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P5_TA(2002)0010

Award of public supply contracts, public service contracts and public works contracts *I**

Proposal for a European Parliament and Council directive on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts (COM(2000) 275 – C5-0367/2000 – 2000/0115(COD))

(Codecision procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to the European Parliament and the Council (COM(2000) 275) ⁽¹⁾,
- having regard to Article 251(2) and Articles 47(2), 55 and 95 of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C5-0367/2000),
- having regard to Rule 67 of its Rules of Procedure,
- having regard to the report of the Committee on Legal Affairs and the Internal Market, the opinions of the Committee on Economic and Monetary Affairs, the Committee on Employment and Social Affairs, the Committee on the Environment, Public Health and Consumer Policy and the Committee on Industry, External Trade, Research and Energy (A5-0378/2001),

1. Approves the Commission proposal as amended;
2. Asks to be consulted again if the Council intends to amend the proposal substantially or replace it with another text;
3. Instructs its President to forward its position to the Council and Commission.

⁽¹⁾ OJ C 29 E, 30.1.2001, p. 11.

P5_TC1-COD(2000)0115

Position of the European Parliament adopted at first reading on 17 January 2002 with a view to the adoption of European Parliament and Council Directive .../.../EC on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

having regard to the proposal from the Commission ⁽¹⁾,

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

having regard of the opinion of the Committee of the Regions ⁽³⁾,

acting in accordance with the procedure set out in Article 251 of the Treaty ⁽⁴⁾,

⁽¹⁾ OJ C 29 E, 30.1.2001, p. 11.

⁽²⁾ OJ C 193, 10.7.2001, p. 7.

⁽³⁾ OJ C 144, 16.5.2001, p. 23.

⁽⁴⁾ Position of the European Parliament of 17.1.2002.

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Whereas:

- (1) Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts⁽¹⁾, Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts⁽²⁾, and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts⁽³⁾ were last amended by European Parliament and Council Directive 97/52/EC⁽⁴⁾. On the occasion of further amendments, which are necessary to meet the requirements for simplification and modernisation expressed by contracting authorities and economic operators in their replies to the Green Paper adopted by the Commission on 27 November 1996⁽⁵⁾, it is therefore appropriate for reasons of clarity, to recast the Directives in a single text.
- (2) ***Account should be taken of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment***⁽⁶⁾.
- (3) The attainment of freedom of movement of goods in respect of public supply contracts, and the attainment of freedom of establishment and freedom to provide services in respect of public services contracts and public works contracts, whereby such contracts are awarded in Member States on behalf of the State or regional or local authorities or other bodies governed by public law, entail not only the abolition of restrictions but also the implementation of provisions relating to the coordination of national procedures for the award of public contracts. The provisions should be based on the rules governing those three freedoms and on the principles flowing from them, such as the principles of equal treatment, of which the principle of non-discrimination is but one specific expression, mutual recognition, proportionality, transparency, and also on the introduction of effective competition in public contracts. As a consequence, these coordination provisions should therefore be interpreted in accordance with the abovementioned rules and principles as well as the other rules of the Treaty.
- (4) These coordination provisions should, as far as possible, have regard to the procedures and practices in force in each of the Member States.
- (5) ***Member States must ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers. To that end, Member States may lay down rules relating to the methods to be used to calculate the price/real cost of a tender with a view to its submission to the contracting authority.***
- (6) ***In accordance with Article 6 of the Treaty, environmental protection requirements must be integrated into the definition and implementation of Community policies and activities, in particular with a view to promoting sustainable development. This includes policies and activities concerned with the construction of the European internal market and directives on public procurement in particular. The Directive therefore integrates Community policy on environmental protection and sustainable development into the public procurement regime.***
- (7) ***Nothing in this Directive prevents any contracting authority from imposing or enforcing measures necessary to protect public morality, public policy, public security or human, animal or plant life or health, in conformity with the Treaty, in particular with a view to sustainable development, provided that those measures are not discriminatory and do not conflict with the objective of opening up the public procurement market.***
- (8) Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994)⁽¹⁾ in particular approved the Agreement on

⁽¹⁾ OJ L 209, 24.7.1992, p. 1.

⁽²⁾ OJ L 199, 9.8.1993, p. 1.

⁽³⁾ OJ L 199, 9.8.1993, p. 54.

⁽⁴⁾ OJ L 328, 28.11.1997, p. 1.

⁽⁵⁾ COM(96) 583 final.

⁽⁶⁾ OJ L 175, 5.7.1985, p. 40. Directive last amended by Directive 97/11/EC (OJ L 73, 14.3.1997, p. 5).

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Government Procurement, hereinafter referred to as the 'Agreement', the aim of which is to establish a balanced multilateral framework of rights and obligations regarding government procurement with a view to achieving the liberalisation and expansion of world trade. In view of the international rights and commitments devolving on the Community as a result of the acceptance of the Agreement, the arrangements to be applied to tenderers and products from signatory third countries are those defined by the Agreement. The Agreement has no direct effect. Accordingly, the contracting authorities covered by the Agreement which comply with these coordination provisions and which apply the same provisions as regards the economic operators of the third countries signatory to the Agreement, should have regard to the Agreement. This Directive should also secure, for economic operators established in the Community, conditions for participation in public procurement which are as favourable as those of economic operators of the third countries being signatories to the Agreement.

- (9) The multitude of thresholds for application of the coordination provisions currently in force is a source of complication for contracting authorities. In addition, the thresholds should be laid down in euro. The thresholds should therefore be laid down in euro in a manner that makes it easier to apply these provisions, while ensuring compliance with the thresholds in the Agreement which are expressed in terms of special drawing rights. For these reasons, thresholds expressed in euro should also be revised periodically to account, if necessary, for any fall in the value of the euro in relation to the special drawing right.
- (10) The public contracts awarded by contracting authorities operating in the water, energy and transport sectors and relating to these activities are covered by *European Parliament and Council Directive .../.../EC of ... on coordinating the procurement procedures of entities operating in the water, energy and transport sectors* ⁽²⁾. However, contracts awarded by contracting authorities in relation to their use of sea, inshore or inland waterway transport services fall within the scope of this Directive.
- (11) In view of the situation of effective competition in contracts in the telecommunications sector following the implementation of the Community rules aimed at liberalising that sector, public contracts relating to telecommunications should be excluded from the scope of this Directive whenever they are awarded with the sole objective of enabling contracting authorities to carry out specific activities in the telecommunications sector.
- (12) ***Certain contracting authorities, particularly regional or local authorities, may, in the course of exercising their powers, award contracts to entities which are formally separate legal entities but which, in view of the particular relationship between the contracting authorities and the entities in question, constitute a mere emanation of the contracting authorities with no autonomous decision-making powers and may, accordingly, be regarded as forming part of those contracting authorities. Under certain conditions, contracts awarded to such entities by contracting authorities should not be subject to the provisions of this Directive.***
- (13) Provision should be made for exceptional cases where measures concerning the coordination of procedures may not necessarily be applied on grounds of State security or secrecy or due to the applicability of specific procurement rules such as those pursuant to international agreements, those concerning the stationing of troops, or the rules of international organisations.
- (14) In accordance with Article 163 of the Treaty, the encouragement of research and development is a means of strengthening the scientific and technological basis of European industry, and the opening-up of public service contracts contributes to this end. The cofunding of research programmes should not be an objective of this Directive; research and development service contracts other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority, are not therefore covered by this Directive.
- (15) Public service contracts relating to the acquisition or rental of immovable property or to rights thereon have particular characteristics, which make the application of procurement rules inappropriate.

⁽¹⁾ OJ L 336, 23.12.1994, p. 1.

⁽²⁾ OJ L ...

