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COUNCIL DIRECTIVE

of 26 July 1971

concerning the co-ordination of procedures for the award of public works contracts

(71/305/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 100 thereof;

Having regard to the General Programme for the abolition of restrictions on freedom of establishment,[1] and in particular Title IV B1 thereof;

Having regard to the General Programme for the abolition of restrictions on freedom to provide services,[2] and in particular Title V C (e) 1 thereof;

Having regard to the proposal from the Commission;

Having regard to the Opinion of the European Parliament[3];

Having regard to the Opinion of the Economic and Social Committee[4];

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 legal persons governed by public law entails not only the abolition of restrictions but also the co-ordination of national procedures for the award of public works contracts;

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

Whereas the Council, in a statement concerning the aforementioned General Programmes, has stressed that co-ordination should be based on the following principles: prohibition of technical specifications that have a discriminatory effect, adequate advertising of contracts, the fixing of objective criteria for participation and the introduction of a procedure of joint supervision to ensure the observation of these principles;

Whereas some of the bodies which currently administer transport services in the Member States are governed by public law and some by private law; whereas, in accordance with the objectives of the common transport policy, equality of treatment should be ensured not only between separate undertakings concerned with a single mode of transport but also between such undertakings and undertakings concerned with other modes of transport;

Whereas, therefore, pending the adoption of provisions concerning the co-ordination of procedures which take into account the special circumstances described above, it is necessary to exclude from the scope of this Directive authorities referred to above which, by reason of their legal status, would fall within its scope;

Whereas it is necessary to avoid the subjection of the production, distribution and transmission or transportation services for water and energy to different systems for their works contracts, 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 this Directive those services referred to above which by reason of their legal status, would fall within its scope until such time as a definitive solution can be adopted in the light of experience;

Whereas provision must be made for exceptional cases where measures concerning the co-ordination of

[1] OJ No 2, 15.1.1962, p. 36/62.
[2] OJ No 2, 15.1.1962, p. 32/62.
[3] OJ No 62, 13.4.1965, p. 883/65.
[4] OJ No 63, 13.4.1965, p. 929/65.

procedures may not necessarily be applied, but such cases must be expressly limited;

Whereas works contracts of less than 1 000 000 units of account can, for the moment, be exempted from competition as provided for under this Directive, and it is appropriate to provide for their exemption from co-ordination measures; whereas, in the light of experience, the Commission will at a later date submit to the Council a new proposal for a Directive whose aim is to lower the threshold for the application of co-ordination measures to public works contracts;

Whereas to ensure development of effective competition in the field of public contracts it is necessary that contract notices drawn up by the authorities of Member States awarding contracts 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 about the services to be provided and the conditions attached thereto; whereas, more particularly, in restricted procedures advertisement is intended to enable contractors of Member States to express their interest in contracts by seeking from the authorities awarding contracts 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;

HAS ADOPTED THIS DIRECTIVE:

TITLE I

General provisions

Article 1

For the purposes of this Directive:

(a) 'public works contracts' are contracts for pecuniary consideration concluded in writing between a contractor (a natural or legal person) and an authority awarding contracts as defined under (b), which have as their object one of the activities referred to in Article 2 of the Council Directive of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in the field of public works contracts and on the award of public works contracts to contractors through acting agents or branches[1];

(b) the State, regional or local authorities and the legal persons governed by public law specified in Annex I shall be regarded as 'authorities awarding contracts';

(c) a contractor who has submitted 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'.

Article 2

In awarding public works contracts, the authorities awarding contracts shall apply their national procedures adapted to the provisions of this Directive.

Article 3

1. In the event of the authorities awarding contracts concluding a contract of the same type as that indicated in Article 1 (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, the provisions of this Directive shall not apply to this so called 'concession' contract. In all other cases, application of the procedures for the award of public contracts shall be compulsory.

2. When the concessionaire is himself one of the authorities awarding contracts, he must apply the national procedures for the award of public works contracts adapted to the provisions of this Directive for works to be carried out by third parties.

