



EUROPEAN COMMISSION

**PUBLIC PROCUREMENT  
IN THE EUROPEAN UNION**

**GUIDE TO THE COMMUNITY RULES ON  
PUBLIC WORKS CONTRACTS**

**OTHER THAN IN THE WATER, ENERGY, TRANSPORT  
AND TELECOMMUNICATIONS SECTORS**

**DIRECTIVE 93/37/EEC**

*This guide has no legal value and does not necessarily  
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# I. INTRODUCTION

## THE COMMUNITY RULES ON PUBLIC WORKS CONTRACTS

### 1. GENERAL PRINCIPLES LAID DOWN IN THE TREATY

The EC Treaty does not specifically mention public procurement. It does, however, lay down fundamental principles which are generally applicable and which contracting authorities have to observe when awarding all contracts, including (as will be explained further on) those whose value falls below the threshold for application of the specific rules laid down in the Directive. The Treaty principles governing public works contracts are, in particular: the right of establishment (Articles 52 *et seq.*), the freedom to provide services (Articles 59 *et seq.*) and the general ban on discrimination on grounds of nationality (Article 6).

#### 1.1 Right of establishment

Under the first of these principles, the EC Treaty<sup>1</sup> requires Member States to allow individuals and companies from other Member States to establish and carry on a business or self-employed activities in their territory under the conditions laid down for their own nationals, subject to the provisions on capital movements.

The principle of equality of treatment with the Member States' own nationals applies to all forms of business and self-employment carried on by natural or legal persons, including those involving the setting-up of agencies, branches or subsidiaries and the formation and management of companies or firms, including cooperatives and other legal persons governed by public or private law, except those which are non-profit-making.

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<sup>1</sup> The ECSC Treaty has no provisions on the right of establishment. Articles 52 *et seq.* of the EC Treaty are consequently applicable to the fields covered by the ECSC Treaty, as they do not conflict with provisions of that Treaty. Article 97 of the Euratom Treaty provides that no restrictions based on nationality may be applied to natural or legal persons, whether public or private, under the jurisdiction of a Member State, where they desire to participate in the construction of nuclear installations of a scientific or industrial nature in the Community. This provision guarantees *inter alia* the right of establishment in connection with the construction of such installations and is directly applicable. In so far as Articles 52 *et seq.* of the EC Treaty do not conflict with provisions of the Euratom Treaty, they too are applicable in the nuclear field.

The only business or self-employed activities which are not covered by the right of establishment are those connected, even occasionally, with the exercise of official authority.

In accordance with the case-law of the Court of Justice of the European Communities, this exception is to be construed strictly and cannot be given a scope which would exceed the objective for which it was inserted in the Treaty (it is to be found in Article 55). Its purpose being to enable Member States to exclude non-nationals from taking up functions involving the exercise of official authority which are connected with one of the business or self-employed activities referred to in Article 52, this need is fully satisfied when the exclusion of non-nationals is limited to those activities which, taken on their own, constitute a direct and specific connection with the exercise of official authority.<sup>2</sup>

The right of establishment rules out both direct discrimination, where non-nationals have to comply with rules or requirements that do not apply to nationals, and indirect discrimination, in other words requirements which are applicable irrespective of nationality but whose effect is exclusively or principally to hinder the taking-up or pursuit of the activity by foreign nationals.<sup>3</sup>

The right of establishment may be limited on grounds of public policy, public security or public health: Article 56 allows Member States to apply provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on any of those grounds.

On the “principle of national treatment”, the Court had this to say:<sup>4</sup>

“Under the terms of the second paragraph of Article 52, freedom of establishment is to be exercised under the conditions laid down for its own nationals by the law of the country where establishment is effected.

In the event that the specific activities in question are not subject to any rules in the host State, so that a national of that Member State does not have to have any specific qualification in order to pursue them, a national of any other Member State is entitled to establish himself on the territory of the first State and pursue those activities there.

However, the taking-up and pursuit of certain self-employed activities may be conditional on complying with certain provisions laid down by law, regulation or administrative action justified by the general good, such as rules relating to organization, qualifications, professional ethics, supervision and liability. Such provisions may stipulate in particular that pursuit of a particular activity is restricted to holders of a diploma, certificate or other evidence of formal qualifications, to persons belonging to a professional body or to persons subject to particular rules or supervision, as the case may be.

Where the taking-up or pursuit of a specific activity is subject to such conditions in the host Member State, a national of another Member State intending to pursue that activity must in principle comply with them. It is for this reason that Article 57 provides that the

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<sup>2</sup> Judgment of 22 June 1974 in Case 2/74 *Reyners v Belgium* [1974] ECR 631.

<sup>3</sup> General programme for the abolition of restrictions on freedom of establishment (OJ No 2, 15.1.1962, p. 36/62); judgment of the Court of Justice of 28 April 1977 in Case 71/76 *Thieffry v Conseil de l'ordre des avocats à la Cour de Paris* [1977] ECR 765.

<sup>4</sup> Paragraphs 33 to 37 of the judgment of 30 September 1995 in Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

Council is to issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications or, as the case may be, for the coordination of national provisions concerning the taking-up and pursuit of activities as self-employed persons.

It follows, however, from the Court's case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it."

## **1.2 Freedom to provide services**

The freedom to provide services<sup>5</sup> is, like the right of establishment, governed by the principle of national treatment. Under the second paragraph of Article 60 of the Treaty, "the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals".

The basic difference between the right of establishment and the freedom to provide services is that the former involves a permanent business establishment in the host country, while the latter involves only temporary residence in the other Member State where the service is provided.

Freedom to provide services covers the performance of services, normally for consideration, in a Member State other than that of the service provider, where the services are not otherwise governed by the Treaty's provisions on the free movement of goods, capital and persons (in which case those special provisions are applicable). Services include activities of an industrial and commercial character and activities of craftsmen and the professions.

Transport services are excluded from the provisions on freedom to provide services and are governed exclusively by Title IV of the Treaty (Transport). There is also a special rule for banking and insurance services. These are to be liberalized in step with the progressive liberalization of capital movements.

The exceptions made in the establishment rules for activities connected with the exercise of official authority and for restrictions on grounds of public policy, public security and public health also apply to the provision of services.

Under the principle of national treatment all laws, regulations and administrative provisions and practices capable of restricting or impeding access to or the practice of self-employed occupations in the services sector by other Member States' nationals or

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<sup>5</sup> Like the right of establishment, the freedom to provide services is not regulated by the ECSC Treaty. Consequently, Articles 59 *et seq.* of the EC Treaty are also applicable to the coal and steel industries, as they do not conflict with provisions of the ECSC Treaty. In the Euratom Treaty, the principle of the freedom to provide services is established by Article 97. In so far as Articles 59 *et seq.* of the EC Treaty do not conflict with provisions of the Euratom Treaty, they reinforce the ban on discrimination enshrined in Article 97.

subjecting other Member States' nationals to different treatment from the Member State's own nationals are prohibited. Differences of treatment may derive from rules that overtly discriminate between nationals and non-nationals or from rules that apply to both.

As the Court has stated,<sup>6</sup> "Article 59 of the Treaty entails, in the first place, the abolition of any discrimination against a person providing services on account of his nationality or the fact that he is established in a Member State other than the one in which the service is provided. National rules which are not applicable to services without discrimination as regards their origin are compatible with Community law only if they can be brought within the scope of an express exemption, such as that contained in Article 56 of the Treaty.

In the absence of harmonization of the rules applicable to services, or even of a system of equivalence, restrictions on the freedom guaranteed by the Treaty in this field may arise in the second place as a result of the application of national rules which affect any person established in the national territory to persons providing services established in the territory of another Member State who already have to satisfy the requirements of that State's legislation.

As the Court has consistently held, such restrictions come within the scope of Article 59 if the application of the national legislation to foreign persons providing services is not justified by overriding reasons relating to the public interest or if the requirements embodied in that legislation are already satisfied by the rules imposed on those persons in the Member State in which they are established.

Lastly, as the Court has consistently held, the application of national provisions to providers of services established in other Member States must be such as to guarantee the achievement of the intended aim and must not go beyond that which is necessary in order to achieve that objective. In other words, it must not be possible to obtain the same result by less restrictive rules".

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<sup>6</sup> Judgment of 25 July 1991 in Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and Others v Commissariaat voor de Media* [1991] ECR I-4007.

## **2. PROVISIONS COORDINATING NATIONAL PROCEDURES**

### **2.1 Objectives**

The abovementioned Treaty principles place a general ban on discriminatory measures and unfair treatment.

However, these prohibitions were not sufficient, on their own, to establish a single market in the specific area of public procurement. Differences between national rules together with the lack of any obligation to open up contracts to Community-wide competition often conspired to keep national markets walled off from foreign competitors. Legislation was therefore needed to make sure that public contracts throughout the Community were open to firms from all Member States on equal terms and to make procurement procedures more transparent so that compliance with the principles laid down in the Treaty could be enforced more effectively.

To make it easier for firms to exercise their right of establishment and freedom to provide services in competing for public works contracts, on 26 July 1971 the Council adopted Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts.<sup>7</sup>

That coordination was based on three main principles:

- Community-wide advertising of contracts to develop real competition between economic operators in all the Member States;
- the banning of technical specifications liable to discriminate against potential foreign bidders;
- application of objective criteria for the selection of tenderers and the award of contracts.

Directive 71/305/EEC did not open up public procurement to the extent expected: the Community legislation did not provide sufficient guarantees and contained several gaps, and its application at national level reflected the protectionism which had characterized the sector for too long.

To make up for the deficiencies identified in these rules, a new directive was therefore adopted: Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts.<sup>8</sup>

The principal innovations concerned in particular:

- the definition of the Directive's scope;
- information and tendering conditions;
- transparency of procedures;
- the definition of the technical specifications.

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<sup>7</sup> OJ No L 185, 16.8.1971, p. 5.

<sup>8</sup> OJ No L 210, 21.7.1989, p. 1.

The need then became evident to combine the provisions of the above two Directives into a single consolidated instrument, so that the Community citizen could use a clear, transparent text and, hence, exercise more easily the specific rights which he enjoys.

The Works Directives were thus consolidated as Directive 93/37/EEC.<sup>9</sup>

Directive 93/37/EEC applies not only throughout the European Community but, in accordance with the Agreement on the European Economic Area,<sup>10</sup> also in Norway, Iceland and Liechtenstein<sup>11</sup>.

The European Parliament and the Council are currently discussing a proposal for a Directive<sup>12</sup> which would align the relevant provisions of Directive 93/37/EEC on those of the new Agreement on Government Procurement (GPA)<sup>13</sup> signed by the European Union on completion of the Uruguay Round of trade negotiations conducted under the auspices of what is now the World Trade Organization.

## **2.2 Legal effect**

As regards legal effect, Article 189 of the EC Treaty states that “a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”.

The Member States are obliged, therefore, to adopt and implement all the arrangements and measures necessary to bring their national law into line with the provisions of directives addressed to them.

As Directive 93/37/EEC is only a consolidation of the existing Works Directives, the Community legislature has obviously not set a deadline for its transposal, and it is therefore applicable immediately. It has, however, maintained the obligations laid

down in the various earlier provisions concerning the time-limits for their transposal and application. Thus, the only time-limits for application still running are those for Greece and Portugal (1 January 1998), and only in the case of the provisions relating to contracts concluded in the water, energy, transport and telecommunications sectors.

The effectiveness of the Directives is not, however, necessarily dependent on the implementing measures taken by the Member States concerned.

In accordance with the established case-law of the Court of Justice concerning direct effect, when the time-limit for transposal into national law expires a Member State may

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<sup>9</sup> OJ No L 199, 9.8.1993, p. 54.

<sup>10</sup> OJ No L 1, 3.1.1994, p. 1.

<sup>11</sup> Decision of the EEA Council No 1/95 of 10 March 1995, OJ No L 86, 20.4.1995, p. 58.

<sup>12</sup> OJ No C 138, 3.6.1995, p. 1.

<sup>13</sup> OJ No C 256, 3.9.1996, p. 1.

not rely on the non-fulfilment of the formalities for transposing a directive into national law or on the adoption of measures which are inconsistent with a directive in order to preclude its courts from applying provisions capable of producing direct effects.

In accordance with the principles established by the Court to determine whether provisions have direct effect, an examination should be made in each case as to whether the nature, structure and terms of the provision in question are likely to produce direct effects in relations between Member States and individuals. Such is the case, as a general rule, where a provision expresses a clear, precise and unconditional obligation allowing the Member States to which the directive is addressed no room for interpretation.

In addition, “when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities (...) are obliged to apply those provisions”.<sup>14</sup>

The Court took the line that it would be contradictory to hold that private individuals are entitled to avail themselves of the provisions of a directive fulfilling the above conditions before national courts, with a view to obtaining judgment against the authorities, and yet to find that the latter are not obliged to apply the provisions of the directive by disregarding those provisions of national law which are not consistent with the directive.

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<sup>14</sup> Paragraph 31 of the Court’s judgment of 22 June 1989 in Case 103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECR 1839.



## II. THE CONSOLIDATED DIRECTIVE 93/37/EEC

### 1. WHAT IS MEANT BY “PUBLIC WORKS CONTRACTS”?

#### 1.1 Definition

Public works contracts are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority, which have as their object:

- either the execution, or both the execution and design, of works related to one of the activities (building and civil engineering, installation and building completion work) covered by Class 50 of NACE<sup>15</sup> or of a work;
- or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority.

A work is defined by the Directive as “the outcome of building or civil engineering works taken as a whole” – e.g. a hospital, theatre or bridge – “that is sufficient of itself to fulfil an economic and technical function”, i.e. fully equipped and completed.

#### 1.2 The contractor

As the Court has stated,<sup>16</sup> the concept of the contractor must be interpreted so as to include not only a natural or legal person who will himself carry out the works but also a person who will have the contract carried out through agencies or branches or will have recourse to technicians or outside technical divisions. or even a group of undertakings, whatever its legal form. In the case in point, the Court ruled that “a holding company which does not itself execute works may not, because its subsidiaries which do not carry out works are separate legal persons, be precluded on that ground from participation in public works contract procedures”.<sup>17</sup>

#### 1.3 The contracting authority

The Directive defines contracting authorities as the State, regional or local authorities, bodies governed by public law, or associations formed by one or more such authorities or bodies governed by public law.

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<sup>15</sup> The general industrial classification of economic activities within the European Communities. A list of the activities covered by Class 50 is given in Annex I.

<sup>16</sup> Judgment of 14 April 1994 in Case C-389/92 *Ballast Nedam Groep NV v Belgian State* [1994] ECR I-1289.

<sup>17</sup> See also point 6.4.3 (Groups of contractors).

- *The State*

It is worth stressing that for the purposes of applying the Directive, the concept of the State is not confined to the administration as such, but also covers bodies which, albeit not formally part of the traditional structures of the administration, have no legal personality of their own and carry out tasks that are normally the responsibility of the State administration, which they merely represent in different ways.

This point was clarified by the Court of Justice in *Beentjes v Netherlands State*,<sup>18</sup> in which it had to rule whether Directive 71/305/EEC applied to the award of public works contracts by the Waterland Local Land Consolidation Committee, a body with no legal personality of its own. To that end, the Court stressed that “the objective of Directive 71/305/EEC is to coordinate national procedures for the award of public works contracts concluded in Member States on behalf of the State, regional or local authorities or other legal persons governed by public law” and that the term “the State” within the meaning of Article 1(b) Directive 71/305/EEC defining contracting authorities “must be interpreted in functional terms. The aim of the Directive, which is to ensure the effective attainment of freedom of establishment and freedom to provide services in respect of public works contracts, would be jeopardized if the provisions of the Directive were to be held to be inapplicable solely because a public works contract is awarded by a body which, although it was set up to carry out tasks entrusted to it by legislation, is not formally a part of the State administration.

Consequently, a body such as that in question here, whose composition and functions are laid down by legislation and which depends on the authorities for the appointment of its members, the observance of the obligations arising out of its measures and the financing of the public works contracts which it is its task to award, must be regarded as falling within the notion of the State for the purpose of the abovementioned provision, even though it is not part of the State administration in formal terms.”

- *Bodies governed by public law*

The Directive defines bodies governed by public law on the basis of three cumulative criteria. A body governed by public law thus means any body:

- (1) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and
- (2) having legal personality, and
- (3) \* either 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.

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<sup>18</sup> Judgment of 20 September 1988 in Case 31/87 [1988] ECR 4635.