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- (16) The award of public contracts for certain audiovisual services in the broadcasting field should be able to take into account considerations of cultural and social importance which make the application of procurement rules inappropriate.
- (17) Arbitration and conciliation services are usually provided by bodies or individuals designated or selected in a manner which cannot be governed by procurement rules.
- (18) Financial services covered by this Directive should not include the instruments of monetary policy, exchange rate, public debt, reserve management, and other policies involving transactions in securities and other financial instruments. Accordingly, contracts in connection with the issue, sale, purchase or transfer of securities and other financial instruments are not covered. The services provided by the central bank are also excluded.
- (19) *Certain techniques for centralising purchases have been developed in Member States. Several entities, in charge of procurement for other contracting authorities, have been created for this purpose. These techniques allow, owing to the size of the volumes purchased, broadened competition and improved efficiency of public procurement. It is necessary, therefore, to establish a Community definition for purchasing groups dedicated to contracting authorities and to define the procedures applicable to them, and the manner in which contracting authorities may freely have recourse to purchasing groups, provided that the latter are themselves contracting authorities.*
- (20) *The provisions of this Directive shall be fully applicable to contracts whereby purchasing groups mentioned under Article 1(5) procure supplies or services. Contracting authorities directly acquiring supplies or services from or through such a purchasing group shall be deemed to have complied with the provisions of this Directive, provided that the purchasing group has complied with those provisions.*
- (21) The field of services is best delineated, for the purpose of applying the procedural rules of this Directive and for monitoring purposes, by subdividing it into categories corresponding to particular headings of a common classification and by bringing them together in two annexes, 1 A and 1 B, according to the regime to which they are subject. As regards services in Annex 1 B, the relevant provisions of this Directive should be without prejudice to the application of Community rules specific to the services in question.
- (22) *Where public service contracts, for instance in the sector of real estate management, also cover works that are ancillary to the main object of the contract and consequential or complementary thereto, the fact that such works form part of the contract does not warrant the contract in question being categorised as a public works contract. By the same token, a contract whose object is specifically concerned with the performance of building or civil engineering works should be regarded as a public works contract, even if the contract also provides for the provision of services which are necessary in order to carry out the building or civil engineering works.*
- (23) With regard to public service contracts, full application of this Directive should be limited, for a transitional period, to contracts for which its provisions will enable the full potential for increased cross-frontier trade to be realised. Contracts for other services need to be monitored during this transitional period before a decision is taken on the full application of this Directive. The mechanism for such monitoring needs to be defined. This mechanism must, at the same time, enable interested parties to have access to the relevant information.
- (24) *In view of the varying requirements stipulated in public works contracts, contracting authorities must be able to make provision for the execution and design of works to be awarded either separately or jointly. It is not the intention of this Directive to prescribe either joint or separate contract awards. The decision to award contracts separately or jointly must be determined by qualitative and economic criteria. Joint awards must be duly justified by contracting authorities on those grounds.*

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- (25) Contracting authorities may seek or accept advice which may be used in the preparation of specifications for a specific contract, provided, however, that such advice does not have the effect of precluding competition.
- (26) The technical specifications drawn up by public purchasers need to allow public procurement to be opened up to competition. To this end, it must be possible to submit bids which reflect the diversity of technical solutions. Accordingly, it must be possible to draw up the technical specifications in terms of functional performance and requirements, and, where reference is made to the European standard or, in the absence thereof, to the national standard, other equivalent arrangements must be accepted. To demonstrate equivalence, tenderers should be permitted to use any form of evidence. Reference to specifications stipulating a particular origin should remain the exception. **Where no uniform standards applicable throughout Europe are in force in the relevant field, contracting authorities must be permitted to specify a particular national standard. This is necessary in order to keep subsequent maintenance and repair costs as low as possible and, particularly in the case of works with safety implications, to ensure smooth functioning on the basis of known, reliable and compatible building components and structures.**
- (27) For certain particularly complex contracts, contracting authorities may find it objectively impossible to define the tools likely to meet their needs or assess what the contract can offer in terms of technical or financial solutions without this being attributable to a lack of information or deficiencies on their part. Provision should therefore be made for a negotiated procedure, with a call for competition which is sufficiently flexible to deal with these situations. In these cases, the sole aim of negotiation should be to permit the contracting authority, through dialogue with the candidates, to explain its requirements and define them with the necessary precision so that tenders can be formulated and assessed objectively so as to ascertain the most advantageous tender in economic terms. It should therefore be limited to the **consultation stage**; tenders drawn up on the basis **of contract** documents cannot therefore be open to negotiation. This flexibility is granted subject to observance of the principles of equal treatment, non-discrimination and transparency.
- (28) Certain new buying techniques have developed in Member States and meet the needs of contracting authorities. A Community definition of these buying techniques, known as 'framework agreements', should therefore be provided, together with specific rules allowing competition to be reopened between the parties to the framework agreement for the award of public contracts on the basis of that agreement in order to ensure that the contracting authorities have security of supply at the best value for money. The reopening of competition should comply with the special rules on the advertising, time-limits and conditions for the submission of tenders to prevent markets from being partitioned and to ensure that the principle of equal treatment is observed. For the same reasons, the term of the framework agreements should not exceed three years, except in cases duly justified by the contracting authority where a longer term is necessary owing to the nature of the contract.
- (29) To ensure development of effective competition in the field of public contracts, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community. The information contained in those notices should enable economic operators established in the Community to determine whether the proposed contracts are of interest to them. For this purpose, operators should be provided with an adequate understanding of the subject-matter of the contract and the conditions to which it is subject. It is therefore appropriate to give greater prominence to published notices, by the use of appropriate instruments such as standard-form contract notices and the nomenclature of the Common Procurement Vocabulary (CPV) laid down by European Parliament and Council Regulation (EC) No .../...⁽¹⁾. In restricted procedures, advertising should particularly seek to enable economic operators of Member States to express their interest in contracts by seeking from the contracting authorities invitations to tender under the required conditions.
- (30) Additional information concerning contracts should, as is customary in Member States, be given in the contract documents for each contract or else in an equivalent document.

⁽¹⁾ OJ L ...

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- (31) Contract performance conditions are compatible with the Directive provided that they **do not constitute unjustified discrimination** with regard to tenderers from other Member States, and provided that they are indicated in the contract notice. They may in particular be intended to favour employment of excluded or disadvantaged people or to fight against unemployment **or to achieve specific environmental goals**.
- (32) ***In cross-border situations, where workers from one Member State provide services in another Member State in respect of a public procurement contract, European Parliament and Council Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of a transnational provision of services⁽¹⁾ sets out conditions which should be observed in the host country in respect of such posted workers.***
- (33) In the light of the new information and communications technologies and the simplifications they can bring about in the publication of contracts and in terms of the efficiency and transparency of award procedures, it is appropriate to put electronic means on an equal footing with the conventional means of communicating and exchanging information. As far as possible, the means and the technology chosen should be compatible with the technologies used in other Member States.
- (34) European Parliament and Council Directives 1999/93/EC of 13 December 1999 on a Community framework for electronic signatures⁽²⁾ and 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')⁽³⁾ should, in the context of this Directive, apply to the transmission of information by electronic means.
- (35) The use of electronic means leads to savings in time. As a result, where electronic means are used, provision should be made for reducing the minimum periods, subject however to the condition that they be compatible with the specific modes of transmission envisaged at Community level.
- (36) Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time-limits⁽⁴⁾ should apply to the calculation of the permitted periods laid down in this Directive.
- (37) The selection of candidates should be completely transparent. A definition should therefore be provided of the objective criteria that the contracting authorities can use to select the competitors and of the means that the economic operators can use to prove that they satisfy those criteria. With this objective of transparency, the contracting authority should be obliged to set out, as soon as a contract is put up for tender, the selection criteria it will use to make its selection, in addition to the specific capacities it may require of the economic operators to admit them to the contract award procedure.
- (38) The relevant Community rules on mutual recognition of diplomas, certificates or other evidence of formal qualifications apply when evidence of a particular qualification is required for participation in an award procedure or a design contest for services.
- (39) Contracts should be awarded on the basis of objective criteria which respect the principles of non-discrimination and equality of treatment and ensure that tenders are assessed in conditions of effective competition. Only two award criteria should therefore be applied: that of 'lowest price' and that of 'the most economically advantageous tender'.
- (40) In order to ensure compliance with the principle of equality of treatment in the awarding of contracts, the necessary transparency should be ensured and enhanced with regard to the criteria chosen to determine the most economically advantageous tender. The contracting authorities should there-

⁽¹⁾ OJ L 18, 21.1.1997, p. 1.

⁽²⁾ OJ L 13, 19.1.2000, p. 12.

⁽³⁾ OJ L 178, 17.7.2000, p. 1.

⁽⁴⁾ OJ L 124, 8.6.1971, p. 1.

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fore indicate at the start of the procedure the relative weighting given to each of these criteria. It should be more than a simple indication of the descending order of importance attaching to the criteria. For exceptional cases fully justified by the contracting authority where it is not possible to fix the relative weighting at the start of the procedure, it should be possible to allow its indication to be given at a later stage.