3. When the State, a regional or local authority or one of the legal persons governed by public law specified in Annex I grants to a concessionaire other than an authority awarding contracts the right to have public works carried out and to exploit them, the concession contract shall stipulate that such concessionaire must observe the principle of non-discrimination on grounds of nationality in respect of contracts awarded to third parties.

4. Public works contracts awarded by bodies which are governed by public law and which administer transport services shall not be subject to the provisions of this Directive.

5. The provisions of this Directive shall not apply to public works contracts awarded by the

[1] OJ No L 185, 16.8.1971, p. 1.

production, distribution, transmission or transportation services for water and energy.

Article 4

The Directive shall not apply to public contracts awarded by a Member State:

— in pursuance of an international agreement concluded with a third country which, in respect of the award of contracts, contains provisions which differ from those of this Directive;

— to undertakings of third countries in pursuance of an international agreement which excludes undertakings of Member States;

— in accordance with the particular procedure of an international organisation.

Article 5

1. National procedures whereby any interested contractor may tender shall be subject to the provisions relating to 'open procedures' within the meaning of this Directive (Articles 10 to 13, 16, 20 and 23 to 29).

2. National procedures whereby contractors may tender only if invited to do so by the authorities awarding contracts shall be subject to the provisions relating to 'restricted procedures' within the meaning of this Directive (Articles 10 to 12, 14, 15, 17, 18, 20 to 29).

3. Contracts awarded in the cases referred to in Article 9 shall be subject to the provisions of Article 10 only.

Article 6

In the case of contracts relating to the design and construction of a public housing scheme whose size and complexity, and the estimated duration of the work involved, require that planning be based from the outset on close collaboration within a team comprising representatives of the authorities awarding contracts, experts and the contractor to be responsible for carrying out the works, a special award procedure may be adopted for selecting the contractor most suitable for integration into the team.

In particular, authorities awarding contracts shall include in the contract notice as accurate as possible a description of the works to be carried out so as to enable interested contractors to form a valid idea of the project. Furthermore, authorities awarding contracts shall, in accordance with the provisions of Articles 23 to 28, set out in such contract notice the personal, technical and financial conditions to be fulfilled by candidates.

Where such procedure is adopted, authorities awarding contracts shall apply the common advertising rules relating to restricted procedure and to the criteria for qualitative selection.

Article 7

1. The provisions of Titles II, III and IV and Article 9 shall apply, under the conditions laid down in Article 5, to public works contracts whose estimated value is not less than 1 000 000 units of account.

2. No contract may be split up with the intention of avoiding the application of this Article.

Article 8

When calculating the amounts referred to in Articles 7, 9 and 29 account shall be taken not only of the amount of the 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 authorities awarding contracts.

Article 9

Authorities awarding contracts may award their works contracts without applying the provisions of this Directive, except those of Article 10, 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 terms of the original contract are not substantially altered;

(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) for works carried out purely for purposes of research, experiment, study or development;

(d) in so far as is strictly necessary when, for reasons of extreme urgency brought by events unforeseen by the authorities awarding contracts, the time limit laid down in other procedures cannot be kept;

(e) when works are declared secret or when their execution 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;

(f) for additional works not included in the contract originally considered or in the contract first concluded but which have, through unforeseen circumstances, become necessary for carrying out the work described therein, on condition that the award is made to the contractor carrying out such work;

— when such works cannot be technically or financially separated from the main contract without great inconvenience to the authorities awarding contracts;

— or when such works, although separable from the execution of the original contract, are strictly necessary to its later stages;

however, the aggregate value of contracts awarded for additional works may not exceed 50% of the value of the original contract;

(g) for new works consisting of the repetition of similar works entrusted to the undertaking to which the same authorities awarding contracts awarded an earlier contract, provided that such works conform to a basic project for which a first contract was awarded according to the procedures referred to in Article 5;

as soon as the first project is put up for tender, notice must be given that this procedure might be adopted and the total estimated cost of subsequent works shall be taken into consideration by the authorities awarding contracts when they apply the provisions of Article 5. This procedure may only be applied during the three years following the conclusion of the original contract;

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

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 year on the basis of the present Article, at least as regards contracts awarded by States, Länder, regions, provinces or départments. Member States shall, as far as possible, classify the contracts awarded according to each of the cases cited in this Article.