The Directive thus applies to any body with legal personality under public or private law, established in the general interest, whose operational choices and activities are or may be influenced by a contracting authority as a result of the links between them by virtue of one or more of the conditions that go to make up the third criterion.

The only bodies which are established in the general interest and fulfil the other criteria but are not regarded as contracting authorities by the Directive are those set up for the specific purpose of meeting needs of an industrial or commercial nature, i.e. needs which they satisfy by carrying on economic activities in the industrial or commercial field that involve supplying goods or services on markets which are open to other public or private operators under fully competitive conditions. These are therefore bodies which carry on a business equivalent to that of a private operator.

It should be emphasized that the exemption provided for by the Directive applies only to bodies which carry on such economic activities since they were set up in order specifically to do so. Consequently, the exemption does not apply to bodies which, while carrying on commercial or industrial activities, were in fact set up to satisfy a different general interest: e.g. a body set up specifically to carry out administrative tasks so as to meet general-interest needs of a social nature, which, to ensure that its books balance, also carries on a profitable commercial activity.

Nevertheless, each individual case must be analysed to determine whether the body governed by public law is subject to the Directive.

In the interests of greater transparency in application, the Directive sets out, in Annex I, a list<sup>19</sup> of bodies and categories of bodies fulfilling the criteria for bodies governed by public law and lays down a procedure for updating the list to ensure that it is as exhaustive as possible.

The obligation on a body governed by public law to comply with the Directive does not, however, depend on its prior inclusion in the list: it is under such an obligation as soon as it fulfils the criteria. Similarly, although a body may be on the list, it could be exempted from complying with the Directive if it were no longer to meet one or more of the cumulative criteria.

#### **1.4 Form and subject of contracts**

The Directive states merely that the contract must be for pecuniary interest and concluded in writing. The consideration for the work performed by the contractor must therefore take the form of a price or, at all events, be quantifiable in monetary terms.<sup>20</sup> The contractor's remuneration, could, for example, consist in the transfer of land or property by the contracting authority.

As far as the subject of the contract is concerned, the Directive states that it consists not only in the execution, or both the execution and design, of works, but also in "the

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<sup>19</sup> The list is reproduced in Annex II to this guide.

<sup>20</sup> Nevertheless, where the consideration consists wholly or partly in the right to exploit the construction covered by the contract, the latter is not a public works contract, but a public works concession. Concessions are subject to different rules outlined in section 7.

execution by whatever means of a work corresponding to the requirements specified by the contracting authority”.

By these new definitions of the subject of the contract, and particularly the latter one, the Community legislature has made it clear that all contracts relating to the execution of building and/or civil engineering works, whether or not accompanied by other tasks, are public works contracts. All the new forms of contract in which the contracting authority chooses to entrust to the contractor a fairly large number of tasks – for example arranging finance, purchasing land and devising projects – thus alleviating the workload involved in the authority’s traditional role in the public works sector, are covered by the Directive.

Economic statistics show that contracting authorities very frequently choose to rely on a general contractor who designs the works according to their requirements and coordinates execution of the entire project, or else prefer to conclude a project development or management contract whereby the work is financed and executed entirely by the contractor, whom they then of course reimburse.

The scope of the Directive is thus as wide as possible in order to take in the whole gamut of contractual relationships that could be contemplated by contracting authorities to meet their specific needs.

It is worth noting that the Directive does not cover the mere purchase of existing property, unless of course the property was built to the requirements of the contracting authority, which had previously given an undertaking to purchase it after completion. Such an agreement would constitute a property development contract and would be subject to the Directive.

Similarly, mere renting of property for which there is no link with any construction or purchase contract is not covered by the Directive.

Neither do public service contracts (e.g. for property management) constitute public works contracts: these are subject to Directive 92/50/EEC on the public procurement of services in so far as any works entailed are only incidental and do not form the subject-matter of the contract.<sup>21</sup>

In line with the definition given in the Directive, a public works contract must have as its main object the execution of building and/or civil engineering work covered by Class 50 of NACE, or the execution of a work.

### **1.5 Contracts subsidized to more than 50% by contracting authorities**

The Directive requires Member States to take the necessary measures to ensure that contracting authorities comply or ensure compliance with its provisions where they subsidize directly by more than 50% a works contract awarded by an entity other than themselves, whether that entity is public or private.

This requirement applies, however, only to contracts concerning civil engineering works (covered by Class 50, Group 502, of the NACE nomenclature) and to contracts relating to

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<sup>21</sup> Judgment of the Court of Justice of 19 April 1994 in Case C-331/94 *Gestión Hotelera Internacional SA v Comunidad Autónoma de Canarias and Others* [1994] ECR I-1329.

building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes.

The subsidies to be taken into consideration are all the different forms of assistance, including that provided by the Community, which are directly intended for the works contracts in question.

In view of the subsidy it is granting and its experience in awarding contracts, a contracting authority could itself choose the contractor, even if the outcome of the works is not intended for its own use. In such cases, it must itself comply with the provisions of the Directive.

If, on the other hand, the choice of contractor is left to the recipient of the subsidy, the contracting authority must require the recipient to comply with the Directive, for example by including such compliance among the general conditions to be met in order to obtain certain grants or among the specific conditions laid down in the instrument granting the subsidy.

The list of the types of works concerned given in the relevant article of the Directive is exhaustive. However, the list of premises, namely hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes, is a generic list of categories of premises. These categories should not be construed narrowly, since a restrictive interpretation would undermine the aim of the Directive, which is to ensure greater transparency in the award of public works contracts.

Homes for retired people or the physically disabled should thus, for example, be treated in the same way as hospitals where their purpose is to provide medical or surgical care for sick people, whether elderly or disabled, rather than assisting the elderly or disabled and only occasionally administering minor treatment.



## 2. PUBLIC WORKS CONTRACTS COVERED BY THE DIRECTIVE

Deciding whether or not a contract constitutes a public works contract as defined above is only the first step in determining whether it falls within the scope of the Directive. The latter applies above a given value threshold and subject to certain exceptions linked to the activities of certain bodies, the purpose of the contract or special conditions governing it.

### 2.1 Threshold

The provisions of the Directive apply to public works contracts whose estimated value excluding VAT is not less than ECU 5 million.

The value of this threshold in national currencies is based on the average daily values of those currencies expressed in ecus over the 24 months ending on the last day of August immediately preceding each adjustment. These values, which are calculated by the Commission and are normally to be adjusted by it every two years from 1 January 1992 onwards, are published in the "C" (Information and Notices) series of the Official Journal of the European Communities ("Official Journal") in November.

The currency equivalents of the thresholds applicable until the forthcoming adjustment (i.e., unless adjusted early, until 31 December 1997) are the following:

National currency equivalent of:

	ECU 5 000 000	ECU 1 000 000
Belgian franc/Luxembourg franc	197 463 667	39 492 733
Danish krone	37 517 115	7 503 423
German mark	9 529 019	1 905 804
Greek drachma	1 450 386 458	290 077 291
French franc	32 910 979	6 582 196
Finish markka	30 586 642	6 117 328
Dutch guilder	10 683 965	2 136 793
Irish pound	4 014 106	802 821
Italian lira	9 927 175 000	1 985 435 000
Austrian schilling	67 036 083	13 407 217
Pound sterling	3 950 456	790 091
Spanish peseta	799 822 917	159 964 583
Portuguese escudo	982 444 792	196 488 958
Swedish krona	46 628 913	93 325 783

## **2.2 Estimation of contract value**

### *2.2.1 Rules*

In general terms, the value to be taken into account in determining whether a public works contract reaches the threshold is the estimated value excluding VAT of the contract which the contracting authority intends to award. The estimation should therefore include all the services, materials, etc. to be covered by the contract. For example, where a contracting authority chooses to award a development contract, the estimated contract value should include not only activities covered by Class 50 of the NACE nomenclature, but also all other tasks to be entrusted to the contractor under that contract.

Alongside the above general rule, which flows from the way in which public works contracts are defined, the Directive lays down rules for estimating the contract value in three specific cases.

Where the contracting authority itself makes available to the contractor supplies needed to carry out the works, the contract value must include the estimated value of those supplies as well as the value of the works.

Supplies should be understood here as referring not only to materials to be incorporated in the building or structure, but also to the plant or equipment necessary for the works: a contracting authority could, for example, provide the contractor with a crane or lorries. In the case of plant and equipment, the value to be taken into account will of course not always be the purchase price, but instead the price normally charged on the market for hiring it. Which of the two prices is taken into account will depend on the average life of the equipment and the length of time it is made available by the contracting authority: if an item of equipment is designed to have a useful life that is longer than the time it is made available (for example, the equipment is made to last for five years and the contractor can use it for one year), the value to be taken into account will be the hire price. If, on the other hand, the equipment is made available for longer than its average life, the contracting authority will have to include its purchase price in the estimate of the contract value.

Where a work is subdivided into several lots, each one the subject of a contract, the aggregate value of all the lots must be taken into account in determining whether or not the threshold has been reached. If that is the case, the Directive is to be applied to the award of each contract, irrespective of the value of the lot to which it relates. Nevertheless, contracting authorities are allowed to award freely lots whose estimated value excluding VAT is less than ECU 1 million. Permission to depart from the Directive is, however, limited: the aggregate value of lots awarded freely may not exceed 20% of the total estimated value of all lots.

Let us take an example: a contract for building works is divided into three lots, estimated at ECU 3 million, ECU 1 200 000 and ECU 900 000. The aggregate estimated value is therefore ECU 5 100 000, which clearly exceeds the threshold for application of the Directive. However, the derogation may be used for the lot estimated at ECU 900 000, since its individual value is less than ECU 1 million and does not exceed 20% of the total value of all the lots. The Directive does not apply to this lot, which need not be advertised, but it does apply to the other two.

Where a contracting authority intends “subsequently” to award, by negotiated procedure, further works consisting of the repetition of similar works to the successful tenderer for

the contract that is being put up for tender, it must include in the calculation of the value of the first contract the estimated total cost of the subsequent works and, where appropriate, the estimated value of all the necessary supplies that it will make available to the contractor.

### 2.2.2 *Splitting of contracts*

Lastly, no work or contract may be split up with a view to avoiding application of the Directive. This blanket prohibition catches any splitting which is not justified on objective grounds and is thus solely designed to circumvent the rules laid down in the Directive.

## 2.3 Exclusions

As far as works contracts in the utilities sectors are concerned, the Works Directive does not apply to contracts awarded in the areas listed in Articles 2, 7, 8 and 9 of Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors<sup>22</sup> or to contracts which satisfy the tests of Article 6(2) of that Directive. Directive 90/531/EEC has been replaced by Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors<sup>23</sup>; references to Directive 90/531/EEC are therefore to be understood as applying to Directive 93/38/EEC.

The text of these articles is as follows:

### *Article 2*

1. *This Directive shall apply to contracting entities which:*
  - (a) *are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;*
  - (b) *when they are not public authorities or public undertakings, have as one of their activities any of those referred to in paragraph 2 or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.*
2. *Relevant activities for the purposes of this Directive shall be:*
  - (a) *the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of:*
    - (i) *drinking water, or*
    - (ii) *electricity, or*
    - (iii) *gas or heat,**or the supply of drinking water, electricity, gas or heat to such networks;*

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<sup>22</sup> OJ No L 297, 29.10.1990, p. 1.

<sup>23</sup> OJ No L 199, 9.8.1993, p. 84.

- (b) *the exploitation of a geographical area for the purpose of:*
- (i) *exploring for or extracting oil, gas, coal or other solid fuels, or*
  - (ii) *the provision of airport, maritime or inland port or other terminal facilities to carriers by air, sea or inland waterway;*
- (c) *the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.*

*As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service;*

- (d) *the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services.*

3. *For the purpose of applying paragraph 1(b), special or exclusive rights shall mean rights deriving from authorizations granted by a competent authority of the Member State concerned, by law, regulation or administrative action, having as their result the reservation for one or more entities of the exploitation of an activity defined in paragraph 2.*

*A contracting entity shall be considered to enjoy special or exclusive rights in particular where:*

- (a) *for the purpose of constructing the networks or facilities referred to in paragraph 2, it may take advantage of a procedure for the expropriation or use of property or may place network equipment on, under or over the public highway;*
- (b) *in the case of paragraph 2(a), the entity supplies with drinking water, electricity, gas or heat a network which is itself operated by an entity enjoying special or exclusive rights granted by a competent authority of the Member State concerned.*

4. *The provision of bus transport services to the public shall not be considered to be a relevant activity within the meaning of paragraph 2(c) where other entities are free to provide those services, either in general or in a particular geographical area, under the same conditions as the contracting entities.*

5. *The supply of drinking water, electricity, gas or heat to networks which provide a service to the public by a contracting entity other than a public authority shall not be considered as a relevant activity within the meaning of paragraph 2(a) where:*

- (a) *in the case of drinking water or electricity:*
  - *the production of drinking water or electricity by the entity concerned takes place because its consumption is necessary for carrying out an activity other than that referred to in paragraph 2, and*
  - *supply to the public network depends only on the entity's own consumption and has not exceeded 30% of the entity's total production of drinking water or energy, having regard to the average for the preceding three years, including the current year;*

- (b) *in the case of gas or heat:*

- *the production of gas or heat by the entity concerned is the unavoidable consequence of carrying on an activity other than that referred to in paragraph 2, and*
- *supply to the public network is aimed only at the economic exploitation of such production and amounts to not more than 20% of the entity's turnover having regard to the average for the preceding three years, including the current year.*

6. *The contracting entities listed in Annexes I to X shall fulfil the criteria set out above. In order to ensure that the lists are as exhaustive as possible, Member States shall notify the Commission of amendments to their lists. The Commission shall revise Annexes I to X in accordance with the procedure in Article 40.*

### **Article 6**

1. *This Directive shall not apply to contracts or design contests which the contracting entities award for purposes other than the pursuit of their activities as described in Article 2(2) or for the pursuit of such activities in a non-member country, in conditions not involving the physical use of a network or geographical area within the Community.*

2. *However, this Directive shall apply to contracts or design contests awarded or organized by the entities which exercise an activity referred to in Article 2(2)(a)(i) and which:*

- (a) *are connected with hydraulic engineering projects, irrigation or land drainage, provided that the volume of water intended for the supply of drinking water represents more than 20% of the total volume of water made available by these projects or irrigation or drainage installations; or*
- (b) *are connected with the disposal or treatment of sewage.*

3. *The contracting entities shall notify the Commission at its request of any activities they regard as excluded under paragraph 1. The Commission may periodically publish lists of the categories of activities which it considers to be covered by this exclusion for information in the Official Journal of the European Communities. In so doing, the Commission shall respect any sensitive commercial aspects the contracting entities may point out when forwarding this information.*

### **Article 7**

1. *This Directive shall not apply to contracts awarded for purposes of resale or hire to third parties, provided that the contracting entity enjoys no special or exclusive right to sell or hire the subject of such contracts and other entities are free to sell or hire it under the same conditions as the contracting entity.*

2. *The contracting entities shall notify the Commission at its request of all the categories of products or activities which they regard as excluded under paragraph 1. The Commission may periodically publish lists of the categories of products or activities which it considers to be covered by this exclusion for information in the Official Journal of the European Communities. In so doing, the Commission shall respect any sensitive commercial aspects the contracting entities may point out when forwarding this information.*

### **Article 8**

1. *This Directive shall not apply to contracts which contracting entities exercising an activity described in Article 2(2)(d) award for purchases intended exclusively to enable them*

*to provide one or more telecommunications services where other entities are free to offer the same services in the same geographical area and under substantially the same conditions.*

2. *The contracting entities shall notify the Commission at its request of any services which they regard as excluded under paragraph 1. The Commission may periodically publish the list of services which it considers to be covered by this exclusion for information in the Official Journal of the European Communities. In so doing, the Commission shall respect any sensitive commercial aspects the contracting entities may point out when forwarding this information.*

### **Article 9**

1. *This Directive shall not apply to:*

- (a) *contracts which the contracting entities listed in Annex I award for the purchase of water;*
- (b) *contracts which the contracting entities listed in Annexes II to V award for the supply of energy or of fuels for the production of energy.*

2. *The Council shall re-examine the provisions of paragraph 1 when it has before it a report from the Commission together with appropriate proposals.*

The public works contracts awarded in the fields of water, energy, transport and telecommunications excluded from the scope of the Works Directive are, therefore, those covered by the abovementioned articles of Directive 90/531/EEC, replaced by Directive 93/38/EEC, which are not the subject of this guide.