- (41) ***Member States should establish the appropriate procedures for the enforcement and operation of this Directive within their own jurisdictions. They should consider the need for an independent public procurement agency to ensure compliance with the Directive by contracting authorities.***
- (42) The award criteria for the public procurement of services should not prejudice the application of national laws on the remuneration of certain services, such as those on the remuneration of architects, ***engineers*** or lawyers.
- (43) ***Contracting authorities may reject tenders that are abnormally low owing to non-compliance with minimum social requirements.***
- (44) Certain technical conditions and in particular conditions concerning notices, statistical reports and the nomenclature used and the conditions for reference to such nomenclature need to be adopted and amended in the light of changing technical requirements. The lists of contracting authorities in the annexes need to be updated. A fast and flexible adoption procedure should therefore be provided for this purpose. In accordance with Article 2 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission⁽¹⁾, the measures for the implementation of this Directive should be adopted by use of the advisory procedure provided for in Article 3 of that Decision.
- (45) In order to promote access by small and medium-sized undertakings to public contracts, it is appropriate to provide for subcontracting arrangements.
- (46) ***It is appropriate to take action to prevent the award of public contracts to economic operators who have been found guilty by a definitive judgment of offences which call into question their reliability for the purposes of performing the contract which is to be awarded. This applies in particular to the offences of participation in a criminal organisation or corruption or fraud to the detriment of the financial interests of the European Communities in a Member State and to violations of employment law or environmental law relevant to the performance of the contract which is to be awarded. In assessing the reliability of tenderers, account should also be taken of any definitive judgment convicting them of unlawful agreements in connection with public contracts or of serious professional misconduct.***
- (47) This Directive should be without prejudice to the obligations laid down on Member States as to the time-limits within which they are required to transpose Directives 92/50/EEC, 93/36/EEC and 93/37/EEC, those time-limits being set out in Annex XII.
- (48) ***The Commission should examine the possibility of adopting a proposal for a Directive to regulate systematically the concessions sector and so-called 'project financing',***

HAVE ADOPTED THIS DIRECTIVE:

TITLE I

Definitions and general principles

Article 1

Definitions

1. For the purpose of this Directive, the definitions set out in paragraphs 2 to 17 shall apply.
2. 'Public supply contracts' means contracts for pecuniary interest concluded in writing between one or more suppliers and a contracting authority and involving the purchase, lease, rental or hire purchase, with or without option to buy, of products.

⁽¹⁾ OJ L 184, 17.7.1999, p. 23.

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'Public service contracts' means contracts for pecuniary interest concluded in writing between one or more service providers and a contracting authority relating exclusively or mainly to the provision of services mentioned in Annex I.

'Public works contracts' means contracts for pecuniary interest concluded in writing between one or more contractors 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 referred to in Annex II or of a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A 'work' means the outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an economic or technical function.

A contract which also includes the supply of services shall be deemed to be a public works contract if its object specifically relates to the execution of building or civil engineering works and the services are necessary for the execution of such works.

Public service contracts in the sector of real estate management which include works shall not be categorised as public works contracts if such works are ancillary with respect to the main object of the contract and are consequential or complementary thereto.

The contracting authority's decision concerning the separate or joint award of contracts for works or services shall be guided by qualitative and economic criteria. A joint award must be justified by the contracting authority in relation to these aspects.

3. A public contract covering the delivery of products and, in addition, siting and installation operations shall be considered to be a public supply contract.

A public contract covering both products and services within the meaning of Annex I shall be considered to be a 'service contract' if the value of the services in question exceeds that of the products covered by the contract.

A public contract intended to cover services referred to in Annexes IA and IB and including activities referred to in Annex II only by way of addition to the principal object of the contract shall be considered to be a public service contract, and not a public works contract.

4. The terms 'supplier', 'service provider' or 'contractor' mean any natural or legal person or public body or group of such persons and/or bodies which offers, respectively, products, services or the execution of works.

The term 'economic operator' shall cover equally a supplier, a service provider or a contractor.

An economic operator who has submitted a tender is designated by the term 'tenderer'. One who has sought an invitation to take part in a restricted or negotiated procedure shall be designated by the term 'candidate'.

5. 'Contracting authorities' means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law ***as well as purchasing groups set up by the latter for the purpose of awarding public contracts.***

A 'body governed by public law' means any body:

- (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and
- (b) having legal personality, and
- (c) 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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The non-exhaustive lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in the second subparagraph are set out in Annex III. Member States shall periodically notify the Commission of any changes of their lists of bodies and categories of bodies.

A 'purchasing group' means a contracting authority created in order to acquire supplies or services intended for other contracting authorities, or to determine the conditions of procurement thereof. Member States shall notify to the Commission the purchasing groups meeting this definition.

6. A contract is 'particularly complex' if the contracting authority is not able to define, either by holding a design contest or by a functional contract notice, the technical or other means of meeting its requirements or what the market can offer in terms of technical or financial solutions.

7. 'Open procedures' means those national procedures whereby any interested economic operator may submit a tender.

'Restricted procedures' means those national procedures whereby only those economic operators invited by the contracting authority may submit a tender.

'Negotiated procedures' means those national procedures whereby the contracting authorities consult the economic operators of their choice and negotiate the terms of contract with one or more of these.

8. A 'reverse auction' means controlled rounds of electronic tendering which result in the contract being awarded to the tenderer who submits the lowest price in the final round of tendering.

9. A 'framework agreement' means an agreement between ***a contracting authority within the meaning of paragraph 5 and one or more economic operators the aim of which is to lay down the terms for contracts to be awarded during a particular period, in particular with regard to the prospective price and, where appropriate, the prospective quantity.***

10. 'Framework agreements' in the translation and interpreting services sector are identical contracts entered into with several service providers. Translation and interpreting service providers shall be classified in order on the basis of the award criteria and actual merit in contract performance. Actual merit shall be assessed at intervals, in compliance with the principle of equal opportunities.

11. An 'outline solution' means a preliminary indication of the type of solution which a candidate intends to propose to meet the needs and requirements of the contracting authority; as regards public service contracts, this outline solution shall not consist in a plan or design within the meaning of paragraph 12.

12. 'Design contests' means those national procedures which enable the contracting authority to acquire, mainly in the fields of area planning, town planning, architecture and engineering or data processing, a plan or design selected by a jury after being put out to competition ***with the*** award of prizes.

13. 'Public works concession' means a contract of the same type as the public works contracts referred to in 1(c) except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment.

14. 'By electronic means' means by means of electronic equipment for the processing (including digital compression) and storage of data transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means.

15. 'Writing' means any expression consisting of words or figures which can be read, reproduced and subsequently communicated. It may include information which is transmitted and stored by electronic means.

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16. The Common Procurement Vocabulary (CPV), adopted by Regulation (EC) No .../..., is the reference nomenclature applicable to public contracts.

17. For the specific purposes of Articles 16, 67(2) and 74(1), the following phrases shall have the following meanings:

- (a) 'public telecommunications network' means the public telecommunications infrastructure which enables signals to be conveyed between defined network termination points by wire, by microwave, by optical means or by other electromagnetic means;
- (b) a 'network termination point' means all physical connections and their technical access specifications which form part of the public telecommunications network and are necessary for access to, and efficient communication through, that public network;
- (c) 'public telecommunications services' means telecommunications services the provision of which the Member States have specifically assigned to, inter alia, one or more telecommunications entities;
- (d) 'telecommunications services' means services the provision of which consists wholly or partly in the transmission and routing of signals on the public telecommunications network by means of telecommunications processes.

Article 2

Equality of treatment, non-discrimination and transparency

Contracting authorities shall take all necessary steps to ensure compliance with the principles of equality of treatment, transparency and non-discrimination.

TITLE II

Rules on public contracts

CHAPTER I

General provisions

Article 3

Groups of economic operators

1. Tenders may be submitted by groups of economic operators, **and the persons taking part may meet the selection criteria specified by the contracting authorities pursuant to Articles 50(2), 54, 55 and 56 cumulatively. The length of any professional experience requested by the contracting authority may not be accumulated. There may be a requirement for minimum criteria to be met by at least one of the members of the group, who shall act as its head.** These groups may not be required to assume a specific legal form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.

2. In the procedures for the award of public service contracts, candidates or tenderers who, under the law of the Member State in which they are established, are entitled to provide the relevant service activity, shall not be rejected solely on the grounds that, under the law of the Member State in which the contract is awarded, they would have been required to be either natural or legal persons.

Legal persons may be required to indicate in the tender or the request for participation the names and relevant professional qualifications of the staff to be responsible for the performance of the service.

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Article 4

Conditions laid down by the agreements concluded within the World Trade Organisation

For the purposes of the award of contracts by contracting authorities, Member States shall apply in their relations conditions as favourable as those which they grant to economic operators of third countries in implementation of the Agreement on government procurement (hereinafter: 'the Agreement'), concluded in the framework of the Uruguay Round multilateral negotiations.

The Member States shall, to this end, consult each other within the Advisory Committee for Public Contracts on the measures to be taken pursuant to the Agreement.