TITLE II

Common rules in the technical field

Article 10

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

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 products of a specific make or source or of a particular process and which therefore favour or eliminate certain undertakings. In particular, the indication of trade marks, patents, types, or of a specific origin or production, shall be prohibited. However, if such indication is accompanied by the words 'or equivalent', it shall be authorised in cases where the authorities awarding contracts are unable to give a description of the subject of the contract using specifications which are sufficiently precise and intelligible to all parties concerned.

Article 11

When projects are put up for competition or when invitations to tender permit contractors to submit variations on a project of the administration, the authorities awarding contracts may not reject a tender solely on the grounds that it has been drawn up using a method for pricing the works which differs from that used in the country where the contract is being awarded, provided that the tender accords with the terms and conditions of the contract documents. The tenderer must include with his tender all the evidence needed for examining the project and must supply any additional explanations which the authorities awarding contracts consider necessary.

TITLE III

Common advertising rules

Article 12

Authorities awarding contracts who wish to award a public works contract by open or restricted procedure shall make known their intention by means of a notice.

Such notice shall be sent to the Official Publications Office 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.

Under the accelerated procedure provided for in Article 15, the notice shall be published in its original language only, in the four editions of the *Official Journal of the European Communities*.

The notice referred to in the preceding paragraph 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 15, not later than five days after that date.

The notice shall not be published in the official journals or in the specialist press of the country of the authorities awarding contracts 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*.

The authorities awarding contracts must be able to supply evidence of the date of dispatch.

Article 13

In open procedures, the time limit for the receipt of tenders shall be fixed by the authorities awarding contracts at no less than thirty-six days from the date of sending the notice. Provided it has been requested in good time, additional information relating to the contract documents shall be supplied by the authorities awarding contracts not later than six days before the final date fixed for receipt of tenders.

Where tenders can only be made after a visit to the site or after inspection of the documents supporting the contract documents, the time limits laid down in the preceding paragraph shall be extended accordingly.

Article 14

In restricted procedures, the time limit for receipt of requests to participate shall be fixed by the authorities awarding contracts at not less than twenty one days from the date of sending the notice.

The authorities awarding contracts shall simultaneously and in writing invite the selected candidates to submit their tenders.

The time limit for the receipt of tenders shall be fixed by the authorities awarding contracts at not less than twenty-one days from the date of sending the written invitation. Provided it has been requested in good time, additional information relating to the contract documents must be supplied by the authorities awarding contracts at least six days before the final date fixed for receipt of tenders.

When tenders can only be made after a visit to the site or after inspection of the documents supporting the contract documents, the time limits laid down in the preceding paragraph shall be extended accordingly.

Article 15

In cases where urgency renders impracticable the time limits laid down in the preceding Article, the authorities awarding contracts may apply the shorter time limits specified below:

— a time limit for the receipt of requests to participate which shall be not less than twelve days from the date of sending the notice;

— a time limit for the receipt of tenders which shall be not less than ten days from the date of the invitation to tender.

Provided it has been requested in good time, additional information relating to the contract documents must be supplied by the authorities awarding contracts not later than four days before the final date fixed for the receipt of tenders.

Requests for participation in contracts and invitations to tender may be made in writing or by telegram, telex or telephone. When requests to participate are made by telegram, telex or telephone, they must be confirmed in writing.

Article 16

In open procedures, the notice shall include at least the following information:

(a) the date of dispatch to the Official Publications Office of the European Communities;

(b) the award procedure chosen;

(c) the site; the nature and extent of the services to be provided and the general nature of the work; if the contract is subdivided into several lots: the order of size of the different lots and the possibility of tendering for one, for several, or for all of the lots; if the notice concerns a contract which, apart from the possible carrying out of works, entails the drawing up of a project, then only the information needed by contractors to understand the purpose of the contract and to tender accordingly;