It should be emphasized that Directive 93/38/EEC, in view of the qualifications provided for by Article 6(2), applies only to contracts which the contracting entities, exercising an activity referred to by the Directive, award for the pursuit of such activities.

Consequently, a contracting authority which carries on several activities at the same time may rely on the non-applicability of the Works Directive only in respect of the public works contracts which it awards in the exercise of activities covered by the abovementioned articles of Directive 93/38/EEC.

A municipality running a metro system, for example, will not apply the Works Directive when having a new line built to extend the network, but will have to apply it when having a school or theatre built. The Works Directive will also apply in cases where the contract for the new line is awarded by a municipality that does not run the transport system itself but has the works carried out to extend a network run on its behalf by another entity.

The Directive does not apply to public contracts governed by different procedural rules and awarded:

- 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 such agreements must, however, be communicated

to the Commission, which may examine them in consultation with the Advisory Committee for Public Contracts;<sup>24</sup>

- to undertakings in a Member State or a non-member country in pursuance of an international agreement relating to the stationing of troops;
- pursuant to the particular procedure of an international organization.

Lastly, the Directive does not apply to works contracts:

- which are declared secret; or
- the performance 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
- where the protection of the basic interests of that State's security so requires.

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<sup>24</sup> This Committee was set up by Council Decision 71/306/EEC of 26 July 1971 (OJ No L 185, 16.8.1971, p. 15), as amended by Council Decision 77/63/EEC of 21 December 1976 (OJ No L 13, 15.1.1977, p. 15).



### **3. AWARD PROCEDURES**

The new Directive provides for three types of contract award procedure: the open procedure and the restricted procedure, between which contracting authorities are free to choose, and the negotiated procedure, which they may use only in exceptional circumstances.

#### ***N.B.***

*When the Works Directive was adopted, the Council and the Commission stressed in a joint statement that “in open and restricted procedures all negotiation with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out; however, discussions with candidates or tenderers may be held but only for the purpose of clarifying or supplementing the content of their tenders or the requirements of the contracting authorities and provided this does not involve discrimination”.*

Furthermore, a special procedure may be used for the award of specific contracts relating to the design and construction of a public housing scheme.

#### **3.1 Open procedures**

An open procedure is one where all interested contractors may submit tenders in response to a published contract notice.

#### **3.2 Restricted procedures**

A restricted procedure is one where, of the contractors who have expressed their interest following publication of the contract notice, only those so invited by the contracting authority may submit tenders.

Candidates invited to bid must be chosen, on the basis of the information on their personal standing and the information and formalities necessary for evaluating the minimum economic and technical conditions set out in the contract notice, from among those possessing the qualifications specified in Articles 24 to 29 of the Directive.

An accelerated form of restricted procedure may be used where, for reasons of extreme urgency, contractors cannot be allowed the periods normally required under restricted procedures. As this is an exception which is likely to restrict competition, it should be construed strictly, i.e. reserved for cases where the contracting authority can prove the objective need for urgency and the genuine impossibility of abiding by the normal periods prescribed for this procedure.

The reasons for the use of the accelerated form of the procedure must be given in the contract notice published in the Official Journal.

### 3.3 Negotiated procedures

A negotiated procedure is one where a contracting authority consults the contractors of its choice and negotiates the terms of the contract, for example the technical, administrative or financial conditions, with one or more of them.

In negotiated procedures, the contracting authority is able to act in the same way as a private economic operator not only when awarding the contract, but also during the prior discussions.

The procedure is not, however, to be equated with private contracting. It requires the contracting authority to adopt an active approach in determining the terms of the contract, such as prices, completion deadlines, technical specifications and guarantees. Neither does the negotiated procedure relieve the contracting authority of the obligation to comply with certain rules of good administrative practice. In other words, it has to:

- compare effectively tenders and the advantages they offer; and
- apply the principle of equal treatment between tenderers.

Reliance on this flexible procedure is justified by the exceptional circumstances in which the contract has to be awarded and so is allowed only in the cases listed exhaustively in the Directive.

According to the case-law of the Court of Justice, “those provisions which authorize derogations from the rules” laid down in the Directive “intended to ensure the effectiveness of the rights” regarding freedom of establishment and the freedom to provide services “in the field of public works contracts, must be interpreted strictly and the burden of proving the actual existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances”.<sup>25</sup>

According to circumstances, the Directive allows the negotiated procedure to be used with or without prior publication of a contract notice in the Official Journal.

#### 3.3.1 *Negotiated procedures with prior publication of a contract notice*

Here, the contracting authority has to select the candidates it invites to take part in the negotiated procedure from among those presenting the qualifications specified in the notice. Such qualifications can be only those provided for by Articles 24 to 29 of the Directive, i.e. they must relate exclusively to the contractor’s personal standing and economic and technical capacity.

An accelerated form of the procedure is allowed under the same conditions as for restricted procedures.

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<sup>25</sup> Judgment of 10 March 1987 in Case 199/85 *Commission v Italy* [1987] ECR 1039. See also: Case C-24/91 *Commission v Spain* [1992] ECR I-1989; Case C-107/92 *Commission v Italy* [1993] ECR I-4655; Case C-328/92 *Commission v Spain* [1994] ECR I-1569; Case C-57/94 *Commission v Italy* [1995] ECR I-1249; Case C-318/94 *Commission v Germany* [1996] ECR I-1949.

Public works contracts may be awarded by negotiated procedure, with prior publication of a notice, in the following three cases:

- (1) where an open or restricted procedure has elicited only irregular tenders<sup>26</sup> or tenders which are unacceptable<sup>27</sup> under national provisions compatible with Title IV of the Directive (Common rules on participation: General provisions; Criteria for qualitative selection; and Criteria for the award of contracts), in so far as the original terms of the contract, as specified in the contract notice and contract documents, are not substantially altered. Otherwise, the open or restricted procedure has to be started again from the beginning in full compliance with the provisions of the Directive applicable to each of the procedures.

Changes to the financing conditions, the deadlines for completion, the requirements for acceptance of the works, or the construction technique, for example, are to be regarded as substantial alterations to those terms.

A contracting authority may legitimately resort to the negotiated procedure only where it has issued a prior official statement that the tenders received during the preceding open or restricted procedure were irregular or unacceptable, and has declared that procedure closed.

Contracting authorities need not publish a notice where they include in the negotiated procedure all contractors who satisfy the selection criteria referred to in Articles 24 to 29 of the Directive and who submitted during the prior open or restricted procedure tenders complying with the formal requirements of the tendering procedure, i.e. the procedural rules mentioned in the contract documents;

- (2) where the works are carried out solely for the purpose of research, experiment or development, and not with a view to establishing commercial viability or recovering research and development costs.

For some research work involving highly confidential data, the assessment of the suitability of candidates for inclusion in the negotiated procedure, although based on the selection criteria laid down in the Directive, may take account of the confidentiality aspect. Even in such cases, however, the nationality of the contractors may not enter into the assessment;

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

### *3.3.2 Negotiated procedures without prior publication of a contract notice*

Public works contracts may be awarded by negotiated procedure, without prior publication of a contract notice, in the following five cases:

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<sup>26</sup> For example, tenders which do not comply with the tender requirements, in which prices are sheltered from normal competitive forces or which comprise unconscionable clauses.

<sup>27</sup> For example, tenders received late, submitted by tenderers who do not have the requisite qualifications or whose price either exceeds the contracting authority's budget or is abnormally low.

- (1) where no tenders or appropriate tenders are received in response to an open or restricted procedure, in so far as the original terms of the contract are not substantially altered. In this case, the contracting authority has to draw up a report setting out all the grounds for reliance on this procedure and send it to the Commission, on request, for verification.

“Inappropriate tenders” means not only unacceptable or irregular tenders, but also tenders which are completely irrelevant to the contract and are therefore incapable of meeting the contracting authority’s needs as specified in the contract documents. Such tenders are consequently regarded as not having been submitted;

- (2) where, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, the works can be assigned to one contractor only;
- (3) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events that could not be foreseen by the contracting authority, contractors cannot be allowed the periods laid down for open or restricted procedures - even in the accelerated form - or for negotiated procedures with prior publication of a contract notice. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.

***N.B.***

*The concept of unforeseeable events is taken to mean occurrences that overwhelmingly transcend the normal bounds of economic and social life (for example, an earthquake or flooding).*

*It should also be stressed that the negotiated procedure is allowed only for having work carried out that is strictly necessary in order to cope with such unforeseeable events as a matter of extreme urgency;*

- (4) for additional works not included in the project initially allocated or in the contract first concluded but which have, through unforeseen circumstances, become necessary for carrying out the work described therein.

In such cases, contracting authorities may have recourse to the negotiated procedure, provided that:

- (a) the works are assigned to the contractor carrying out the project, and
  - (b) they cannot be technically or economically separated from the main contract without great inconvenience to the contracting authority, or although the works can be separated from the execution of the main contract, they are strictly necessary to its later stages, and
  - (c) the aggregate value of contracts awarded for additional works does not exceed 50% of the value of the main contract;
- (5) for new works consisting of the repetition of similar works entrusted to the initial contractor by the same contracting authority, provided that:

- (a) such works conform to a basic project which was the subject of an initial contract awarded by open or restricted procedure, and
- (b) as soon as the first project was put up for tender, notice was given that such a procedure might be adopted, and
- (c) the total estimated cost of subsequent works was taken into consideration by the contracting authority when it estimated the value of the initial contract for the purposes of determining whether the threshold for application of the Directive was reached.

The negotiated procedure may, however, be applied in such cases only during the three years following conclusion of the initial contract.

### **3.4 Special procedure for public housing schemes**

For the award of contracts relating to both the design and the 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 contracting authority, experts and the contractor who is to carry out the works, the Directive allows contracting authorities to apply a special procedure for selecting the contractor most suitable for integration into the team.

Where they apply this procedure, however, contracting authorities must observe the common advertising rules laid down in the Directive for restricted procedures and the criteria for the qualitative selection of candidates.

They must in particular include in the contract notice the personal, technical and financial conditions to be fulfilled by candidates in accordance with Articles 24 to 29 of the Directive and 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.

### **3.5 Cancellation of an award procedure**

Contracting authorities may decide not to award a contract in respect of which a prior call for competition has been made, or to recommence the procedure.

In such cases, they must inform the Office for Official Publications of the European Communities (the “Publications Office”) of their decision.

They must also inform candidates or tenderers who so request of the grounds for their decision.



## 4. COMMON ADVERTISING RULES

### 4.1 Contract notices

The Directive provides for three types of notice that contracting authorities must submit for publication in the Official Journal of the European Communities and input into the TED database concerning the award of contracts under the open, restricted or negotiated procedure:

- **the indicative notice**, which gives prior information on contracts to be awarded and is thus confined to a brief statement of the main features of such contracts. Contracting authorities are required to publish an indicative notice concerning works contracts they intend to award as soon as they have taken the planning decision, but before initiating an award procedure. The purpose of the indicative notice is to enable interested contractors to schedule their work, to be better informed of opportunities and - particularly in the case of firms from different Member States - to compete on an equal footing with firms located close to the contracting authority. Publication of an indicative notice, which is not compulsory, accordingly allows contracting authorities to shorten the deadlines for responding to the contract notice;<sup>28</sup>
- **the contract notice**, which must be published when the award procedure is launched. Publication of this notice is one of the fundamental obligations that contracting authorities have to fulfil and is intended to develop effective competition between contractors in all Member States by providing them with the information they need in order to express their interest in contracts awarded throughout the Community;
- **the contract award notice**, setting out the most important points concerning the conditions in which contracts have been awarded. This notice ensures greater transparency in award procedures while enabling unsuccessful contractors more accurately to assess their chances of winning other comparable contracts.

### 4.2 Content and presentation of notices

Contracting authorities are required to draw up notices in accordance with the models given in Annex IV to the Directive, setting out the information specified in the relevant model.

Where the items are mandatory, the information required must be given. Where they are optional and not relevant to the contract in question, the contracting authority should indicate the fact, by entering “not applicable” or words to that effect.

Certain items of the contract notice call for some explanation.

In the section relating to the minimum standards required of the contractor, the information and formalities specified must comply with Articles 24 to 29 of the Directive.

As far as proof of the contractor’s financial and economic standing is concerned, Article 26 of the Directive allows contracting authorities using the restricted or negotiated procedure to specify the necessary references in either the contract notice or the invitation

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<sup>28</sup> See points 4.7.1 and 4.7.2.

to tender. Where the contracting authority opts for the latter, it must mention the fact in the relevant section of the notice.

In the section concerning the criteria to be used for awarding the contract, the contracting authority must enter either:

- “the lowest price”, or
- “the most economically advantageous tender”, or
- where it is using the restricted procedure and specifies the award criteria in the invitation to tender, “award criteria stated in the invitation to tender”, or words to that effect.

Where the contracting authority indicates that it will award the contract to “the most economically advantageous tender”, it must specify the factors that will be taken into consideration either in the same section of the contract notice or in the contract documents. In the latter case, it must add in that section of the notice the words “award criteria stated in the contract documents”.

In the case of contract award notices, the Directive allows certain derogations. Publication of the notice remains mandatory, of course, but contracting authorities may, in certain cases, withhold information whose release would impede law enforcement or be otherwise contrary to the public interest, would prejudice the legitimate commercial interests of particular enterprises, whether public or private, or might prejudice fair competition between contractors.

While conveying clear and comprehensive information, notices must be concise: the Directive stipulates that they must not run to more than one page of the Official Journal, or approximately 650 words.

### **4.3 Model notices**

The model notices specified in the Directive are given below:

#### *4.3.1 Indicative notice*

1. Name, address, telephone number, telegraphic address, telex and fax numbers of the contracting authority.
2. (a) Site;  
(b) Nature and extent of the services to be provided and, where relevant, the main characteristics of any lots by reference to the work;  
(c) If available, an estimate of the cost range of the proposed services.
3. (a) Estimated date for initiating the award procedures in respect of the contract or contracts;  
(b) If known, estimated date for the start of the work;  
(c) If known, estimated timetable for completion of the work.
4. If known, terms of financing of the work and of price revision and/or references to the provisions in which these are contained.
5. Other information.
6. Date of dispatch of the notice.
7. Date of receipt of the notice by the Publications Office.

4.3.2 *Contract notice*

**Open procedures**

1. Name, address, telephone number, telegraphic address, telex and fax numbers of the contracting authority.
2. (a) Award procedure chosen;  
(b) Nature of contract for which tenders are being requested.
3. (a) Site;  
(b) Nature and extent of the services to be provided and general nature of the work;  
(c) If the work or the contract is subdivided into several lots, the size of the different lots and the possibility of tendering for one, for several or for all of the lots;  
(d) Information concerning the purpose of the work or the contract where the latter also involves the drawing-up of projects.
4. Any time-limit for completion.
5. (a) Name and address of the service from which the contract documents and additional documents may be requested;  
(b) Where applicable, amount and terms of payment of the sum to be paid to obtain such documents.
6. (a) Final date for receipt of tenders;  
(b) Address to which tenders must be sent;  
(c) Language or languages in which tenders must be drawn up.
7. (a) Where applicable, persons authorized to be present at the opening of tenders;  
(b) Date, hour and place of opening of tenders.
8. Any deposit and guarantees required.
9. Main terms concerning financing and payment and/or references to the provisions in which these are contained.
10. Where applicable, the legal form to be taken by the grouping of contractors to whom the contract is awarded.
11. Minimum economic and technical standards required of the contractor to whom the contract is awarded.
12. Period during which the tenderer is bound to keep open his tender.
13. Criteria for the award of the contract. Criteria other than that of the lowest price must be mentioned where they do not appear in the contract documents.
14. Where applicable, prohibition on variants.
15. Other information.
16. Date of publication of the indicative notice in the Official Journal or references to its non-publication.
17. Date of dispatch of the notice.
18. Date of receipt of the notice by the Publications Office.