Article 5

Confidentiality

Without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 39(3) and 46 respectively, the contracting authorities shall respect fully, **both throughout and after the award procedure**, the confidential nature of **the** information furnished by the economic operators. **This includes technical or trade secrets, the confidentiality of tenders and proposed solutions and any other confidential information given by the economic operator.**

CHAPTER II

Scope

Article 6

General

This Directive shall apply to public supply, service and works contracts not excluded under Section 2 whose estimated value net of value-added tax (VAT) is equal to or greater than the thresholds laid down in Article 9.

The contracting authorities shall nevertheless be obliged to respect, for all contracts, including those below the thresholds referred to in Article 9, the fundamental principles of the Treaty in general and the principle of non-discrimination on the basis of nationality in particular. The principle of non-discrimination implies an obligation of transparency in order to enable the contracting authority to ascertain that the principle is being respected. The obligation of transparency incumbent upon the contracting authority consists in ensuring, for the benefit of every potential tenderer, an adequate level of publicity in order to open up service contracts to competition, as well as control over the impartiality of the award procedures. In defining the appropriate procedures to guarantee respect for this obligation the Member States shall refer to the relevant provisions of this Directive.

Article 7

Contracts with purchasing groups

The provisions of this Directive shall be fully applicable to contracts whereby purchasing groups mentioned under Article 1(5) procure supplies or services. Contracting authorities acquiring supplies or services directly from a purchasing group or through the intermediary of a third party shall be deemed to have complied with the provisions of this Directive, provided that the purchasing group has complied with those provisions.

Article 8

Defence procurement

This Directive shall apply to public contracts awarded by contracting authorities in the field of defence, except for public supply and service contracts to which the provisions of Article 296 of the Treaty apply.

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Section 1

Thresholds

Subsection 1

Amounts

Article 9

Public contracts

The thresholds for the applicability of this Directive shall be as follows:

- (a) **€200 000** for public supply and service contracts awarded by contracting authorities which are listed as central government authorities in Annex IV; in the case of public supply contracts awarded by contracting authorities operating in the field of defence, this shall apply only to contracts involving products covered by Annex V;
- (b) **€300 000**,
 - for public supply and service contracts awarded by contracting authorities other than those listed in Annex IV;
 - for public supply contracts awarded by contracting authorities which are listed in Annex IV and operate in the field of defence, where these contracts involve products not covered by Annex V;
- (c) **€7 000 000** for public works contracts awarded by all contracting authorities.

Article 10

Contracts subsidised by more than 50 % by contracting authorities

Member States shall take the necessary measures to ensure that contracting authorities which subsidise directly by more than 50 % a works contract whose estimated value net of VAT is equal to or greater than € 5 300 000 and which involves civil engineering activities in position 45200000 of the CPV in Annex II or relating to building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes, ensure compliance with this Directive where that contract is awarded by one or more entities other than themselves or comply with this Directive where they themselves award that contract for and on behalf of those entities.

The first paragraph shall also apply where contracting authorities subsidise directly, by more than 50 %, a service contract whose estimated value net of VAT is equal to or greater than € 200 000 which is connected with a works contract within the meaning of the first paragraph.

Subsection 2

Methods for calculating value

Article 11

Calculating the value of framework agreements

1. The basis for calculating the value of a framework agreement shall be the estimated maximum value net of VAT of all the contracts envisaged for the period in question.
2. The value of contracts as referred to in paragraph 1 shall be calculated in accordance with Articles 12, 13 and 14.

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Article 12

Calculating the value of public supply contracts

1. For the purposes of calculating the value of public supply contracts, their estimated value shall equal or exceed the threshold concerned at the time of dispatch of the contract notice in accordance with Article 39(2).
2. No procurement requirement for a given quantity of supplies may be split up with the intention of evading the application of this Directive.
3. In the case of contracts for the lease, rental or hire purchase of products, the value to be taken as the basis for calculating the estimated value of the contract shall be:
 - (a) in the case of fixed-term contracts, where their term is 12 months or less the total contract value for its duration, or, where their term exceeds 12 months, its total value including the estimated residual value;
 - (b) in the case of contracts for an indefinite period or in cases where there is doubt as to the duration of the contracts, the monthly value multiplied by 48.
4. In the case of regular contracts or of contracts which are to be renewed within a given time, the estimated contract value shall be established on the basis of:
 - (a) either the actual aggregate value of similar successive contracts awarded over the previous fiscal year or 12 months, adjusted, where possible, for anticipated changes in quantity or value over the 12 months following the initial contract;
 - (b) or the estimated aggregate value of successive contracts awarded during the 12 months following the first delivery or during the term of the contract, where this is greater than 12 months.

The method of valuation shall not be used with the intention of evading the application of this Directive.

5. If a proposed procurement of supplies of the same type may lead to contracts being awarded at the same time in separate lots, the estimated value of the total sum of these lots shall be taken as the basis for the application of paragraph 3 and of points (a) and (b) of Article 9.
6. Where a proposed contract provides for options, the basis for calculating the estimated contract value shall be the maximum permitted total amount of the purchase, lease, rental, or hire-purchase, including use of the option clauses.

Article 13

Calculating the value of public service contracts

1. For the purposes of calculating the estimated amount of a contract, the contracting authority shall include the estimated total remuneration of the service provider, taking account of the provisions set out in paragraphs 2 to 8.
2. Where a proposed contract provides for options, the basis for calculating the contract value shall be the maximum permitted total amount, including use of the option clauses.
3. For the purposes of calculating the estimated contract value for the following types of services, account shall be taken, where appropriate:
 - (a) of the premium payable, **as well as other, comparable types of remuneration**, in the case of insurance services,
 - (b) as regards banking and other financial services, of fees, commissions and interest as well as other types of remuneration,
 - (c) of fees or commissions, in the case of design contracts.

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4. Where the services are subdivided into several lots, each one the subject of a contract, the value of each lot shall be taken into account for the purpose of calculating the applicable threshold.
5. Where the value of the lots is equal to or greater than the applicable threshold, the provisions of this Directive shall apply to all lots. A contracting authority need not apply the first indent of points (a) and (b) of Article 9 to any lots which have an estimated individual value net of VAT of less than € 80 000, provided that the total value of such lots does not exceed 20 % of the total value of the lots.
6. In the case of contracts which do not specify a total price, the value to be taken as the basis for calculating the estimated contract value shall be:
 - (a) in the case of fixed-term contracts, where their term is 48 months or less, the total contract value for its duration;
 - (b) in the case of contracts of indefinite duration, **contracts including a tacit renewal clause or contracts** with a term of more than 48 months, the monthly value multiplied by 48.
7. In the case of regular contracts or contracts which are to be renewed within a given time, the contract value shall be established on the basis of:
 - (a) either the actual aggregate cost of similar contracts for the same categories of services awarded over the previous fiscal year of 12 months, adjusted, where possible, for anticipated changes in quantity or value over the 12 months following the initial contract,
 - (b) or the estimated aggregate cost during the 12 months following the first service performed or during the term of the contract, where this is greater than 12 months.
8. The selection of the valuation method shall not be used with the intention of evading the application of this Directive, nor shall any procurement requirement for a given amount of services be split up with the intention of evading the application of this Article.

Article 14

Calculating the value of public works contracts

1. When calculating the thresholds referred to in point (c) of Article 9 and the amounts referred to in points (a) and (b) of Article 35(4), account shall be taken not only of the value of the public works contracts but also of the estimated value of the supplies needed to carry out the works and made available to the contractor by the contracting authorities.
2. No work or contract may be split up with the intention of evading the application of this Directive.
3. Where a work is subdivided into several lots, each one the subject of a contract, the value of each lot must be taken into account for the purpose of calculating the threshold referred to in point (c) of Article 9.

Where the aggregate value of the lots is equal to or greater than this threshold, the provisions of point (c) of Article 9 shall apply to all lots.

However, a contracting authority need not apply point (c) of Article 9 to any lots which have an estimated individual value net of VAT of less than € 1 million, provided that the total value of such lots does not exceed 20 % of the total value of the lots.

Section 2

Excluded contracts

Article 15

Contracts in the water, energy and transport sectors

This Directive shall not apply to public contracts covered by Directive .../.../EC [on coordinating the procurement procedures of entities operating in the water, energy and transport sectors], which are awarded by contracting authorities exercising one or more of the activities referred to in Articles 3 to 6 of that Directive and are awarded for the pursuit of such activities, nor to public contracts excluded from the scope of that Directive under Articles 5(2), 21 and 28 thereof.

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Article 16

Specific exclusions in the field of telecommunications

This Directive shall not apply to public contracts for the principal purpose of permitting the contracting authorities to provide or exploit public telecommunications networks or to provide one or more public telecommunications services.

