only, in all editions of the *Official Journal of the European Communities.*

4. The notice referred to in the preceding paragraphs shall be published in the *Official Journal of the European Communities* not later than nine days after the date of dispatch and, in the case of the accelerated procedure provided for in Article 12, not later than five days after that date.

5. The notice shall not be published in the Official Journals or in the press of the country of the contracting authorities before the date of its dispatch, and it shall mention this date. It shall not contain information other than that published in the *Official Journal of the European Communities.*

6. The contracting authorities must be able to supply evidence of the date of dispatch.

7. The cost of the publication of notices in the *Official Journal of the European Communities* shall be borne by the Communities. No notice may be longer than one page of the Journal; that is to say, approximately 650 words. Notices shall be drawn up in accordance with the model notices contained in Annex III. Every edition of the *Official Journal of the European Communities* which contains a notice or notices shall reproduce the model notice or notice on which the published notice or notices are based.

Article 10

1. In open procedure, the time limit for the receipt of tenders fixed by the contracting authorities shall be not less than 36 days from the date of dispatch of the notice.