## Restricted procedures

1. Name, address, telephone number, telegraphic address, telex and fax numbers of the contracting authority.
2.
  - (a) Award procedure chosen;
  - (b) Where applicable, justification for the use of the accelerated procedure;
  - (c) Nature of the contract for which tenders are being requested.
3.
  - (a) Site;
  - (b) Nature and extent of the services to be provided and general nature of the work;
  - (c) If the work or the contract is subdivided into several lots, the size of the different lots and the possibility of tendering for one, for several or for all of the lots;
  - (d) Information concerning the purpose of the work or the contract where the latter also involves the drawing-up of projects.
4. Any time-limit for completion.
5. Where applicable, the legal form to be taken by the grouping of contractors to whom the contract is awarded.
6.
  - (a) Final date for receipt of requests to participate;
  - (b) Address to which requests must be sent;
  - (c) Language or languages in which requests must be drawn up.
7. Final date for dispatch of invitations to tender.
8. Any deposit and guarantees required.
9. Main terms concerning financing and payment and/or the provisions in which these are contained.
10. Information concerning the contractor's personal situation and minimum economic and technical standards required of the contractor to whom the contract is awarded.
11. Criteria for the award of the contract where they are not mentioned in the invitation to tender.
12. Where applicable, prohibition on variants.
13. Other information.
14. Date of publication of the indicative notice in the Official Journal or reference to its non-publication.
15. Date of dispatch of the notice.
16. Date of receipt of the notice by the Publications Office.

## Negotiated procedures

1. Name, address, telephone number, telegraphic address, telex and fax numbers of the contracting authority.
2.
  - (a) Award procedure chosen;
  - (b) Where applicable, justification for the use of the accelerated procedure;
  - (c) Nature of the contract for which tenders are being requested.
3.
  - (a) Site;
  - (b) Nature and extent of the services to be provided and general nature of the work;
  - (c) If the work or the contract is subdivided into several lots, the size of the different lots and the possibility of tendering for one, for several or for all of the lots;
  - (d) Information concerning the purpose of the work or the contract where the latter also involves the drawing-up of projects.
4. Any time-limit for completion.
5. Where applicable, the legal form to be taken by the grouping of contractors to whom the contract is awarded.
6.
  - (a) Final date for receipt of tenders;
  - (b) Address to which tenders must be sent;
  - (c) Language or languages in which tenders must be drawn up.
7. Any deposit and guarantees required.
8. Main terms concerning financing and payment and/or the provisions in which these are contained.
9. Information concerning the contractor's personal situation and information and formalities necessary in order to evaluate the minimum economic and technical standards required of the contractor to whom the contract is awarded.
10. Where applicable, prohibition on variants.
11. Where applicable, name and address of contractors already selected by the awarding authority.
12. Date(s) of previous publications in the Official Journal.
13. Other information.
14. Date of publication of the indicative notice in the Official Journal.
15. Date of dispatch of the notice.
16. Date of receipt of the notice by the Publications Office.

### 4.3.3 *Contract award notice*

1. Name and address of awarding authority.
2. Award procedure chosen.
3. Date of award of contract.
4. Criteria for award of contract.
5. Number of tenders received.
6. Name and address of successful contractor(s).
7. Nature and extent of the services provided, general characteristics of the finished structure.
8. Price or range of prices (minimum/maximum) paid.
9. Where appropriate, value and proportion of contract likely to be subcontracted to third parties.
10. Other information.
11. Date of publication of the contract notice in the Official Journal.
12. Date of dispatch of the notice.
13. Date of receipt of the notice by the Publications Office.

In describing the subject-matter of contracts, the Commission has recommended that contracting authorities use the Common Procurement Vocabulary.<sup>29</sup>

### **4.4 Method of setting time-limits**

The time-limits specified in contract notices must be such that their expiry can be determined by contractors in all Member States on an equal footing.

It would not be acceptable for contracting authorities to set such time-limits by specifying a particular number of days from the date of publication of the notice in a national or regional official gazette, for example. Such practice would place much greater difficulties in the way of contractors from other Member States and thus runs contrary to the principle of the freedom to provide services.

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<sup>29</sup> Commission recommendation of 30 July 1996 on the use of the Common Procurement Vocabulary (CPV) for describing the subject-matter of public contracts (OJ No L 222, 3.9.1996, p. 10).

#### **4.5 National advertising**

In order to ensure that equivalent information is disseminated at both national and Community level, the Directive provides that any notices published in the official gazettes or in the press of the country of the contracting authority must not contain information other than that published in the Official Journal of the European Communities. In addition, notices may not be published at national level before they are dispatched for publication at Community level and must mention the date of such dispatch.

#### **4.6 Who is responsible for publishing notices?**

Notices are published by the Publications Office.

In general terms, contracting authorities have to transmit their notices as quickly as possible and through the most appropriate channels. In particular, the Directive requires them:

- to send the indicative notice as soon as possible after the decision approving the planning of the works contracts that they intend to award;
- in the case of accelerated restricted or negotiated procedures, to send notices by telex, telegram or fax;
- to send the contract award notice not later than 48 days after the award of the contract in question;
- to be able to supply proof of the date of dispatch of notices to the Publications Office.

The address for correspondence is:

*Supplement to the Official Journal of the European Communities  
Office for Official Publications of the European Communities  
2, rue Mercier  
L-2985 Luxembourg  
Telephone: (352) 499 28 23 32  
Telex: 1324 pubof LU  
2731 pubof LU  
Fax: (352) 49 00 03  
(352) 49 57 19*

Within twelve days (or five days in the case of the accelerated form of restricted or negotiated procedures), the Publications Office publishes the notices in the Supplement to the Official Journal<sup>30</sup> and via the TED (Tenders Electronic Daily) database<sup>31</sup>:

- indicative and contract award notices in full in all the official languages of the Community;
- contract notices in full in their original language only and in summary form in all the other languages.

The Publications Office takes responsibility for the necessary translations and summaries.

The costs of publishing notices in the Supplement to the Official Journal are borne by the Community.

#### **4.7 Time-limits**

In order to give all potential contractors throughout the Community a chance to tender for a contract or seek an invitation to take part in an award procedure before the closing date, the Directive lays down minimum periods to be allowed at the different stages of the procedures: contracting authorities may not set shorter deadlines than those specified in the Directive, but they are, of course, free to allow longer periods. The Directive also lays down maximum periods within which contracting authorities have to dispatch contract documents and provide additional information.

##### *4.7.1 Open procedures*

- (a) Time-limit set by the contracting authority for the receipt of tenders:
- not less than 52 days from the date of dispatch of the notice for publication in the Official Journal, where the contracting authority has not published an indicative notice;
  - not less than 36 days from that date, where the contracting authority has published an indicative notice;

The above time-limits must be appropriately extended:

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<sup>30</sup> The Supplement to the Official Journal may be obtained in all Member States from the addresses listed in Annex III.

<sup>31</sup> For any information concerning this database and the arrangements for accessing it, please contact:  
Office for Official Publications of the European Communities  
2, rue Mercier  
L-2985 Luxembourg  
Telephone: (352) 499 28 25 63 - 499 28 25 64  
Telex: 1324 pubof LU  
Fax: (352) 48 85 73

- where the contract documents, supporting documents or additional information are too bulky to be supplied within the time-limits laid down by the Directive; or
  - where tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the contract documents.
- (b) Time-limit for dispatch of the contract documents and supporting documents by the contracting authority: not more than six days following receipt of the request, provided that it is made in good time.
- (c) Time-limit for additional information relating to the contract documents to be supplied by the contracting authority: not later than six days prior to the closing date for the receipt of tenders, provided that such information has been requested in good time.

#### 4.7.2 *Restricted procedures*

- (a) Time-limit set by the contracting authority for the receipt of requests to participate: not less than 37 days (or 15 days, in the case of accelerated restricted procedures) from the date of dispatch of the notice for publication in the Official Journal.
- (b) Time-limit for additional information relating to the contract documents to be supplied by the contracting authority: not later than six days (or four days, in the case of accelerated restricted procedures) prior to the closing date for the receipt of tenders, provided that such information has been requested in good time.
- (c) Time-limit set by the contracting authority for the receipt of tenders:
- not less than 40 days (or 10 days, in the case of accelerated restricted procedures) from the date of dispatch of the written invitation to submit a tender, where the contracting authority has not published an indicative notice;
  - not less than 26 days (or 10 days, in the case of accelerated restricted procedures) from the same date, where the contracting authority has published an indicative notice.

The above time-limits must be appropriately extended where tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the contract documents.

#### 4.7.3 *Negotiated procedures with prior publication of a contract notice*

Time-limit set by the contracting authority for the receipt of requests to participate:

not less than 37 days (or 15 days, in the case of accelerated negotiated procedures) from the date of dispatch of the notice for publication in the Official Journal.

4.7.4 Summary tables

**OPEN PROCEDURES**

The **contract documents** and **supporting documents** must be supplied within **six days** of the request

Any **additional information** concerning the contract documents must be communicated not later than **six days** prior to the time-limit for the receipt of tenders

Time-limit for the **receipt of tenders**:  
Not less than **52 days** (if no indicative notice has been published)  
Not less than **36 days** (if an indicative notice has been published)

**RESTRICTED PROCEDURES AND NEGOTIATED PROCEDURES WITH PRIOR PUBLICATION OF A CONTRACT NOTICE**

Time-limit for the **receipt of applications to take part**, from the date when the notice is sent for publication in the OJ:  
Not less than **37 days**  
Not less than **15 days** (accelerated procedures)

The **invitation to submit a tender** must be sent **simultaneously** to all successful candidates, along with the **contract documents** and **supporting documents**

Any **additional information** concerning the contract documents must be communicated not later than **six days** (four days in the case of accelerated procedures) prior to the time-limit for the receipt of tenders

**RESTRICTED PROCEDURES ONLY**

Time-limit for the **receipt of tenders**, from the date of dispatch of the written invitation to tender:  
Not less than **40 days** (if no indicative notice has been published)  
Not less than **26 days** (if an indicative notice has been published)  
Not less than **10 days** (accelerated procedures)

#### **4.8 Method of calculating certain time-limits**

Closing dates for the receipt of tenders and requests to participate must be calculated in accordance with Council Regulation (EEC, Euratom) No 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time-limits.<sup>32</sup>

Under these rules, periods expressed as a certain number of days from a particular event:

- (a) run from the day following the day on which the event takes place;
- (b) begin at 00h00 on the first day, as defined in (a), and end at 24h00 on the last day of the period;
- (c) end, if the last day of the period falls on a public holiday or a Saturday or Sunday, and the period is not expressed in hours, at 24h00 on the following working day.

Periods expressed in hours, which are common for certain acts to be performed by contractors, end at the time and date stated.

Periods include public holidays and weekends unless these are expressly excluded or the periods are expressed as a certain number of working days. Public holidays are all days designated as such in the Member State in which the relevant act has to be performed.

For further details, the reader is referred to the text of the Regulation.

#### **4.9 Submission of requests to participate**

In restricted procedures and negotiated procedures with prior publication of a contract notice, requests to participate may be made by letter or by telegram, telex, fax or telephone. If they are made by one of the last four methods, they must be confirmed by letter dispatched before the closing date for the receipt of such requests.

Where the accelerated form of those procedures is used, requests to participate must be made, in accordance with the Directive, by the most rapid means of communication possible. If they are made by telegram, telex, fax or telephone, they must be confirmed by letter dispatched before the closing date for the receipt of requests to participate.

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<sup>32</sup> The text of the Regulation is reproduced in Annex IV.

#### **4.10 Rules governing the dispatch and content of invitations to tender**

Invitations to tender must be made in writing and sent simultaneously to all selected candidates.

The letter of invitation should normally be accompanied by the contract documents and supporting documents and include at least the following information:

- (a) where it is not accompanied by the contract documents and supporting documents, which the contracting authority does not have since they are the responsibility of another department, the address of the department from which they may be requested, the deadline for submitting such a request and the amount and terms of payment of any charge for obtaining such documents;
- (b) the closing date for the receipt of tenders, the address to which they must be sent and the language(s) in which they must be drawn up;
- (c) a reference to the published contract notice;
- (d) an indication of any documents to be attached, either to support verifiable statements made, or to supplement the information provided by the candidate to show that he meets the selection criteria;
- (e) the criteria for the award of the contract, if not stated in the contract notice.

Where the accelerated form of restricted or negotiated procedures is used, the Directive requires contracting authorities to send out invitations to tender by the most rapid means of communication possible.

## 5. COMMON RULES IN THE TECHNICAL FIELD

The contracting authorities have to indicate, in the general or contractual documents relating to each contract, the technical specifications with which the works must comply.

### 5.1 Definition of technical specifications

The following terms are defined in Annex III to the Directive:

- (1) **“Technical specifications”**: the totality of the technical requirements contained in particular in the contract documents, defining the characteristics required of a work, material, product or supply, which permits a work, a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the contracting authority. These technical requirements shall include levels of quality, performance, safety or dimensions, including the requirements applicable to the material, the product or to the supply as regards quality assurance, terminology, symbols, testing and test methods, packaging, marking or labelling. They shall also include rules relating to design and costing, the test, inspection and acceptances for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to lay down, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve;
- (2) **“Standard”**: a technical specification approved by a recognized standardizing body for repeated and continuous application, compliance with which is in principle not compulsory;
- (3) **“European standard”**: a standard approved by the European Committee for Standardization (CEN) or by the European Committee for Electrotechnical Standardization (Cenelec) as ‘European standards (EN)’ or ‘Harmonization documents (HD)’ according to the common rules of these organizations;
- (4) **“European technical approval”**: a favourable technical assessment of the fitness for use of a product, based on fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of application and use. The European approval shall be issued by an approval body designated for this purpose by the Member State;
- (5) **“Common technical specification”**: a technical specification laid down in accordance with a procedure recognized by the Member States to ensure uniform application in all Member States which has been published in the Official Journal;
- (6) **“Essential requirements”**: requirements regarding safety, health and certain other aspects in the general interest that the construction works must meet.

## **5.2 What technical specifications should be referred to?**

### *5.2.1 General rule*

The common rules in the technical field have been brought into line with the Community's new policy on standardization and reflect the progress made in pursuing that policy in recent years.

Without prejudice to the application of legally binding national technical rules, provided that these are compatible with the Treaty, the Directive thus requires contracting authorities to define the technical specifications applicable to the contract by reference to national standards implementing European standards, to European technical approvals or to common technical specifications.

### *5.2.2 Exceptions*

A contracting authority may depart from this general rule if:

- the standards, European technical approvals or common technical specifications do not include any provision for establishing conformity, or technical means do not exist for establishing satisfactorily the conformity of a product to these standards, European technical approvals or common technical specifications;
- use of these standards, European technical approvals or common technical specifications would oblige the contracting authority to acquire products or materials 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 the changeover, within a given period, to European standards, European technical approvals or common technical specifications.

This exception also applies in cases where use of a standard, a European technical approval or a common technical specification would entail disproportionate technical difficulties because they are inappropriate, through being technically obsolete or intended for application in a different context. In such situations, a contracting authority would clearly be entitled to depart from the general rule without having a strategy for the changeover to European standards, European technical approvals or common technical specifications;

- the project concerned is of a genuinely innovative nature for which the use of existing European standards, European technical approvals or common technical specifications would not be appropriate.

Contracting authorities relying on these possibilities for departing from the general rule must, wherever possible, state the reasons for doing so in the contract notice or contract documents. They are required, at all events, systematically to record the reasons in their internal documentation and to communicate them on request to Member States and to the Commission.

### 5.2.3 *Cases where no European standards, European technical approvals or common technical specifications exist*

In the absence of European standards, European technical approvals or common technical specifications, the Directive provides that the technical specifications:

- (a) are to be defined by reference to the national technical specifications recognized as complying with the essential requirements listed in the Community directives on technical harmonization, in accordance with the procedures laid down in those directives, and in particular in accordance with the procedures laid down in Council Directive 89/106/EEC of 21 December 1988 on construction products;<sup>33</sup>
- (b) may be defined by reference to national technical specifications relating to the design and method of calculation and execution of works and use of materials;
- (c) may be defined by reference to other documents.

In this case, reference should be made, in order of preference, to:

- (i) national standards implementing international standards accepted by the country of the contracting authority;
- (ii) other national standards and national technical approvals of the country of the contracting authority;
- (iii) any other standard.

## **5.3 Prohibition of discriminatory specifications**

Since the free movement of goods and the freedom to provide services throughout the Community are fundamental principles on which the single market is based, all discriminatory technical specifications are prohibited.

The Directive thus prohibits the inclusion of technical specifications which mention products of a specific make or source or a particular process and thereby favour or eliminate certain firms, unless such specifications are justified by the subject of the contract.

In particular, the indication of trade marks, patents or types or of a specific origin or production is prohibited; however, if such indication is accompanied by the words “or equivalent”, it is allowed in cases where the contracting authorities are unable to give a description of the subject of the contract using specifications which are sufficiently precise and intelligible to all parties concerned.

A contracting authority using such specifications must be able to provide evidence that they are necessary.

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<sup>33</sup> OJ No L 40, 11.12.1989, p. 12.