Article 17

Contracts reserved for sheltered employment schemes or sheltered workshops

Member States may reserve certain contracts for sheltered employment schemes or sheltered workshops. This must be stated in the contract notice.

A 'sheltered employment scheme' or 'sheltered workshop' is a scheme or workshop where over half the persons employed are persons with disabilities which, by their nature or gravity, prevent them from following an occupation in normal working conditions, and which offers such persons the security of an employment contract or an apprenticeship contract for the purpose of occupational rehabilitation or retraining.

Article 18

Secret contracts and contracts requiring special security measures

This Directive shall not apply to public contracts when they are declared to be secret, when their execution must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, or when the protection of the basic security interests of that State so requires.

Article 19

Contracts awarded pursuant to international rules

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

- (a) pursuant to an international agreement concluded in conformity with the Treaty between a Member State and one or more third countries and covering supplies or works intended for the joint implementation or exploitation of a work by the signatory States or services intended for the joint implementation or exploitation of a project by the signatory States; all agreements shall be communicated to the Commission, which may consult the Advisory Committee for Public Contracts;
- (b) to undertakings in a Member State or a third country pursuant to an international agreement relating to the stationing of troops;
- (c) pursuant to the particular procedure of an international organisation.

Article 20

Contracts excluded from the definition of a public service contract

This Directive shall not apply to public service contracts for:

- (a) the acquisition or rental, by whatever means, of land, existing buildings, or other immovable property or concerning rights thereon; nevertheless, financial service contracts concluded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive;

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- (b) the acquisition, development, production or co-production of **programme material** by broadcasters and contracts for broadcasting time;
- (c) arbitration and conciliation services;
- (d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, **transactions enabling the contracting authority to raise money or capital** and central bank services;
- (e) employment contracts;
- (f) research and development services other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority.

Article 21

Contracts awarded on the basis of an exclusive right

This Directive shall not apply to **public contracts** awarded **by a contracting authority to another contracting authority or to an association of contracting authorities** on the basis of an exclusive right which **they enjoy** pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.

Article 22

Contracts awarded to entities formed by contracting authorities

This Directive shall not apply to contracts awarded by a contracting authority to:

- (a) **a legally distinct entity, if the contracting authority exercises over that entity a control which is similar to that which it exercises over its own departments and if that entity carries out the essential part of its activities with the controlling contracting authority;**
- (b) **a joint venture formed by that contracting authority with other contracting authorities, if that contracting authority exercises over the joint venture a control which is similar to that which it exercises over its own departments and if the joint venture carries out the essential part of its activities with the controlling contracting authority or authorities.**

CHAPTER III

Arrangements for public service contracts

Article 23

Service contracts listed in Annex I A

Contracts which have as their object services listed in Annex I A shall be awarded in accordance with the provisions of Chapters IV to VII.

Article 24

Service contracts listed in Annex I B

Contracts which have as their object services listed in Annex I B shall be subject solely to Articles 27 and 39(3).

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Article 25

Mixed contracts including services listed in Annex I A and services listed in Annex I B

Contracts which have as their object services listed both in Annex I A and in Annex I B shall be awarded in accordance with the provisions of Titles IV to VII where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. In other cases, contracts shall be awarded in accordance with Article 27 and the third subparagraph of Article 39(3).

CHAPTER IV

Specific rules governing specifications and contract documents

Article 26

General provisions

1. For each contract, contracting authorities shall draw up a set of contract documents, clarifying and supplementing the information contained in the contract notices. In this context they shall introduce only technical specifications in accordance with Article 27 and, if they accept variants, the provisions set out in Article 28 shall be applicable.
2. Contracting authorities may require information on the subject of sub-contracting in accordance with Article 29 or stipulate conditions concerning obligations relating to employment protection provisions and working conditions in accordance with Article 30.
3. Contracting authorities may require particular conditions concerning performance of the contract, provided that those conditions are compatible with Community law **and are in accordance with the principles of equal treatment, non-discrimination and transparency as set out in Article 2.**

Article 27

Technical specifications

1. The technical specifications as defined in point 1 of Annex VI shall be set out in the contract documentation, such as contract notices, contract documents or additional documents.
2. Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening of public procurement to competition.
3. Technical specifications shall be formulated by referring to national standards implementing European standards, European technical approvals, **European eco-labels**, common technical specifications, international standards or when these do not exist national standards or national technical approvals, or any other technical reference produced by European standardisation bodies as defined in Annex VI, provided that the reference is accompanied by the words 'or equivalent'.

They may also be formulated in **terms of performance requirements**, of functional requirements **or of requirements with regard to the environmental impact of the product throughout its lifetime**. They shall, however, be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract.

'Equivalent' standards, in the context of the information provided by the contracting authority in its description of the tasks to be performed, mean standards which are compatible with the technical, functional and performance requirements, do not entail or cause any safety risks and do not incur any additional costs for the contracting authority.

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4. Where, in the case of public works contracts, there are no European standards, European technical approvals or common technical specifications, and it is impossible to formulate the specifications in terms of performance or functional requirements, the technical specifications may be defined by reference to national technical specifications relating to design and method of calculation and execution of works and use of material. Such reference shall be accompanied by the words 'or equivalent'.

5. Where a contracting authority makes use of the option of referring to the specifications mentioned in the first subparagraph of paragraph 3, **it cannot reject a tender on the grounds that the products and services tendered for do not comply with the specifications to which they have referred, provided that the tenderer proves in his tender, to the satisfaction of the contracting authority,** by whatever appropriate means, that the solutions he proposes satisfy in an equivalent manner the requirements defined by the technical specifications.

*A technical dossier of the manufacturer or a test report from a **recognised body** may constitute an appropriate means.*

A contracting authority that rejects a tender on the grounds that its requirements are not satisfied in an equivalent manner shall inform the tenderer, at the latter's request, of the grounds for non-equivalence.

6. Where a contracting authority uses the option laid down in the second subparagraph of paragraph 3 to prescribe in terms of performance, it may not reject a tender for products or services which comply with a national standard transposing a European standard, with a European technical approval, a common technical specification or an international standard, if these standards and approvals address the same functional and performance requirements and are appropriate.

The tenderer must demonstrate in his tender by any appropriate means such as a technical dossier or a test report by a third party that the product or service in compliance with the standard meets the functional or performance requirements of the contracting authority.

7. Technical specifications shall not refer to a specific make or **source, or** to trade marks, patents, types or a specific origin or **economic operator engaged in production or supply**. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraphs 3 and 4 is not possible; such reference shall be accompanied by the words 'or equivalent'.

Article 28

Variants

1. Where the criterion for the award of the contract is that of the most economically advantageous tender, contracting authorities may take account of variants which are submitted by a tenderer and meet the minimum performance or specifications required by these contracting authorities.

2. The contracting authorities shall state in the contract documents the minimum specifications to be respected by the variants and any specific requirements for their presentation. The contracting authorities shall indicate in the tender notice if variants are not permitted.

3. Article 27 shall apply to variants.

4. In the procedures for awarding public supply contracts, contracting authorities which have admitted variants pursuant to paragraph 1 may not reject a variant on the sole ground that it would lead, if successful, to a service contract rather than a public supply contract within the meaning of this Directive.

In the procedures for awarding public service contracts, contracting authorities which have admitted variants pursuant to paragraph 1 may not reject a variant on the sole ground that it would lead, if successful, to a supply contract rather than a public service contract within the meaning of this Directive.

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Article 29

Subcontracting

In the contract documents, the contracting authority may **not place any quantitative restrictions on the exercise, by the undertakings, of freedom of organisation of their own inputs**. It shall ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any designated subcontractors. This indication shall be without prejudice to the question of the principal economic operator's liability. **The contracting authority shall prohibit any subcontracting to undertakings which are in the situation referred to in Article 53 and/or undertakings which do not meet the requirements laid down in Articles 54, 55 and 56.**

Intellectual services, with the exception of translation and interpretation services and management and related services, may not be contracted out.

All requirements regarding the economic, financial and social performance of an economic operator shall apply to firms which carry out subcontracting.

Article 30

Service and works contracts: obligations relating to **taxes, environmental protection**, employment protection provisions and working conditions

1. In the procedures for awarding service and works contracts, the contracting authority **shall** state in the contract **documents the body or bodies** from which a tenderer may obtain the appropriate information on the obligations relating to **taxes, environmental protection**, employment protection provisions and the working conditions which are in force in the Member State, region or locality in which the services are to be provided or in which the works **contract is** to be performed and which shall be applicable to the services provided or the works carried out on site during the performance of the contract.

2. **Contractors shall be obliged to respect as a minimum standard the employment protection obligations, working conditions and labour law obligations, including collective as well as individual rights, arising from applicable labour legislation, judicial decisions and collective agreements which are deemed to be generally binding, provided that these are compatible with existing Community legislation and the general rules and principles of Community law, in particular the principle of equal treatment and non-discrimination.**

3. **The provisions under paragraph 2 shall not prevent application of employment protection provisions and working conditions which are more favourable to workers provided that these are compatible with Community law.**

4. The contracting authority which supplies the information referred to in paragraph 1 shall request the tenderers or those participating in the contract award procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are in force in the place where the service is to be provided or the works are to be carried out.

The first subparagraph shall be without prejudice to the application of the provisions of Article 63 concerning the examination of abnormally low tenders.

CHAPTER V

Procedures

Article 31

Use of open, restricted and negotiated procedures

1. In awarding public contracts the contracting authorities shall apply the procedures defined in Article 1(7), in accordance with this Directive.

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2. Contracting authorities shall award their public contracts by the open procedure or by the restricted procedure.
3. In the specific cases and under the specific conditions laid down in Articles 32, 33 and 35, they may use the negotiated procedure.
4. ***Without prejudice to paragraphs 1, 2 and 3, where a contracting authority decides to invite the submission of tenders by electronic means, the contracting authority may decide to award the contract by a reverse auction as defined in Article 1(8).***

Article 32

Cases justifying use of the negotiated procedure with publication of a contract notice

Contracting authorities may award their public contracts by negotiated procedure, after publication of a contract notice, in the following cases:

1. In respect of public supply contracts, public service contracts and public works contracts:
 - (a) in the event of irregular tenders or the submission of tenders which are unacceptable under national provisions compatible with the provisions of Articles 3, 28, 29, 30 and those of Chapter VII, in response to an open or restricted procedure, insofar as the original terms of the contract are not substantially altered.

Contracting authorities may refrain from publishing a contract notice where they include in the negotiated procedure all the tenderers and only those tenderers who satisfy the criteria of Articles 53 to 60 and which, during the prior open or restricted procedure, have submitted tenders in accordance with the formal requirements of the tendering procedure.

- (b) for the award of particularly complex public contracts, provided that the criterion for the award of the contract is that of the most economically advantageous tender, and provided that the procedure rules set out in Article 33 are complied with.

A contract is considered to be particularly complex when the contracting authority

- is not objectively able to define the technical or other means of meeting its requirements, or
- is not objectively in a position to assess what the market can offer in terms of technical or financial solutions.

2. In respect of public service contracts and public works contracts, in exceptional cases, when the nature of the services or works or the risks attaching thereto do not permit prior overall pricing.
3. In respect of public ***supply or*** service contracts, when the nature of the ***tasks*** to be ***performed***, in particular in the case of intellectual services, ***such as, for example, category 12 of Annex I A*** and services falling within category 6 of Annex I A, is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selecting the best tender according to the rules governing open or restricted procedures.
4. In respect of public works contracts, for works which are performed solely for purposes of research, testing or development and not with the aim of ensuring profitability or recovering research and development costs.

Article 33

Specific rules on particularly complex public contracts

1. In the ***case of particularly complex contracts within the meaning of Article 1(6)*** the contracting authorities shall publish a contract notice. ***This shall contain in particular:***

- (a) ***as precise a description as possible of their requirements in respect of the work to be performed,***
- (b) ***the estimated value of the contract,***

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- (c) *the conditions which the economic operators must fulfil in order to be admitted to the award procedure in accordance with Article 50 and the selection criteria referred to in Articles 53 to 60,*
- (d) *the award criteria and their respective weighting,*
- (e) *an invitation to submit an outline solution.*

2. *The outline solution shall be submitted within the time limit laid down in Article 42(3).*

Under Article 51(2) the contracting authorities may decide to invite a restricted number of participants in the award procedure to take part in a competitive dialogue. In this case, they shall announce this in the contract notice and reduce the number of participants objectively on the basis of factors relating to the competences and expertise set out in the same notice in accordance with the provisions of Article 50(2), (4) and (6). The number of candidates invited to participate in the award procedure must be at least three, provided that sufficient candidates possess the necessary qualifications in terms of competence and expertise. The award criteria and their respective importance must be set out in the contract notice in accordance with point (b) of Article 62(1) and may not be altered in the course of the award procedure, subject to the provisions of paragraph 3.

3. *The contracting authorities shall discuss, in a separate technical dialogue with each of the selected candidates, the technical means, designs and solutions best suited to meeting their needs. The contracting authorities may not disclose the proposed solutions and confidential information provided by candidates to other candidates or to third parties either during, or after the completion of, the procedure. If, in the course of the negotiations, the contracting authority deems it necessary to change the original requirements for the work in question specified in the contract notice, it must inform simultaneously and in writing all participants in the technical dialogue of any such change. The award criteria and their relative importance may not be amended unless they are no longer appropriate to the subject-matter of the contract as established in the light of the technical dialogue. Any proposed solutions submitted by candidates after that time shall be final. Any candidates who had submitted their proposed solutions before any such change was made must be given the opportunity to revise their position and draw up a fresh outline proposal if they wish.*

4. *The contracting authority shall declare the technical dialogue closed after consulting all candidates. All proposed solutions submitted thereafter shall be final. Candidates shall be invited simultaneously, and in writing, to state the cost of their definitive outline proposal within ten days. The contracting authority shall assess the tenders, without negotiation, on the basis of the criteria established to determine the most economically advantageous tender.*

5. *The contracting authority must make provision in the contract notice for participants to receive a monetary payment to compensate for any costs incurred. It shall be payable to all candidates whose outline proposals constitute feasible solutions. The amount of the monetary payment shall be indicated when candidates are invited to take part in the competitive dialogue, and must be such as to cover the average cost involved in preparing for and participating in the technical dialogue. If the contracting authority amends its requirements with regard to the work in question in the course of the technical dialogue, the compensatory payment shall be raised to take account of the additional work therefore incurred for candidates. The aggregate sum to be paid by way of compensation to all candidates shall be taken into account for the purpose of calculating the threshold values pursuant to Article 9 and must not exceed 15 % of the estimated contract value set out in the contract notice.*

Article 34

Exclusive dialogue

1. *In the case of contract award procedures whose objective is the creation of a public-private partnership, nothing in this Directive shall prevent the operation of paragraph 2.*

2. *Where there are matters that cannot reasonably or cost-effectively be resolved prior to the receipt of tenders, those matters may be the subject of exclusive dialogue between the contracting authority and the tenderer that has submitted the most economically advantageous tender prior to the award of the contract. This exclusive dialogue may not substantially alter fundamental aspects of the most economically advantageous tender, distort competition or infringe the Treaty or the general principles of Community law.*

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Article 35

Cases justifying use of the negotiated procedure without publication of a contract notice

Contracting authorities may award public contracts by a negotiated procedure without prior publication of a contract notice in the following cases:

1. As regards public supply contracts, public service contracts and public works contracts:
 - (a) when no tenders or no suitable tenders have been submitted in response to an open procedure or restricted procedure, provided that the initial conditions of contract are not substantially altered and on condition that a report is sent to the Commission if it so requests;
 - (b) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator;
 - (c) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time-limit for the open, restricted or negotiated procedures with publication of a contract notice referred to in Article 32 cannot be kept. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.
2. As regards public supply contracts:
 - (a) when the products involved are manufactured purely for the purpose of research, experiment, study or development, this provision does not extend to quantity production to establish commercial viability or to recover research and development costs;
 - (b) for additional deliveries by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance: the length of such contracts as well as that of recurrent contracts may, as a general rule, not exceed three years.
3. As regards public service contracts, when the contract concerned follows a design contest and shall, under the rules applying, be awarded to the successful candidate or to one of the successful candidates: in the latter case, all successful candidates shall be invited to participate in the negotiations.
4. As regards public service contracts and public works contracts:
 - (a) for additional services or works not included in the project initially considered or in the contract first concluded but which have, through unforeseen circumstances, become necessary for the performance of the services or works described therein, on condition that the award is made to the economic operator performing such services or works:
 - when such additional services or works cannot be technically or economically separated from the main contract without major inconvenience to the contracting authorities, or
 - when such services or works, although separable from the performance of the original contract, are strictly necessary for its completion.

However, the aggregate value of contracts awarded for additional services or works may not exceed 50 % of the amount of the main contract.