### ***Principle of mutual recognition***

As far as product specifications are concerned, the provisions of the Directive must at all events be interpreted in the light of the Court's case-law on measures having an effect equivalent to quantitative restrictions.

If there are no common technical rules or standards, a contracting authority cannot reject tenders involving the use of products from other Member States on the sole grounds that the products comply with different technical rules or standards, without first checking whether they meet the requirements of the contract.<sup>34</sup>

In accordance with the mutual recognition principle, it must consider on equal terms products from other Member States manufactured in accordance with technical rules or standards which afford the same degree of protection of the legitimate interests concerned as the relevant national rules.

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<sup>34</sup> Judgment of 22 September 1988 in Case 45/87 *Commission v Ireland* [1988] ECR 4929.

## **6. COMMON RULES ON PARTICIPATION**

The common rules on advertising and technical aspects would not be enough to ensure that the principles of the right of establishment and freedom to supply services were genuinely applied in the public procurement field, if participation – the most crucial aspect of the contract award procedure – could be affected by the arbitrary decisions of contracting authorities.

Title IV of the Directive therefore lays down common rules on participation, which govern the selection of contractors, the award of contracts and certain special conditions as regards eligibility.

### **6.1 When and how is the suitability of contractors checked and the contract awarded?**

The Directive provides that contracts are to be awarded on the basis of the criteria laid down in Chapter 3 of Title IV, with due regard to the provisions of Article 19 on variants, after the suitability of contractors not excluded under Article 24 (contractor's good repute) has been checked.

It stipulates that contracting authorities must base such checks on the criteria of economic, financial and technical capacity referred to in Articles 26 to 29. The suitability of contractors must therefore be checked not only in open, but also in restricted and negotiated procedures.

In the system set up by the Directive, examination of the suitability of contractors and award of the contract are two different steps in the procurement procedure. The Court,<sup>35</sup> without finding a rigid chronological division between the two stages, nevertheless stressed the clear distinction drawn in the Directive between the criteria for checking the suitability of a tenderer and those for awarding the contract. In its judgment, the Court stated that “even though the Directive (...) does not rule out the possibility that examination of the tenderer's suitability and the award of the contract may take place simultaneously, the two procedures are governed by different rules”.

Consequently, when examining tenders, contracting authorities may not, for example, allow themselves to be influenced by the tenderer's financial capacity or give a tenderer who has not satisfied the pre-established selection criteria a second chance because they deem his tender advantageous.

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<sup>35</sup> Case 31/87 *Beentjes v Netherlands State* [1988] ECR 4635.

## 6.2 Selection of contractors

In coordinating procedures for the award of public contracts, it was essential to ensure that contractors were not eliminated on discriminatory grounds.

Thus, as the Court of Justice has held, the Directive is not limited to stating the criteria for selection on the basis of which contractors may be excluded from participation by the authority awarding the contract, but also prescribes the manner in which contractors may furnish proof that they satisfy those criteria.<sup>36</sup>

The criteria concerned cover the good repute and the professional capacity of the contractor, i.e. trade registration, economic and financial standing, and technical capability.

In accordance with the decisions of the Court,<sup>37</sup> the suitability of contractors may be examined only on the basis of the qualitative selection criteria laid down in the Directive, i.e. criteria which refer to the contractors' economic and financial standing and technical capability.

### ***N.B.***

*The aim of the abovementioned provisions of the Directive is not to restrict the national authorities' powers to set the level of those capacities for the purposes of participation in different contracts, but to determine what references or evidence they may require to be submitted.*

*As the Court has emphasized, it is important to specify that national competence in this field is not unlimited, though, since all the relevant provisions of Community law and, in particular, the prohibitions deriving from the principles established in the Treaty as regards the right of establishment and the freedom to provide services must be complied with.*

### 6.2.1 Contractor's personal situation

Article 24 of the Directive contains an exhaustive list of the grounds to do with a contractor's personal situation on which he may be excluded from a procedure. Any contractor may be disqualified who:

- (a) is bankrupt or is being wound up, whose affairs are being administered by the court, who has entered into an arrangement with creditors, who has suspended business activities or who is in any analogous situation arising from a similar procedure under national laws and regulations;

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<sup>36</sup> Judgment of 10 February 1982 in Case 76/81 *Transporoute v Minister of Public Works* [1982] ECR 417.

<sup>37</sup> Judgment of 9 July 1987 in Joined Cases 27 to 29/86 *CEI v Association Intercommunale pour les Autoroutes des Ardennes* [1987] ECR 3368; Case 31/87 *Beentjes v Netherlands State* [1988] ECR 4635.

- (b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding-up or administration by the court or for an arrangement with creditors or of any other similar proceedings under national laws or regulations;
- (c) has been convicted of an offence concerning his professional conduct by a judgment which has the force of *res judicata*;
- (d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can justify;
- (e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;
- (f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;
- (g) is guilty of serious misrepresentation in supplying the information required under Chapter 2 of Title IV of the Directive.

As regards (d) and (g), it is for the contracting authority to show that such circumstances exist. In the other cases, it is for the contractor, if the contracting authority so requests, to show that the circumstances concerned do not apply.

However, contracting authorities are not free to determine the type of evidence that may be required of contractors. Under the same article, an authority is obliged to accept as sufficient evidence:

- for (a), (b) or (c), the production of an extract from the “judicial record” or, failing this, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or in the country from which that person comes showing that these requirements have been met;
- for (e) or (f), a certificate issued by the competent authority in the Member State concerned.

Where the country concerned does not issue such documents or certificates, they may be replaced by a declaration on oath or, in Member States where such an oath is not used, by a solemn declaration made by the interested party before a judicial or administrative authority, a notary or a competent professional or trade body in the country of origin or in the country from which that party comes.

### 6.2.2 *Enrolment in the professional or trade register*

As evidence of general professional capacity, the contracting authority may, pursuant to Article 25, request contractors to prove that they are enrolled in the professional or trade register under the conditions laid down by the laws of the Member State in which they are established. The registers concerned are:

- in Belgium, the Registre du Commerce/Handelsregister;
- in Denmark, the Handelsregistret, Aktieselskabesregistret and the Erhvervsregistret;
- in Germany, the Handelsregister and the Handwerksrolle;
- in Greece, the registrar of contractors' enterprises (“Επιχειρησικό Μητρώο Επιχειρησών Επιχειρήσεων”) of the Ministry for Environment, Town and Country Planning and Public Works,
- in Spain, the Registro Oficial de Contratistas del Ministerio de Industria, Comercio y Turismo;
- in France, the Registre du Commerce and the Répertoire des métiers;
- in Italy, the Registro della Camera di commercio, industria, agricoltura e artigianato;
- in Luxembourg, the Registre aux firmes and the Rôle de la Chambre des métiers;
- in the Netherlands, the Handelsregister;
- in Portugal, the Comissão de Alvarás de Empresas de Obras Públicas e Particulares (CAEOPP);
- in the United Kingdom and Ireland, the contractor may be requested to provide a certificate from the Registrar of Companies or the Registrar of Friendly Societies, or a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place and under a given business name;
- in Austria, the Firmenbuch, the Gewerberegister, the Mitglieder-verzeichnisse der Landeskammern;
- in Finland, the Kaupparekisteri/Handelsregistret;
- in Sweden, the aktiebolags-, handels- eller föreningsregistren.

Clearly, to require that a contractor established in another Member State should be enrolled on the professional or trade register in the country of the contracting authority would not only be contrary to the Directive but would be a very serious infringement of the principle of the freedom to supply services within the Community.

It should be emphasized, moreover, that even a mere mention of such a requirement in the contract notice, without the contracting authority actually requiring foreign contractors subsequently to furnish such evidence, would breach this principle on account of the dissuasive effect that such a mention might have on contractors from other Member States.

### 6.2.3 *Financial and economic standing*

Under Article 26, proof of the contractor's financial and economic standing may, as a general rule, be furnished by one or more of the following references:

- (a) appropriate statements from bankers;
- (b) the submission of the firm's balance sheets or extracts therefrom, where publication of a balance sheet is required under company law in the country in which the contractor is established;
- (c) a statement of the firm's overall turnover and the turnover on construction works for the three previous financial years.

The list is not exhaustive. The Directive requires contracting authorities to specify in the contract notice or the invitation to tender which reference or references they have chosen and what other references are to be produced.

Consequently, as regards economic and financial standing, it is for the contracting authorities not only to determine what level of capacity is required for a contractor to be eligible, but also what supporting documents are necessary. Any documents required other than the types specified in the Directive must, however, provide objectively appropriate evidence of the necessary capacity for carrying out works on the scale in question and, in particular, they must not lead to discrimination between domestic contractors and contractors from other Member States.

In *CEI v Association Intercommunale pour les Autoroutes des Ardennes*,<sup>38</sup> the Court of Justice acknowledged, for instance, that the criteria for determining economic and financial standing could include the total value of the works carried out at one time by the contracting firm.

Lastly, if for any valid reason the contractor is not able to furnish the references requested, the contracting authority must allow him to establish his economic and financial standing by means of any other document. However, it is for the contracting authority to assess whether such documents are appropriate.

### 6.2.4 *Technical capability*

As regards the contractor's technical capability, Article 27 contains an exhaustive list of the evidence which contracting authorities may require.

Such evidence may be furnished by:

- (a) the contractor's educational and professional qualifications and/or those of the firm's managerial staff, and, in particular, those of the person or persons responsible for carrying out the works;

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<sup>38</sup> Judgment of 9 September 1987 in Joined Cases 27 to 29/86 [1987] ECR 3368.

- (b) a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed. Where necessary, the competent authority shall submit these certificates direct to the contracting authority;
- (c) a statement of the tools, plant and technical equipment available to the contractor for carrying out the work;
- (d) a statement of the firm's average annual manpower and the number of managerial staff for the last three years;
- (e) a statement of the technicians or technical divisions which the contractor can call upon for carrying out the work, whether or not they belong to the firm.

As in the case of economic and financial standing, contracting authorities must specify in the contract notice, the invitation to tender or the invitation to negotiate which of these references are to be produced.

#### *6.2.5 Additional information*

To ensure the transparency of the selection process, additional qualitative requirements may not be specified after publication of the contract notice or transmission of the invitation to tender.

After that stage, the contracting authority may, within the limits set by Articles 24 to 27, request contractors only to supplement or clarify the certificates and documents submitted (Article 28).

This is an option which is open to contracting authorities and which they may use at their discretion, but not in a discriminatory manner. Nor does it give a contractor who has not furnished proper evidence that he satisfies the requirements for a particular contract the right to be invited to rectify his omissions.

#### *6.2.6 Official lists of approved contractors*

Article 29 of the Directive contains special provisions on the methods whereby Member States compile and administer official lists of approved contractors and on the value to contracting authorities in other Member States of the evidence of suitability resulting from registration on such lists.

“Member States who have official lists of recognized contractors must adapt them to the provisions of Article 24(a) to (d) and (g) and of Articles 25, 26 and 27” (Article 29(1)).

These lists must therefore be drawn up and updated in the light of an objective assessment based on the criteria laid down in the Directive for the selection of contractors in an award procedure.

A holding company which does not itself carry out works but has them carried out by its subsidiaries may produce references relating to its subsidiaries for the purpose of registration on a list of approved contractors provided it can establish “that, whatever the nature of its legal link with those subsidiaries, it actually has available to it the resources of the latter which are necessary for carrying out the contracts”.<sup>39</sup>

Contractors on such lists in the Member State in which they are established may claim such registration as alternative evidence, within the limits examined below, that they fulfil the qualitative criteria set out in Articles 24 to 27.

By decision of the Court of Justice,<sup>40</sup> contractors established in other Member States cannot be required to be registered in the State of the contracting authority.

Such a requirement would deprive Article 59 of the EEC Treaty of all effectiveness, the purpose of that Article being precisely to abolish restrictions on the freedom to provide services by persons who are not established in the State in which the service is to be provided.

A contractor who chooses to use such alternative evidence must submit to the contracting authority a registration certificate issued by the appropriate authority indicating the references which made registration possible and his classification on the list.

As regards the evidential value of such a certificate, Article 29(3) lays down that: “certified registration in the official lists by the competent bodies shall, for the contracting authorities in other Member States, constitute a presumption of suitability for works corresponding to the contractor’s classification only as regards Articles 24(a) to (d) and (g), 25, 26(b) and (c) and 27(b) and (d).

Information which can be deduced from registration in official lists may not be questioned. However, with regard to the payment of social security contributions, an additional certificate may be required of any registered contractor whenever a contract is offered.”

Apart from the evidence provided by such objective facts, the contractor may, as regards those references where suitability can be presumed, be requested by the contracting authority to supplement that information so that his suitability for particular works may be assessed.

As regards those references where suitability cannot be presumed, the contractor is obliged to submit the documents required by the contracting authority in accordance with the Directive.

As the Court has confirmed,<sup>41</sup> the evidential value of a certificate of registration on an official list of approved contractors in one Member State to contracting authorities in other Member States is confined to the objective facts which made registration possible and

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<sup>39</sup> Case C-389/92 *Ballast Nedam Groep NV v Belgian State* [1994] ECR I-1289.

<sup>40</sup> Case 76/81 *Transporoute v Minister of Public Works* [1982] ECR 417.

<sup>41</sup> Joined Cases 27 to 29/86 *CEI v Association Intercommunale pour les Autoroutes des Ardennes* [1987] ECR 3368.

does not extend to the resultant classification. The contracting authorities, while they may not question the information deduced from registration, may determine the level of financial and economic standing and technical capacity required in order to participate in a given contract.

Consequently, they are required to accept that a contractor's economic and financial standing and technical capacity are sufficient for works corresponding to his classification only in so far as that classification is based on equivalent criteria in regard to the capacities required. If that is not the case, however, they are entitled to reject a tender submitted by a contractor who does not fulfil the required conditions.

### **6.3 Number of candidates invited to submit a tender or to negotiate**

In accordance with Article 22, in restricted and negotiated procedures contracting authorities select the candidates they will invite to submit a tender or to negotiate from among those with the qualifications specified in Articles 24 to 29, on the basis only of the information given relating to the contractor's personal situation and of the information and formalities necessary for the evaluation of the minimum economic and technical conditions to be satisfied in accordance with the requirements set out in the notice.

#### ***N.B.***

*Contracting authorities are not, however, obliged to invite all candidates to tender who satisfy the requisite conditions. As explained below, the Directive allows them to restrict numbers, with the proviso that they apply the same, transparent and objective, qualitative selection criteria already established.*

*Contracting authorities may, therefore, limit those invited to bid or to negotiate only if they do not exclude those candidates who best satisfy the conditions set out in the contract notice.*

#### **6.3.1 Restricted procedures**

As regards the number of contractors invited to tender under restricted procedures, the Directive permits contracting authorities to prescribe a range within which the number of firms they intend to invite will fall, but only if the range is stated in the contract notice – any subsequent determination being prohibited – and only if the range includes at least five candidates.

The range must reflect the nature of the works to be carried out.

#### ***N.B.***

*The Directive also provides that, in any event, the number of candidates invited to tender must be sufficient to ensure genuine competition.*

*Having determined a minimum number in advance in accordance with the Directive, a contracting authority could find itself unable to stick to that number because it had received too few applications from sufficiently qualified firms.*

*In that eventuality, it is presumed that there is genuine competition where at least three candidates are invited to tender, assuming that sufficient applications to take part were received from eligible firms.*

### *6.3.2 Negotiated procedures with prior publication of a contract notice*

In negotiated procedures with prior publication of a contract notice, at least three candidates must be invited to negotiate, provided of course that enough suitable candidates apply.

### *6.3.3 Inviting nationals from other Member States*

At all events, where contractors are invited to tender under a restricted or negotiated procedure, the Directive requires contracting authorities to include, without any discrimination, nationals from other Member States who have the necessary qualifications, and under the same conditions as their own nationals; the Member States must ensure that they do so.

As a general rule, it can be presumed that there is no discrimination on grounds of nationality when contractors are selected if, in its selection, the contracting authority maintains the same proportion between domestic candidates and those from other Member States as that observed among candidates with the requisite qualifications. If a check is made, however, such a presumption will be without prejudice to a more detailed assessment of the information taken into account at selection stage.

### *6.3.4 Notification of unsuccessful candidates*

Contracting authorities must, within 15 days of the date on which the request is received, inform unsuccessful candidates who so request of the reasons why they were not invited to submit a tender or to negotiate.