Contractors may be entrusted directly with additional works not included in the initial project which have, through unforeseen circumstances, become necessary for the performance of the work when such additional works cannot be technically or economically separated from the main work without major inconvenience or when such works, although separable from the performance of the main work, are strictly necessary for its completion;

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- (b) for new services or works consisting of the repetition of similar services or works entrusted to the economic operator to whom the same contracting authorities awarded an earlier contract, provided that such services or works conform to a basic project for which a first contract was awarded according to the open or restricted procedures.

As soon as the first project is put up for tender, the option of using this procedure shall be pointed out, and the total estimated cost of subsequent services or works shall be taken into consideration by the contracting authorities when they apply the provisions of Article 9.

This procedure may be used only during the three years following the conclusion of the original contract.

Article 36

Framework agreements

1. Contracting authorities which have concluded a framework agreement within the meaning of Article 1(9) shall reopen competition between the parties to the framework agreement in accordance with the following procedure:

- (a) For every contract to be awarded, the contracting authorities shall consult all economic operators who are party to the framework agreement, in writing.
- (b) The contracting authorities shall fix a time-limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject of the contract and the time needed to send in tenders.
- (c) Tenders shall be submitted in writing, and their content shall remain confidential until the time-limit for reply has expired.
- (d) Contracting authorities shall award each contract to the tenderer who has submitted the best tender on the basis of the award criteria established in accordance with Article 62.

The procedure set out in the first subparagraph may be applied only between the contracting authority and the economic operators originally party to the framework agreement.

2. Where a contracting authority has not concluded a framework agreement within the meaning of Article 1(9), it shall award each contract falling within the scope of this Directive in accordance with the provisions thereof.

3. Where contracting authorities choose to set up a qualification system in accordance with Article 52, the system shall be the subject of a notice drawn up in accordance with the standardised model in the Annexes to European Parliament and Council Directive .../.../EC [on coordinating the procurement procedures of entities operating in the water, energy and transport sectors] indicating the purpose of the qualification system and how to have access to the rules concerning its operation. The system shall not have a duration of less than five years.

4. Contracting authorities shall enter into framework agreements as defined in Article 1(9), with a minimum of three parties, where there is a sufficient number of economic operators satisfying the selection criteria.

The term of these agreements may not exceed three years or, in exceptional, duly justified cases, five years. Contracting authorities may not use framework agreements improperly or in such a way as to restrict or to distort competition.

5. The agreements provided for in this Article shall not apply to intellectual services.

The contracting authorities may conclude multiple framework agreements for the provision of translation and interpreting services.

For any given service, the contracting authorities must select the economic operator available to perform that service in accordance with the order of ranking.

6. Subject to the definition of framework contracts in Article 1(9), framework agreements shall not be admissible in the case of public works contracts.

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Article 37**Electronic auction**

1. *In cases where it is possible for the qualitative and quantitative characteristics of the object or service to be procured to be described so precisely that the only item still to be agreed is the price, the contracting authority may award the contract electronically by means of an auction using the open procedure. The contracting authority shall set a maximum price as the starting price, which tenderers may underbid. If the lowest offer is below the relevant threshold, this shall not affect the application of this Directive, provided that the starting price was above the threshold.*
2. *The auction must be announced at least 15 days beforehand in the Official Journal of the European Communities. In addition, the provisions of Articles 39 to 41 shall apply.*
3. *The auction shall continue for a minimum of seven days. Offers may be submitted throughout that period. The steps to be taken by tenderers shall be established by the contracting authority ex aequo et bono, by the beginning of the auction at the latest.*
4. *The contract shall be awarded to the tenderer who has submitted the most advantageous offer while complying with the conditions laid down in Articles 53 to 57. If the tenderer submitting the most favourable offer is disqualified, the tenderer offering the next most advantageous offer shall be selected, subject to the provisions of this paragraph.*
5. *If no bids are received, Article 31 shall apply.*

Article 38**Public works contracts: particular rules for public-private cooperation**

In the case of **public works which, for reasons of size, complexity, duration and/or financing, require collaborative project planning** by a team comprising representatives of the contracting authorities, experts and the contractor to be responsible for carrying out the works, a special award procedure may be adopted for selecting the contractor most suitable for integration into the team.

In particular, contracting authorities shall include in the contract notice as accurate as possible a description of the works to be carried out so as to enable interested contractors to form a valid idea of the project. Furthermore, contracting authorities shall, in accordance with the selection criteria referred to in Articles 53 to 60, set out in such a contract notice the personal, technical and financial conditions to be fulfilled by candidates.

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

CHAPTER VI**Rules on advertising and transparency****Section 1****Publication of notices****Article 39****Notices**

1. Contracting authorities shall make known, by means of an indicative notice:
 - (a) In the case of public supply contracts, the total procurement by product area which they intend to award over the following twelve months, where the total estimated value, taking into account the provisions of Articles 9 and 12, is equal to or greater than € 750 000.

The product area shall be established by the contracting authorities by reference to the CPV nomenclature.

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- (b) In the case of public service contracts, the estimated total value of the service contracts in each of the categories of services listed in Annex I A which they intend to award over the following twelve months, where such estimated total value, taking into account the provisions of Articles 9 and 14, is equal to or greater than € 750 000.
- (c) in the case of public works contracts, the essential characteristics of the works contracts which they intend to award, the value of which is equal to or greater than the threshold specified in Article 9, taking into account the provisions of Article 14.

The notices referred to in (a) and (b) shall be sent as soon as possible after the beginning of their budgetary year.

The notice referred to in (c) shall be sent as soon as possible after the decision approving the planning of the works contracts that the contracting authorities intend to award.

The Commission shall determine the conditions of reference in the notice to particular positions of the nomenclature, in accordance with the procedure laid down in Article 85(2).

2. Contracting authorities who wish to award a public contract by open, restricted or, under the conditions laid down in Article 32, negotiated procedure, shall make known their intention by means of a contract notice **or, where a qualification system is maintained in accordance with Article 52, by means of a notice on the existence of a qualification system.**

3. Contracting authorities which have awarded a public contract or a framework agreement within the meaning of Article 1(9) shall send a notice of the results of the award procedure no later than 48 days after the award of the contract or framework agreement.

In the case of contracts awarded under a framework agreement within the meaning of Article 1(9), the contracting authorities are not bound to send a notice of the results of the award procedure for each contract based on that agreement.

In the case of public contracts for services listed in Annex I B, the contracting authorities shall indicate in the notice whether they agree to its publication. The Commission shall draw up the rules for establishing statistical reports on the basis of such notices and for the publication of such reports in accordance with the procedure laid down in Article 85(2).

Certain information on the contract award or the contract award under a framework agreement may be withheld from publication where release of such information would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of economic operators, public or private, or might prejudice fair competition between them.

Article 40

Form and manner of publication of notices

1. The notices shall be drawn up in accordance with the standard forms adopted by the Commission in accordance with the procedure in Article 85(2), **shall be published in the Official Journal of the European Communities** and shall, at the least, specify the information indicated in Annex VII A.

The contracting authorities may not set any conditions other than those specified in Articles 55 and 56 when requesting information concerning the economic, financial and technical standards which they require of economic operators for their selection.

2. In the case of framework agreements within the meaning of Article 1(9), the notices referred to in Article 39(1) and (2) shall also be marked 'framework agreement' and shall indicate the planned duration specifying, where appropriate, the grounds justifying duration of the framework agreement of more than three years, the expected number and where appropriate the maximum number of economic operators, the estimated total value of the supplies, services or works for the entire duration and, as a guideline, the value and frequency of the contracts to be awarded. It shall also indicate the objective criteria on which the choice of tenders is based, and the criteria governing the award of each contract under a reopened competition, such criteria being established in accordance with Article 62.

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3. The notices shall be published in accordance with the technical specifications for publication set out in Annex VIII.

4. Notices drawn up and transmitted by electronic means in accordance with the technical specifications for publication set out in Annex VIII shall be published not later than five days after they are sent.

Notices which are not transmitted by electronic means in accordance with the technical specifications for publication given in Annex VIII shall be published not later than 12 days after they are sent.

In the case of the accelerated procedure referred to in Article 42(5), this period shall be reduced to five days provided that the notice was sent by fax or by electronic means.

5. Contract notices referred to in Article 39(2) shall be published in full in an official language of the Community, this language version constituting the sole authentic text. A summary of the important elements of each notice shall be published in the other official languages.

6. The notices and their contents may not be made public at national level before the date on which they are sent in accordance with Annex VIII.

7. Notices published at national level shall not contain information other than that contained in the notices dispatched in accordance with Annex VIII, but shall mention the date of that dispatch.

8. The costs of publishing notices in accordance with Annex VIII shall be borne by the Community.

The content of notices not sent by electronic means in accordance with the technical specifications for publication set out in Annex VIII shall be limited to approximately 650 words.