## **6.4 Special participation conditions**

### *6.4.1 Tenders proposing variants on the specifications*

The stimulation of technical progress in the construction industry is a key element in the creation of a single market that is competitive at world level. It is therefore in the general interest that the transfer of technology and know-how from one Member State to another in the public-works field should benefit not only users in general but the industry itself.

Accordingly, and in view of current work in the Community on the establishment of performance-related specifications instead of detailed technical requirements, the Directive provides that contractors may, as long as they comply with certain conditions, propose variants.

This possibility arises only where a contract is to be awarded on the basis of the most economically advantageous tender, since this is the criterion normally adopted in the case of the largest, most complex contracts, where the submission of a variant may be very significant, and since assessment of a variant involves several criteria and not just price.

The Directive leaves it to the discretion of contracting authorities to decide whether they wish to authorize or prohibit variants and to establish what type of variants they are prepared to consider and the conditions for the submission of such variants - they may, for instance, require firms to submit a basic tender along with the variant.

However, if they decide to prohibit variants, contracting authorities must say so in the contract notice.

Where variants are allowed, the contracting authority is not obliged to say so in the contract notice, but must mention in the contract documents the minimum conditions which variants must comply with and the procedures for their submission.

Thereafter, it may take into consideration only those variants that meet the minimum requirements set out in the contract documents.

Furthermore, contracting authorities may not reject a variant on the sole grounds that it has been drawn up with technical specifications defined by reference to national standards transposing European standards, to European technical approvals, to common technical specifications or to national technical specifications recognized as complying with the essential requirements listed in the Community directives on technical harmonization, in accordance with the procedures laid down in those directives, or again by reference to national technical specifications relating to design and method of calculation and execution of works and use of materials.

#### *6.4.2 Subcontracting*

Subcontracting in the public procurement field is not regulated as such by the Directive. However, to ensure transparency of the conditions under which contracts are performed, the Directive provides that, in the contract documents, the contracting authority may request the tenderer to indicate, in his tender, any share of the contract which he intends to subcontract to third parties.

The Directive also states that such notification does not predetermine the main contractor's liability.

#### *6.4.3 Groups of contractors*

Groups of contractors must be allowed to submit a tender or to negotiate without having to assume a particular legal form. However, a group may be required to assume a particular legal form if it is awarded the contract. In such a case, the contracting authority must have indicated beforehand, in the contract notice, the legal form required.

As was pointed out in connection with the definition of the contractor (point 1.2), the Court has stated<sup>42</sup> that a company which has neither the intention nor the resources to carry out the works itself may participate in a procedure for the award of a public works contract. However, in order to prove that it has the required financial and economic standing and technical capability, it must establish that it actually has available to it the resources of the contractors by whom it intends to have the contract carried out and that those resources meet the requirements specified by the contracting authority.

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<sup>42</sup> Case C-389/92 *Ballast Nedam Groep NV v Belgian State* [1994] ECR I-1289.

#### *6.4.4 Health and safety rules in force where the works are to be carried out*

Contracting authorities are entitled, or may be obliged by the Member State to which they belong, to indicate in the contract documents the authority or authorities from which tenderers can obtain relevant information on the health and safety rules in force in the Member State, region or locality where the works will be executed and which will apply to the work carried out on the site during the performance of the contract. Where the contracting authority supplies the above information, it must ask contractors to indicate that they have taken account of such obligations in the preparation of their tender.

#### *6.4.5 Conditions not laid down by the Directive*

In accordance with the principles established by the Court in *Beentjes*,<sup>43</sup> participation by tenderers may be subject to conditions which are not laid down by the Directive and which relate to the contractor's ability to satisfy, should he be awarded the contract, contractual clauses - in *Beentjes* there was an obligation to employ long-term unemployed persons - which have no bearing on the selection or award criteria.

Such clauses must, of course, comply with all the relevant provisions of Community law and, in particular, with the principles of the right of establishment and the freedom to provide services, and with the prohibition on any discrimination on grounds of nationality.

As regards, more particularly, their compatibility with Directive 93/37/EEC, such clauses must not have a direct or indirect discriminatory effect as regards tenderers from other Member States, i.e. it must not be the case, taking all the particular circumstances into account, that they can be fulfilled only by domestic tenderers or that they would be more difficult to fulfil by tenderers from other Member States.

In addition, since these special conditions are supplementary, contracting authorities must indicate them in the contract notice so that contractors can judge whether a public contract containing such contractual clauses is of interest to them.<sup>44</sup>

### **6.5 Award of the contract**

#### *6.5.1 Award criteria*

The criteria on which contracting authorities base the award of contracts must be either the lowest price or the most economically advantageous tender.

#### ***Lowest price***

This criterion is not difficult to apply, since only the price requested by tenderers is to be taken into consideration and the contract must be awarded to the tenderer asking the lowest price.

Where contracting authorities resort to this award criterion, they must say so:

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<sup>43</sup> Case 31/87 *Beentjes v Netherlands State* [1988] ECR 4635.

<sup>44</sup> For a fuller analysis of the case-law and its possible applications, see the Commission communication of 22 September 1989 on Public procurement: Regional and social aspects (OJ No C 311, 12.12.1989, p. 7).

- in the contract notice in the case of open procedures;
- in the contract notice or the invitation to tender in the case of restricted procedures.

### ***The most economically advantageous tender***

What constitutes the most economically advantageous tender, however, requires further clarification.

The Directive states that contracting authorities may base themselves on “various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit”.

This list is not exhaustive. It is clear from the examples given, though, that the most economically advantageous tender can only be decided on objective grounds, equally applicable to all tenders and strictly related to the subject of the contract.

Variation is allowed, to reflect the inherent requirements of the different works to be carried out and their purpose, as laid down by the contracting authority.

In accordance with the Court’s judgment in *Beentjes*,<sup>45</sup> the Directive gives contracting authorities a power of assessment, which must be used solely to determine the most economically advantageous tender on the basis of objective criteria such as those listed by way of example in the Directive, any arbitrary criterion being prohibited.

Each criterion which the contracting authority intends to use to determine the most economically advantageous offer must be stated, either in the contract notice or in the contract documents. This obligation to publish would not be met – as the Court made clear in *Beentjes* – by a general reference to a provision of national law.

Criteria which have not been stated may not be used to select the tender.

The Directive also provides that, where possible, the criteria should be listed in descending order of importance.

While in some cases it may be difficult to rank the criteria in this way, in others one criterion will be uppermost. For example, in a bridge construction project the ranking of the criteria might well be:

- (i) technical merit (stability, resistance to subsidence, elasticity, etc.);
- (ii) cost, and
- (iii) aesthetic merit.

If two tenders were equal on technical merit, the cheaper of the two would be preferred. If they were equal on technical merit and cost, the choice would go to the more aesthetically pleasing design, and so on.

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<sup>45</sup> Case 31/87 *Beentjes v Netherlands State* [1988] ECR 4635.

Whenever possible, authorities should specify how criteria are ranked so that contractors know on what basis their bids will be assessed.<sup>46</sup>

### 6.5.2 *Exception*

By way of exception, the Directive allows a contract to be awarded on criteria other than price and economic advantage in accordance with rules that were already in force when the Directive was adopted and were designed to give preference to certain bidders; such rules must, of course, be compatible with the Treaty.

These are national rules which, under certain conditions (e.g. where prices are equal or tenders equivalent), provide for contracts to be awarded preferentially to enterprises displaying certain characteristics. Such preference is lawful only if it is extended to all enterprises anywhere in the Community which display the same characteristics.

This exception, which covers only preferences granted for the purpose of promoting certain categories of enterprise, should not be confused with the exception granted in respect of regional preference schemes,<sup>47</sup> which expired on 31 December 1992.

### 6.5.3 *Abnormally low tenders*

Where a contracting authority receives tenders which seem to it to be abnormally low in relation to the transaction, it may not automatically reject them. Before it can do so, the authority is required by the Directive to request in writing from the tenderer concerned all details of the constituent elements of the tender which it considers relevant and to verify those constituent elements taking account of the explanations received from the tenderer.

The Directive specifies the types of explanation that the contracting authority may take into consideration, i.e. those relating to the economy of the construction method, the technical solutions chosen, the exceptionally favourable conditions available to the tenderer for the execution of the work, or the originality of the work proposed by the tenderer.

If this procedure is not applied, no tender may be rejected because it is alleged to be abnormally low. This point was explained by the Court in the following terms:<sup>48</sup> “the fact that the provision (Article 29(5) of Directive 71/305/EEC<sup>49</sup>) expressly empowers the awarding authority to establish whether the explanations are acceptable does not under any circumstances authorize it to decide in advance, by rejecting the tender without even seeking an explanation from the tenderer, that no acceptable explanation could be given.

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<sup>46</sup> Conclusions of the 10th meeting of the Advisory Committee for Public Contracts, held on 25-27 April 1977.

<sup>47</sup> See the Commission communication of 22 September 1989 on Public procurement: Regional and social aspects (OJ No C 311, 12.12.1989, p. 7).

<sup>48</sup> Case 76/81 *Transporoute v Minister of Public Works* [1982] ECR 417.

<sup>49</sup> Article 29(5) of Directive 71/305/EEC corresponds to Article 30(5) of the consolidated Works Directive.

The aim of the provision, which is to protect tenderers against arbitrariness on the part of the authority awarding contracts, could not be achieved if it were left to that authority to judge whether or not it was appropriate to seek explanations”.

In accordance with this ruling, the contracting authority is obliged to allow the tenderer a reasonable period of time in which to submit his explanations.

The Court held in another judgment<sup>50</sup> that the precise, detailed procedure for examining tenders which seemed to be abnormally low was laid down by the Directive to enable bidders who had put in particularly low tenders to show that these were serious and to open up public works contracts. The Court ruled therefore that: “Article 29(5) of Council Directive 71/305/EEC prohibits Member States from introducing provisions which require the automatic disqualification from award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure which is provided under the Directive”. Having explained that the provision in question in the Directive was unconditional and sufficiently precise to be relied on before national courts, the Court also ruled that “an administrative authority, including a municipal authority, is under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305 and to refrain from applying such provisions of national law as are inconsistent with them”.

If the criterion for awarding the contract is the lowest price, the contracting authority must inform the Commission of any tenders which it rejects as too low.

In such cases, the tenders excluded would, if correctly priced, satisfy the criterion laid down for winning the contract. Consequently, it is particularly important to ensure maximum transparency and to allow the Commission to verify, where appropriate, whether the price was indeed abnormally low and therefore unacceptable.

#### *6.5.4 Notification of unsuccessful tenderers*

The contracting authority must, within 15 days of the date on which the request is received, inform any unsuccessful tenderer who so requests of the reasons for rejection of his tender and the name of the successful bidder.

## **6.6 Report on the contract awarded**

For each contract they award, contracting authorities must draw up a report, the full text or main points of which must be communicated to the Commission at its request.

The report must contain at least:

- the name and address of the contracting authority, the subject and value of the contract;
- the names of the candidates or tenderers selected, with reasons;

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<sup>50</sup> Case 103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECR 1839.

- the names of the candidates or tenderers rejected, with reasons;
- the name of the successful tenderer and the reasons why his tender was chosen and, if known, any share of the contract which the tenderer intends to subcontract to third parties;
- for negotiated procedures, the circumstances justifying the use of the procedure.



## **7. PUBLIC WORKS CONCESSIONS**

In view of their specific nature, public works concessions are subject only to advertising rules designed to introduce some transparency in this field.

The authority granting the concession is thus free to choose the procedure (it can, for example, negotiate with prospective concessionaires), to set the level of the qualitative requirements to be met by candidates and to establish the criteria for awarding the concession.

The authority granting the concession does not have unlimited freedom, however: it has to observe the rules enshrined in the Treaty, in particular those concerning the right of establishment and the freedom to provide services and the ban on discrimination on grounds of nationality.

It should also be borne in mind that the advertising rules laid down by the Directive have inevitable repercussions on the procedures for awarding the concession. For example, once the criteria for selecting candidates and the criteria for awarding the concession have been published, they must be applied by the authority, to the exclusion of all other criteria.

### **7.1 What is meant by a “public works concession”?**

For the purposes of the Directive, a public works concession is the same as a public works contract, except that the consideration is usually in the form of the right to exploit the works but is sometimes pecuniary as well.

The key element in determining whether a public works contract or concession is involved is the form that the consideration takes. For the works to be classed as a concession, consideration must consist, at least in part, of the right to exploit the works, i.e. of the profit which the concessionaire, depending on his ability to manage the project, will gain from that right.

It is of little importance whether the revenue from that management is handled physically by the awarding authority or by the concessionaire; what matters is that all or part of such revenue is paid to the latter in consideration for the works.

Depending on the management terms prescribed by the awarding authority, the latter may guarantee the concessionaire a minimum income.

However, were the authority to remunerate the concessionaire with fixed - e.g. monthly or annual - sums in consideration for the works and for the management activity, without such remuneration being in any way proportional to the management revenue, the contract would not be a concession but a public works contract, the scope of which included, in addition to the execution of the works, provision of the requisite services for managing the project. In such a case, the “right to exploit the works” would no longer be meaningful since the risks and benefits associated with exploitation would in reality be retained by the contracting authority.

## **7.2 Public works concessions subject to advertising rules**

Any contract for a public works concession worth ECU 5 million or more must be put out to tender at Community level in accordance with the advertising rules set out below. This means that a contracting authority could not, should the occasion arise, invoke the circumstances that make it possible to award a public works contract without prior publication of a notice in order to award a concession contract without observing the advertising rules.

### *7.2.1 Threshold*

As regards the threshold and the method of its calculation, the same rules apply as for public works contracts (see above).

## **7.3 Advertising rules for public works concessions**

Contracting authorities that wish to conclude a contract for a public works concession are obliged to put that contract out to Community tender by publishing a notice in the Official Journal of the European Communities and in the TED database.

Such notices must be sent, as soon as possible and via the most appropriate channels, to the Publications Office, which, not later than 12 days after dispatch, will publish them in full in the original language - the only authentic one - and in summary form in the other Community languages.

Contracting authorities must be able to prove the date of dispatch of the notice to the Publications Office.

Notices must not be published in national gazettes or in the national press by the contracting authority before that date, which must be mentioned in the notices. Furthermore, national publication must not include information other than that published at Community level.

### *7.3.1 Content and form of the notice*

Public works concession notices must be drawn up, as regards both form and content, in accordance with the model laid down by the Directive and must not run to more than one page of the Official Journal, i.e. about 650 words.

The model is as follows:

1. Name, address, telephone number, telegraphic address, telex and fax numbers of the contracting authority.
2. (a) Site;  
(b) Subject of the concession, nature and extent of the services to be provided.
3. (a) Final date for receipt of applications;  
(b) Address to which applications must be sent;  
(c) Language or languages in which applications must be drawn up.
4. Personal, technical and financial conditions to be fulfilled by the candidates.
5. Criteria for award of contract.
6. Where appropriate, the minimum percentages of the works contracts awarded to third parties.
7. Other information.
8. Date of dispatch of the notice.
9. Date of receipt of the notice by the Publications Office.

#### *7.3.2 Minimum time allowed for the submission of applications*

Where a public works concession is resorted to, contracting authorities are obliged to set a time-limit on the submission of applications.

Such a time-limit may not be less than 52 days<sup>51</sup> from the date of dispatch of the notice to the Publications Office.

### **7.4 Rules applicable to the subcontracting of works by the concessionaire**

The rules which a concessionaire must observe when he has works worth ECU 5 million or more carried out by third parties vary according to who the concessionaire is.

#### *7.4.1 The concessionaire is a contracting authority*

If the concessionaire is a contracting authority within the meaning of the Directive, contracts for the execution of such works must be allocated in full compliance with all the provisions of the Directive.

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<sup>51</sup> As in the case of public works contracts, the rules for calculating this deadline are those laid down in Regulation (EEC, Euratom) No 1182/72 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits (see Annex IV).

#### 7.4.2 *The concessionaire is not a contracting authority*

If the concessionaire is not a contracting authority, the Directive requires only that certain advertising rules be followed.

These rules do not apply where the concessionaire concludes works contracts with firms that are not third parties. For the purposes of the Directive, firms which together form a group in order to win the concession and firms affiliated to them are not regarded as third parties. Where the concessionaire is not a group, but a single enterprise, firms affiliated to it are not regarded as third parties either.

By “affiliated firm” is meant any firm over which the concessionaire may exercise, directly or indirectly, a dominant influence, or any firm which may exercise a dominant influence over the concessionaire or which, in common with the concessionaire, is subject to the dominant influence of another firm by virtue of ownership, financial participation or the rules which govern it.

A dominant influence on the part of a firm is presumed when, directly or indirectly, in relation to another firm, it:

- holds the majority of the firm’s subscribed capital, or
- controls the majority of the votes attaching to shares issued by the firm, or
- may appoint more than half of the members of the firm’s administrative, managerial or supervisory body.

The Directive also provides that an exhaustive list of such firms must be attached to the application for the concession and subsequently updated in accordance with any changes in the links between the firms.

Since the list is exhaustive, a concessionaire may not claim that the advertising rules for the award of works contracts do not apply to a firm which does not appear on the list.

Where a concession is granted without such a list having been submitted - either because the concession was granted before Directive 89/440/EEC<sup>52</sup> came into force and without applying the rules which the Member States had agreed to observe in the Declaration by the Representatives of the Governments of the Member States, meeting within the Council, concerning procedures to be followed in the field of public works concessions,<sup>53</sup> or because the link between the concessionaire and one or more of the firms was established after the concession was granted - the concessionaire is obliged to supply the authority granting the concession with a list of the firms to which he is affiliated before he can conclude a works contract with them direct, without putting it out to Community tender in accordance with the advertising rules laid down by the Directive and set out here below.

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<sup>52</sup> The rules on public works concessions were introduced by Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts (OJ No L 210, 21.7.1989, p. 1).

<sup>53</sup> OJ No C 82, 16.8.1971, p. 13.

#### 7.4.3 *Publication of a tender notice*

The concessionaire is obliged to advertise at Community level his intention to conclude a works contract with a third party.

To this end, he must send a notice as soon as possible and through the most appropriate channels to the Publications Office.

Within the following 12 days, the notice will be published in full in the original language, and in summary form in the other Community languages, both in the Supplement to the Official Journal of the European Communities and in the TED database.

A notice may not be published nationally before it has been sent to the Publications Office and may not contain information other than that published at Community level. The concessionaire must be able to prove the date of dispatch.

#### 7.4.4 *Form and content of the notice*

The notice must comply with the following model laid down by the Directive:

1. (a) Site;  
(b) Nature and extent of the services to be provided and the general nature of the work.
2. Any time-limit for the completion of the works.
3. Name and address of the service from which the contract documents and additional documents may be requested.
4. (a) Final date for receipt of requests to participate and/or for receipt of tenders;  
(b) Address to which requests must be sent;  
(c) Language or languages in which requests must be drawn up.
5. Any deposit and guarantees required.
6. Economic and technical standards required of the contractor.
7. Criteria for the award of the contract.
8. Other information.
9. Date of dispatch of the notice.
10. Date of receipt of the notice by the Publications Office.

The notice must not run to more than one page of the Official Journal, i.e. about 650 words.

#### 7.4.5 *Minimum time-limits*

In allocating works contracts, concessionaires who are not themselves contracting authorities within the meaning of the Directive must observe the following minimum time-limits:<sup>54</sup>

- receipt of applications to take part: not less than 37 days from the date of dispatch of the notice to the Publications Office;
- receipt of tenders: not less than 40 days from the date of dispatch of the notice to the Publications Office, or, where the concessionaire selects in advance the contractors who, following publication of the notice, have applied to take part in the contract, from the date of dispatch of the invitation to tender.

#### 7.4.6 *Exception*

The concessionaire may derogate from the above advertising rules when awarding works contracts which meet the exceptional conditions laid down by the Directive in the five cases where contracting authorities may resort to a negotiated procedure without prior publication of a notice in awarding a public works contract.

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<sup>54</sup> As in the case of public works contracts and public works concessions, the rules for calculating these deadlines are those laid down in Regulation (EEC, Euratom) No 1182/72 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits (see Annex IV).

## **ANNEXES**

- I. List of bodies and categories of bodies governed by public law**
- II. List of professional activities as set out in Class 50 of NACE**
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## **ANNEX I**

**List of bodies and categories of bodies governed by public law**



**LIST OF BODIES AND CATEGORIES OF BODIES GOVERNED BY  
PUBLIC LAW REFERRED TO IN ARTICLE 1(b)**

**I. BELGIUM**

**Bodies**

- Archives générales du Royaume et Archives de l'État dans les Provinces - Algemeen Rijksarchief en Rijksarchief in de Provinciën,
- Conseil autonome de l'enseignement communautaire - Autonome Raad van het Gemeenschapsonderwijs,
- Radio et télévision belges, émissions néerlandaises - Belgische Radio en Televisie, Nederlandse uitzendingen,
- Belgisches Rundfunk- und Fernsehzentrum der Deutschsprachigen Gemeinschaft (Centre de radio et télévision belge de la Communauté de langue allemande - Centrum voor Belgische Radio en Televisie voor de Duitstalige Gemeenschap),
- Bibliothèque royale Albert Ier - Koninklijke Bibliotheek Albert I,
- Caisse auxiliaire de paiement des allocations de chômage - Hulpkas voor Werkloosheidsuitkeringen,
- Caisse auxiliaire d'assurance maladie-invalidité - Hulpkas voor Ziekte- en Invaliditeitsverzekeringen,
- Caisse nationale des pensions de retraite et de survie - Rijkskas voor Rust- en Overlevingspensioenen,
- Caisse de secours et de prévoyance en faveur des marins naviguant sous pavillon belge - Hulp- en Voorzorgskas voor Zeevarenden onder Belgische Vlag,
- Caisse nationale des calamités - Nationale Kas voor de Rampenschade,
- Caisse spéciale de compensation pour allocations familiales en faveur des travailleurs de l'industrie diamantaire - Bijzondere Verrekenkas voor Gezinsvergoedingen ten bate van de Arbeiders der Diamantnijverheid,
- Caisse spéciale de compensation pour allocations familiales en faveur des travailleurs de l'industrie du bois - Bijzondere Verrekenkas voor Gezinsvergoedingen ten bate van Arbeiders in de Houtnijverheid,
- Caisse spéciale de compensation pour allocations familiales en faveur des travailleurs occupés dans les entreprises de batellerie - Bijzondere Verrekenkas voor Gezinsvergoedingen ten bate van Arbeiders der Ondernemingen voor Binnenscheepvaart,
- Caisse spéciale de compensation pour allocations familiales en faveur des travailleurs occupés dans les entreprises de chargement, déchargement et manutention de marchandises dans les ports débarcadères, entrepôts et stations (appelée habituellement «Caisse spéciale de compensation pour allocations familiales des régions maritimes») - Bijzondere Verrekenkas voor Gezinsvergoedingen ten bate van de Arbeiders gebezigd door Ladings- en Lossingsondernemingen en door de Stuwadoors in de Havens, Losplaatsen, Stapelplaatsen en Stations (gewoonlijk genoemd: "Bijzondere Compensatiekas voor kindertoelagen van de zeevaartgewesten"),
- Centre informatique pour la Région bruxelloise - Centrum voor Informatica voor het Brusselse Gewest,
- Commissariat général de la Communauté flamande pour la coopération internationale - Commissariaat-generaal voor Internationale Samenwerking van de Vlaamse Gemeenschap,
- Commissariat général pour les relations internationales de la Communauté française de Belgique - Commissariaat-generaal bij de Internationale Betrekkingen van de Franse Gemeenschap van België,
- Conseil central de l'économie - Centrale Raad voor het Bedrijfsleven,
- Conseil économique et social de la Région wallonne - Sociaal-economische Raad van het Waals Gewest,
- Conseil national du travail - Nationale Arbeidsraad,
- Conseil supérieur des classes moyennes - Hoge Raad voor de Middenstand,
- Office pour les travaux d'infrastructure de l'enseignement subsidié - Dienst voor Infrastructuurwerken van het Gesubsidieerd Onderwijs,
- Fondation royale - Koninklijke Schenking,
- Fonds communautaire de garantie des bâtiments scolaires - Gemeenschappelijk Waarborgfonds voor Schoolgebouwen,
- Fonds d'aide médicale urgente - Fonds voor Dringende Geneeskundige Hulp,
- Fonds des accidents du travail - Fonds voor Arbeidsongevallen,
- Fonds des maladies professionnelles - Fonds voor Beroepsziekten,
- Fonds des routes - Wegenfonds,

- Fonds d'indemnisation des travailleurs licenciés en cas de fermeture d'entreprises - Fonds tot Vergoeding van de in geval van Sluiting van Ondernemingen Ontslagen Werknemers,
- Fonds national de garantie pour la réparation des dégâts houillers - Nationaal Waarborgfonds inzake Kolenmijnschade,
- Fonds national de retraite des ouvriers mineurs - Nationaal Pensioenfonds voor Mijnwerkers,
- Fonds pour le financement des prêts à des États étrangers - Fonds voor Financiering van de Leningen aan Vreemde Staten,
- Fonds pour la rémunération des mousses enrôlés à bord des bâtiments de pêche - Fonds voor Scheepsjongens aan Boord van Vissersvaartuigen,
- Fonds wallon d'avances pour la réparation des dommages provoqués par des pompages et des prises d'eau souterraine - Waals Fonds van Voorschotten voor het Herstel van de Schade veroorzaakt door Grondwaterzuivering en Afpompingen,
- Institut d'aéronomie spatiale - Instituut voor Ruimte-aëronomie,
- Institut belge de normalisation - Belgisch Instituut voor Normalisatie,
- Institut bruxellois de l'environnement - Brussels Instituut voor Milieubeheer,
- Institut d'expertise vétérinaire - Instituut voor Veterinaire Keuring,
- Institut économique et social des classes moyennes - Economisch en Sociaal Instituut voor de Middenstand,
- Institut d'hygiène et d'épidémiologie - Instituut voor Hygiëne en Epidemiologie,
- Institut francophone pour la formation permanente des classes moyennes - Franstalig Instituut voor Permanente Vorming voor de Middenstand,
- Institut géographique national - Nationaal Geografisch Instituut,
- Institut géotechnique de l'État - Rijksinstituut voor Grondmechanica,
- Institut national d'assurance maladie-invalidité - Rijksinstituut voor Ziekte- en Invaliditeitsverzekering,
- Institut national d'assurances sociales pour travailleurs indépendants - Rijksinstituut voor de Sociale Verzekeringen der Zelfstandigen,
- Institut national des industries extractives - Nationaal Instituut voor de Extractiebedrijven,
- Institut national des invalides de guerre, anciens combattants et victimes de guerre - Nationaal Instituut voor Oorlogsinvaliden, Oudstrijders en Oorlogsslachtoffers,
- Institut pour l'amélioration des conditions de travail - Instituut voor Verbetering van de Arbeidsvoorwaarden,
- Institut pour l'encouragement de la recherche scientifique dans l'industrie et l'agriculture - Instituut tot Aanmoediging van het Wetenschappelijk Onderzoek in Nijverheid en Landbouw,
- Institut royal belge des sciences naturelles - Koninklijk Belgisch Instituut voor Natuurwetenschappen,
- Institut royal belge du patrimoine artistique - Koninklijk Belgisch Instituut voor het Kunstpatrimonium,
- Institut royal de météorologie - Koninklijk Meteorologisch Instituut,
- Enfance et famille - Kind en Gezin,
- Compagnie des installations maritimes de Bruges - Maatschappij der Brugse Zeevaartinrichtingen,
- Mémorial national du fort de Breendonck - Nationaal Gedenkteken van het Fort van Breendonck,
- Musée royal de l'Afrique centrale - Koninklijk Museum voor Midden-Afrika,
- Musées royaux d'art et d'histoire - Koninklijke Musea voor Kunst en Geschiedenis,
- Musées royaux des beaux-arts de Belgique - Koninklijke Musea voor Schone Kunsten van België,
- Observatoire royal de Belgique - Koninklijke Sterrenwacht van België,
- Office belge de l'économie et de l'agriculture - Belgische Dienst voor Bedrijfsleven en Landbouw,
- Office belge du commerce extérieur - Belgische Dienst voor Buitenlandse Handel,
- Office central d'action sociale et culturelle au profit des membres de la communauté militaire - Centrale Dienst voor Sociale en Culturele Actie ten behoeve van de Leden van de Militaire Gemeenschap,
- Office de la naissance et de l'enfance - Dienst voor Borelingen en Kinderen,
- Office de la navigation - Dienst voor de Scheepvaart,
- Office de promotion du tourisme de la Communauté française - Dienst voor de Promotie van het Toerisme van de Franse Gemeenschap,
- Office de renseignements et d'aide aux familles des militaires - Hulp- en Informatiebureau voor Gezinnen van Militairen,
- Office de sécurité sociale d'outre-mer - Dienst voor Overzeese Sociale Zekerheid,
- Office national d'allocations familiales pour travailleurs salariés - Rijksdienst voor Kinderbijslag voor Werknemers,

- Office national de l'emploi - Rijksdienst voor de Arbeidsvoorziening,
- Office national des débouchés agricoles et horticoles - Nationale Dienst voor Afzet van Land- en Tuinbouwprodukten,
- Office national de sécurité sociale - Rijksdienst voor Sociale Zekerheid,
- Office national de sécurité sociale des administrations provinciales et locales - Rijksdienst voor Sociale Zekerheid van de Provinciale en Plaatselijke Overheidsdiensten,
- Office national des pensions - Rijksdienst voor Pensioenen,
- Office national des vacances annuelles - Rijksdienst voor de Jaarlijkse Vakantie,
- Office national du lait - Nationale Zuiveldienst,
- Office régional bruxellois de l'emploi - Brusselse Gewestelijke Dienst voor Arbeidsbemiddeling,
- Office régional et communautaire de l'emploi et de la formation - Gewestelijke en Gemeenschappelijke Dienst voor Arbeidsvoorziening en Vorming,
- Office régulateur de la navigation intérieure - Dienst voor Regeling der Binnenvaart,
- Société publique des déchets pour la Région flamande - Openbare Afvalstoffenmaatschappij voor het Vlaams Gewest,
- Orchestre national de Belgique - Nationaal Orkest van België,
- Organisme national des déchets radioactifs et des matières fissiles - Nationale Instelling voor Radioactief Afval en Spleijstoffen,
- Palais des beaux-arts - Paleis voor Schone Kunsten,
- Pool des marins de la marine marchande - Pool van de Zeelieden ter Koopvaardij,
- Port autonome de Charleroi - Autonome Haven van Charleroi,
- Port autonome de Liège - Autonome Haven van Luik,
- Port autonome de Namur - Autonome Haven van Namen,
- Radio et télévision belges de la Communauté française - Belgische Radio en Televisie van de Franse Gemeenschap,
- Régie des bâtiments - Regie der Gebouwen,
- Régie des voies aériennes - Regie der Luchtwegen,
- Régie des postes - Regie der Posterijen,
- Régie des télégraphes et des téléphones - Regie van Telegraaf en Telefoon,
- Conseil économique et social pour la Flandre - Sociaal-economische Raad voor Vlaanderen,
- Société anonyme du canal et des installations maritimes de Bruxelles - Naamloze Vennootschap "Zeekanaal en Haveninrichtingen van Brussel",
- Société du logement de la Région bruxelloise et sociétés agréées - Brusselse Gewestelijke Huisvestingsmaatschappij en erkende maatschappijen,
- Société nationale terrienne - Nationale Landmaatschappij,
- Théâtre royal de la Monnaie - De Koninklijke Muntchouwburg,
- Universités relevant de la Communauté flamande - Universiteiten afhangende van de Vlaamse Gemeenschap,
- Universités relevant de la Communauté française - Universiteiten afhangende van de Franse Gemeenschap,
- Office flamand de l'emploi et de la formation professionnelle - Vlaamse Dienst voor Arbeidsvoorziening en Beroepsopleiding,
- Fonds flamand de construction d'institutions hospitalières et médico-sociales - Vlaams Fonds voor de Bouw van Ziekenhuizen en Medisch-Sociale Instellingen,
- Société flamande du logement et sociétés agréées - Vlaamse Huisvestingsmaatschappij en erkende maatschappijen,
- Société régionale wallonne du logement et sociétés agréées - Waalse Gewestelijke Maatschappij voor de Huisvesting en erkende maatschappijen,
- Société flamande d'épuration des eaux - Vlaamse Maatschappij voor Waterzuivering,
- Fonds flamand du logement des familles nombreuses - Vlaams Woningfonds van de Grote Gezinnen.

### **Categories**

- les centres publics d'aide sociale,
- les fabriques d'église (church councils).

## II. DENMARK

### **Bodies**

- Københavns Havn,
- Danmarks Radio,
- TV 2/Danmark,
- TV2 Reklame A/S,
- Danmarks Nationalbank,
- A/S Storebæltsforbindelsen,
- A/S Øresundsforbindelsen (alene tilslutningsanlæg i Danmark),
- Københavns Lufthavn A/S,
- Byfornyelsesselskabet København,
- Tele Danmark A/S with subsidiaries,
- Fyns Telefon A/S,
- Jydsk Telefon Aktieselskab A/S,
- Københavns Telefon Aktieselskab,
- Tele Sønderjylland A/S,
- Telecom A/S,
- Tele Danmark Mobil A/S.

### **Categories**

- De kommunale havne (municipal ports),
- Andre Forvaltningssubjekter (other public administrative bodies).

## III. GERMANY

### **1. Legal persons governed by public law**

Authorities, establishments and foundations governed by public law and created by federal, State or local authorities in particular in the following sectors:

#### *1.1. Authorities*

- Wissenschaftliche Hochschulen und verfaßte Studentenschaften (universities and established student bodies),
- berufsständige Vereinigungen (Rechtsanwalts-, Notar-, Steuerberater-, Wirtschaftsprüfer-, Architekten-, Ärzte- und Apothekerkammern) (professional associations representing lawyers, notaries, tax consultants, accountants, architects, medical practitioners and pharmacists),
- Wirtschaftsvereinigungen (Landwirtschafts-, Handwerks-, Industrie- und Handelskammern, Handwerksinnungen, Handwerkerschaften) (business and trade associations: agricultural and craft associations, chambers of industry and commerce, craftsmen's guilds, tradesmen's associations),
- Sozialversicherungen (Krankenkassen, Unfall- und Rentenversicherungsträger) (social security institutions: health, accident and pension insurance funds),
- kassenärztliche Vereinigungen (associations of panel doctors),
- Genossenschaften und Verbände (cooperatives and other associations).

## 1.2. Establishments and foundations

Non-industrial and non-commercial establishments subject to State control and operating in the general interest, particularly in the following fields:

- Rechtsfähige Bundesanstalten (federal institutions having legal capacity),
- Versorgungsanstalten und Studentenwerke (pension organizations and students' unions),
- Kultur-, Wohlfahrts- und Hilfsstiftungen (cultural, welfare and relief foundations).

## 2. Legal persons governed by private law

Non-industrial and non-commercial establishments subject to State control and operating in the general interest (including 'Kommunale Versorgungsunternehmen' - municipal utilities), particularly in the following fields:

- Gesundheitswesen (Krankenhäuser, Kurmittelbetriebe, medizinische Forschungseinrichtungen, Untersuchungs- und Tierkörperbeseitigungsanstalten) (health: hospitals, health resort establishments, medical research institutes, testing and carcass-disposal establishments),
- Kultur (öffentliche Bühnen, Orchester, Museen, Bibliotheken, Archive, zoologische und botanische Gärten) (culture: public theatres, orchestras, museums, libraries, archives, zoological and botanical gardens),
- Soziales (Kindergärten, Kindertagesheime, Erholungseinrichtungen, Kinder- und Jugendheime, Freizeiteinrichtungen, Gemeinschafts- und Bürgerhäuser, Frauenhäuser, Altersheime, Obdachlosenunterkünfte) (social welfare: nursery schools, children's playschools, rest-homes, children's homes, hostels for young people, leisure centres, community and civic centres, homes for battered wives, old people's homes, accommodation for the homeless),
- Sport (Schwimmbäder, Sportanlagen und -einrichtungen) (sport: swimming baths, sports facilities),
- Sicherheit (Feuerwehren, Rettungsdienste) (safety: fire brigades, other emergency services),
- Bildung (Umschulungs-, Aus-, Fort- und Weiterbildungseinrichtungen, Volkshochschulen) (education: training, further training and retraining establishments, adult evening classes),
- Wissenschaft, Forschung und Entwicklung (Großforschungseinrichtungen, wissenschaftliche Gesellschaften und Vereine, Wissenschaftsförderung) (science, research and development: large-scale research institutes, scientific societies and associations, bodies promoting science),
- Entsorgung (Straßenreinigung, Abfall- und Abwasserbeseitigung) (refuse and garbage disposal services: street cleaning, waste and sewage disposal),
- Bauwesen und Wohnungswirtschaft (Stadtplanung, Stadtentwicklung, Wohnungsunternehmen, Wohnraumvermittlung) (building, civil engineering and housing: town planning, urban development, housing enterprises, housing agency services),
- Wirtschaft (Wirtschaftsförderungsgesellschaften) (economy: organizations promoting economic development),
- Friedhofs- und Bestattungswesen (cemeteries and burial services),
- Zusammenarbeit mit den Entwicklungsländern (Finanzierung, technische Zusammenarbeit, Entwicklungshilfe, Ausbildung) (cooperation with developing countries: financing, technical cooperation, development and training).

## IV. GREECE

### Categories

Other legal persons governed by public law whose public works contracts are subject to State control.

## V. SPAIN

## Categories

- Entidades Gestoras y Servicios Comunes de la Seguridad Social (administrative entities and common services of the health and social services),
- Organismos Autónomos de la Administración del Estado (independent bodies of the national administration),
- Organismos Autónomos de las Comunidades Autónomas (independent bodies of the autonomous communities),
- Organismos Autónomos de las Entidades Locales (independent bodies of local authorities),
- Otras entidades sometidas a la legislación de contratos del Estado español (other entities subject to Spanish State legislation on procurement).

## VI. FRANCE

### Bodies

#### 1. National public bodies:

##### 1.1. with scientific, cultural and professional character:

- Collège de France,
- Conservatoire national des arts et métiers,
- Observatoire de Paris;

##### 1.2. Scientific and technological:

- Centre national de la recherche scientifique (CNRS),
- Institut national de la recherche agronomique,
- Institut national de la santé et de la recherche médicale,
- Institut français de recherche scientifique pour le développement en coopération (ORSTOM);

##### 1.3. with administrative character:

- Agence nationale pour l'emploi,
- Caisse nationale des allocations familiales,
- Caisse nationale d'assurance maladie des travailleurs salariés,
- Caisse nationale d'assurance vieillesse des travailleurs salariés,
- Office national des anciens combattants et victimes de la guerre,
- Agences financières de bassins.

### Categories

#### 1. National public bodies:

- universités (universities),
- écoles normales d'instituteurs (teacher training colleges).

#### 2. Administrative bodies at regional, departmental and local level:

- collèges (secondary schools),
- lycées (secondary schools),
- établissements publics hospitaliers (public hospitals),
- offices publics d'habitations à loyer modéré (OPHLM) (public offices for low-cost housing).

#### 3. Groupings of territorial authorities:

- syndicats de communes (associations of local authorities),
- districts (districts),
- communautés urbaines (municipalities),
- institutions interdépartementales et interrégionales (institutions common to more than one Département and interregional institutions).

## VII. IRELAND

### **Bodies**

- Shannon Free Airport Development Company Ltd,
- Local Government Computer Services Board,
- Local Government Staff Negotiations Board,
- Córas Tráchtála (Irish Export Board),
- Industrial Development Authority,
- Irish Goods Council (Promotion of Irish Goods),
- Córas Beostoic agus Feola (CBF) (Irish Meat Board),
- Bord Fáilte Éireann (Irish Tourism Board),
- Údarás na Gaeltachta (Development Authority for Gaeltacht Regions),
- An Bord Pleanála (Irish Planning Board).

### **Categories**

- Third Level Educational Bodies of a Public Character,
- National Training, Cultural or Research Agencies,
- Hospital Boards of a Public Character,
- National Health & Social Agencies of a Public Character,
- Central & Regional Fishery Boards.

## VIII. ITALY

### **Bodies**

- Agenzia per la promozione dello sviluppo nel Mezzogiorno.

### **Categories**

- Enti portuali e aeroportuali (port and airport authorities),
- Consorzi per le opere idrauliche (consortia for water engineering works),
- Le università statali, gli istituti universitari statali, i consorzi per i lavori interessanti le università (State universities, State university institutes, consortia for university development work),
- Gli istituti superiori scientifici e culturali, gli osservatori astronomici, astrofisici, geofisici o vulcanologici (higher scientific and cultural institutes, astronomical, astrophysical, geophysical or vulcanological observatories),
- Enti di ricerca e sperimentazione (organizations conducting research and experimental work),
- Le istituzioni pubbliche di assistenza e di beneficenza (public welfare and benevolent institutions),
- Enti che gestiscono forme obbligatorie di previdenza e di assistenza (agencies administering compulsory social security and welfare schemes),
- Consorzi di bonifica (land reclamation consortia),
- Enti di sviluppo o di irrigazione (development or irrigation agencies),
- Consorzi per le aree industriali (associations for industrial areas),
- Comunità montane (groupings of municipalities in mountain areas),
- Enti preposti a servizi di pubblico interesse (organizations providing services in the public interest),
- Enti pubblici preposti ad attività di spettacolo, sportive, turistiche e del tempo libero (public bodies engaged in entertainment, sport, tourism and leisure activities),
- Enti culturali e di promozione artistica (organizations promoting culture and artistic activities).

## IX. LUXEMBOURG

### Categories

- Établissements publics de l'État placés sous la surveillance d'un membre du gouvernement (public establishments of the State placed under the supervision of a member of the Government),
- Établissements publics placés sous la surveillance des communes (public establishments placed under the supervision of the communes),
- Syndicats de communes créés en vertu de la loi du 14 février 1900 telle qu'elle a été modifiée par la suite (associations of communes created under the law of 14 February 1900 as subsequently modified).

## X. THE NETHERLANDS

### Bodies

- De Nederlandse Centrale Organisatie voor Toegepast Natuurwetenschappelijk Onderzoek (TNO) en de daaronder ressorterende organisaties.

### Categories

- De waterschappen (administration of water engineering works),
- De instellingen van wetenschappelijk onderwijs vermeld in artikel 8 van de Wet op het Wetenschappelijk Onderwijs (1985), de academische ziekenhuizen (Institutions for scientific education, as listed in Article 8 of the Scientific Education Act (1985), teaching hospitals).

## XI. PORTUGAL

### Categories

- Estabelecimentos públicos de ensino, investigação científica e saúde (public establishments for education, scientific research and health),
- Institutos públicos sem carácter comercial ou industrial (public institutions without commercial or industrial character),
- Fundações públicas (public foundations),
- Administrações gerais e juntas autónomas (general administration bodies and independent councils).

## XII. THE UNITED KINGDOM

### Bodies

- Central Blood Laboratories Authority,
- Design Council,
- Health and Safety Executive,
- National Research Development Corporation,
- Public Health Laboratory Services Board,
- Advisory, Conciliation and Arbitration Service,

- Commission for the New Towns,
- Development Board For Rural Wales,
- English Industrial Estates Corporation,
- National Rivers Authority,
- Northern Ireland Housing Executive,
- Scottish Enterprise,
- Scottish Homes,
- Welsh Development Agency.

**Categories**

- Universities and polytechnics, maintained schools and colleges,
- National Museums and Galleries,
- Research Councils,
- Fire Authorities,
- National Health Service Authorities,
- Police Authorities,
- New Town Development Corporations,
- Urban Development Corporations.

**XIII. AUSTRIA**

All bodies subject to budgetary supervision by the “Rechnungshof” (audit authority) not having an industrial or commercial character.

**XIV. FINLAND**

Public or publicly controlled entities or undertakings not having an industrial or commercial character.

**XV. SWEDEN**

All non-commercial bodies whose procurement is subject to supervision by the National Board for Public Procurement.



## **ANNEX II**

**List of professional activities as set out in Class 50 of NACE**



**list**



## **ANNEX III**

**List of addresses from which the Supplement  
to the Official Journal can be obtained**



*list*



## **ANNEX IV**

**Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits**



**REGULATION (EEC , EURATOM ) No 1182/71 OF THE COUNCIL**  
**of 3 June 1971**  
**determining the rules applicable to periods, dates and time limits**

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 235 thereof;

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 203 thereof;

Having regard to the proposal from the Commission;

Having regard to the Opinion of the European Parliament<sup>1</sup>;

Whereas numerous acts of the Council and of the Commission determine periods, dates or time limits and employ the terms 'working days' or 'public holidays';

Whereas it is necessary to establish uniform general rules on the subject;

Whereas it may, in exceptional cases, be necessary for certain acts of the Council or Commission to derogate from these general rules;

Whereas, to attain the objectives of the Communities, it is necessary to ensure the uniform application of Community law and consequently to determine the general rules applicable to periods, dates and time limits;

Whereas no authority to establish such rules is provided for in the Treaties;

HAS ADOPTED THIS REGULATION:

*Article 1*

Save as otherwise provided, this Regulation shall apply to acts of the Council or Commission which have been or will be passed pursuant to the Treaty establishing the European Economic Community or the Treaty establishing the European Atomic Energy Community.

<sup>1</sup> OJ No C 51, 29.4.1970, p. 25.

(c) a period expressed in weeks, months or years shall

CHAPTER I

**Periods**

*Article 2*

1. For the purposes of this Regulation, 'public holidays' means all days designated as such in the Member State or in the Community institution in which action is to be taken.

To this end, each Member State shall transmit to the Commission the list of days designated as public holidays in its laws. The Commission shall publish in the *Official Journal of the European Communities* the lists transmitted by the Member States, to which shall be added the days designated as public holidays in the Community institutions.

2. For the purposes of this Regulation, 'working days' means all days other than public holidays, Sundays and Saturdays.

*Article 3*

1. Where a period expressed in hours is to be calculated from the moment at which an event occurs or an action takes place, the hour during which that event occurs or that action takes place shall not be considered as falling within the period in question.

Where a period expressed in days, weeks, months or years is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be considered as falling within the period in question.

2. Subject to the provisions of paragraphs 1 and 4:

(a) a period expressed in hours shall start at the beginning of the first hour and shall end with the expiry of the last hour of the period;

(b) a period expressed in days shall start at the beginning of the first hour of the first day and shall end with the expiry of the last hour of the last day of the period;

provisions of such acts - fixed at a given date shall

start at the beginning of the first hour of the first day of the period, and shall end with the expiry of the last hour of whichever day in the last week, month or year is the same day of the week, or falls on the same date, as the day from which the period runs. If, in a period expressed in months or in years, the day on which it should expire does not occur in the last month, the period shall end with the expiry of the last hour of the last day of that month;

(d) if a period includes parts of months, the month shall, for the purpose of calculating such parts, be considered as having thirty days.

3. The periods concerned shall include public holidays, Sundays and Saturdays, save where these are expressly excepted or where the periods are expressed in working days.

4. Where the last day of a period expressed otherwise than in hours is a public holiday, Sunday or Saturday, the period shall end with the expiry of the last hour of the following working day.

This provision shall not apply to periods calculated retroactively from a given date or event.

5. Any period of two days or more shall include at least two working days.

## CHAPTER II

### Dates and time limits

#### Article 4

1. Subject to the provisions of this Article, the provisions of Article 3 shall, with the exception of paragraphs 4 and 5, apply to the times and periods of entry into force, taking effect, application, expiry of validity, termination of effect or cessation of application of acts of the Council or Commission or of any provisions of such acts.

2. Entry into force, taking effect or application of acts of the Council or Commission - or of

occur at the beginning of the first hour of the day falling on that date.

This provision shall also apply when entry into force, taking effect or application of the afore-mentioned acts or provisions is to occur within a given number of days following the moment when an event occurs or an action takes place.

3. Expiry of validity, the termination of effect or the cessation of application of acts of the Council or Commission - or of any provisions of such acts - fixed at a given date shall occur on the expiry of the last hour of the day falling on that date.

This provision shall also apply when expiry of validity, termination of effect or cessation of application of the afore-mentioned acts or provisions is to occur within a given number of days following the moment when an event occurs or an action takes place.

#### Article 5

1. Subject to the provisions of this Article, the provisions of Article 3 shall, with the exception of paragraphs 4 and 5, apply when an action may or must be effected in implementation of an act of the Council or Commission at a specified moment.

2. Where an action may or must be effected in implementation of an act of the Council or Commission at a specified date, it may or must be effected between the beginning of the first hour and the expiry of the last hour of the day falling on that date.

This provision shall also apply where an action may or must be effected in implementation of an act of the Council or Commission within a given number of days following the moment when an event occurs or another action takes place.

#### Article 6

This Regulation shall enter into force on 1 July 1971.

This Regulation shall be binding in its entirety and directly applicable in all Member States.  
Done at Luxembourg, 3 June 1971.

*For the Council*  
*The President*  
R. PLEVEN

**FOR FURTHER INFORMATION**

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