9. The contracting authorities shall be able to supply proof of the dates on which notices are dispatched.

Article 41

Non-mandatory publication

Contracting authorities may publish in accordance with Annex VIII notices of public contracts which are not subject to the publication requirement laid down in this Section.

Section 2

Time-limits

Article 42

Requests to participate and receipt of *tenders*

1. **In** the case of open procedures, the minimum time-limit for the receipt of tenders is 52 days from the date on which the contract notice was sent.

2. In the case of restricted procedures and negotiated procedures with publication of a contract notice referred to in Article 32, the minimum time-limit for receipt of requests to participate shall be **40 days** from the date on which the contract notice was **sent**.

3. **When** contracting authorities have published an indicative notice, the minimum time-limit for the receipt of tenders shall be **40 days**.

The period shall run from the date on which the contract notice was sent in open procedures, and from the date on which the invitation to tender was sent in restricted procedures and negotiated procedures with publication of a contract notice referred to in Article 32.

The shortened time-limits referred to in the first subparagraph shall be permitted, provided that the indicative notice has included all the information required in the model contract notice and was sent for publication between no less than 52 days and no more than 12 months before the date on which the contract notice was **sent**.

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4. **If**, for whatever reason, the contract documents and the supporting documents or additional information, although requested in good time, have not been supplied within the time-limits set in Article 43, 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, the time-limits for the receipt of tenders shall be extended so that they only apply once all economic operators concerned are aware of all the information needed to produce a tender.

5. In the case of restricted procedures and negotiated procedures with publication of a contract notice referred to in Article 32, where urgency renders impracticable the time-limits laid down in paragraphs 2 and 3, contracting authorities may fix

- (a) a time-limit for the receipt of requests to participate which may not be less than 15 days from the date on which the contract notice was sent, or less than 10 days if the notice was sent by electronic means, in accordance with Annex VIII;
- (b) a time-limit for the receipt of tenders which shall be not less than 10 days from the date of the invitation to tender.

These time-limits may not be used for particularly complex contracts awarded under the procedural rules laid down in Article 33.

Article 43

Contract documents and additional information

1. Where contracting entities do not offer free direct access to the entire contract documents and any supporting documents by electronic means in accordance with Annex VIII, and where, in restricted and negotiated procedures with publication of a contract notice, the invitation to tender is not accompanied by such documents, the contract documents and supporting documents shall be sent to economic operators within six days of receipt of the request to participate, provided that the request was made in good time before the deadline for submission of tenders.

2. Provided it has been requested in good time, additional information relating to the contract documents shall be supplied by the contracting authorities or competent departments not later than six days before the final date fixed for receipt of tenders. In the case of the accelerated form of restricted or negotiated procedures, the time-limit shall be four days.

Section 3

Information content and means of transmission

Article 44

Means of transmission of requests to participate

- 1. Requests to participate in procedures for the award of public contracts may be made by electronic means, letter or fax.
- 2. In the accelerated form of restricted and negotiated procedures, requests for participation shall be made by the most rapid means of communication possible.
- 3. Requests to participate made by fax must be confirmed by letter or electronic means before the expiry of the time-limit set for their receipt.

Article 45

Invitations to submit a tender or to negotiate

- 1. In restricted procedures and negotiated procedures with publication of a contract notice within the meaning of Article 32, the contracting authorities shall simultaneously and in writing invite the selected candidates to submit their tenders or to negotiate.

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2. The invitation to the candidates shall specify how the candidates can access the set of specifications and supporting documents made directly available by electronic means in accordance with Annex VIII.

If this access is not provided, the invitation shall be accompanied by one copy of the specifications and supporting documents.

3. In the accelerated form of restricted and negotiated procedures, invitations to submit a tender shall be made by the most rapid means of communication possible.

4. The invitation to submit tenders and the invitation to negotiate referred to in Article 32 must contain at least

- (a) where an entity other than the contracting authority responsible for the award procedure has the specifications and contract documents, the address from which those specifications and documents may be requested, the closing date for requesting such documents, the sum payable, if any, for obtaining them and any payment procedures;
- (b) in the case of particularly complex contracts under the rules laid down in Article 33, the invitation to negotiate shall also specify the date set for the start of negotiation, the address at which the negotiation is to take place and the language or languages used for negotiating;
- (c) the final date for the receipt of the tenders, the address to which the tenders must be sent and the language or languages in which the tenders must be drawn up;
- (d) a reference to the contract notice published;
- (e) a reference to any documents to be submitted, either in support of verifiable declarations by the tenderer in accordance with the second subparagraph of Article 40(1), or to supplement the information referred to in that Article, and under the conditions laid down in Articles 55 and 56;
- (f) the relative weighting of criteria for the award of the contract if, in exceptional cases referred to in the third subparagraph of Article 62(2), this is not given in the contract notice;
- (g) any other specific condition for taking part in the tendering procedure ***that does not unduly discriminate between tenderers.***

Article 46

Informing candidates and tenderers

1. The contracting authority shall, within 15 days of the date on which a written request is received, inform any eliminated candidate or tenderer of the reasons for rejection of his application or his tender, and any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer.

However, contracting authorities may decide to withhold certain information on the contract award, referred to in the preceding subparagraph, where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of economic operators, public or private, or might prejudice fair competition between them.

2. The contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the award of the contract, including the grounds for any decision not to award a contract for which there has been a call for competition or to recommence the procedure, and shall do so in writing if requested.

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Article 47

Completion of award procedure

Award procedures shall be completed by the award of the contract or cancellation. Award procedures may be cancelled only if

- (a) no tender has been received which fulfils the terms and conditions of the contract notice, or***
- (b) there are other serious grounds which lie outside the powers of the contracting authority.***

Section 4

Communication

Article 48

Means of communication

1. All communication and information exchange mentioned in this Title may be performed by letter, fax or electronic ***means***.

Directives 1999/93/EC and 2000/31/EC shall apply to the transmission of information by electronic means.

A tender may be submitted by electronic means only if an advanced electronic signature within the meaning of Directive 1999/93/EC and a reliable means of encrypting the contents are used.

2. Communication and information exchange ***and the storage, holding and processing of information*** shall be carried out in such a way as to ensure that the integrity of data and the confidentiality of tenders and of all information supplied by economic operators are preserved, and that the contracting authorities only examine the content of tenders after the time-limit set for submitting them has expired.

3. If tenders are submitted by electronic means, tenderers shall undertake to submit the documents, certificates, attestations and declarations mentioned in Articles 53 to 57 and 60 by any appropriate means by the day before the tenders are opened.

4. Whichever means is chosen for submitting tenders may not have the effect of hampering the proper functioning of the internal market.

5. ***Contracting authorities shall provide to tenderers on request a certificate from an accredited third party certifying that they have in place adequate measures to safeguard the confidentiality of tenderers' information during transmission and after receipt.***

Section 5

Reports

Article 49

Content of reports

For every contract the contracting authorities shall draw up a written report which shall include at least the following:

- (a) the name and address of the contracting authority, the subject and value of the contract;
- (b) the names of the candidates or tenderers admitted and the reasons for their selection;
- (c) the names of the candidates or tenderers rejected and the reasons for their rejection;

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- (d) the reasons for the rejection of tenders found to be abnormally low;
- (e) the name of the successful tenderer and the reasons why his tender was selected and, if known, the share of the contract which the successful tenderer intends to subcontract to third parties;
- (f) for negotiated procedures, the circumstances referred to in Articles 32 and 35 which justify the use of these procedures;
- (g) if necessary, the reasons why the contracting authority has decided not to award a contract.

The report, or the main features of it, shall be communicated to the Commission if it so requests.

CHAPTER VII

Conduct of the procedure

Section I

General provisions

Article 50

Selection of participants and award of *contracts*

1. Contracts shall be awarded on the basis of the criteria laid down in Section 3, taking into account Article 28, after the suitability of the economic operators not excluded under Articles 53 and 54 has been checked by contracting authorities in accordance with the criteria of economic and financial standing and of professional and technical knowledge or ability referred to in Articles 55 to 60.
2. Under Section 2, the contracting authorities may determine the level of capacity and experience required for a specific contract. ***A lack of experience may be offset by evidence of special capacity.***
3. Tenderers, in the case of open procedures, and candidates, in the case of restricted and negotiated procedures, may not be excluded from the award procedure on the basis of selection criteria and/or levels of capacity and experience not specified in the contract notice.
4. Where contracting authorities decide, in a restricted or negotiated procedure with publication of a contract notice, to limit the number of candidates to be invited to submit tenders within the maximum number or range specified in Article 51, they shall do so on the basis of objective criteria established in accordance with paragraph 2.

These criteria shall be set out in the contract notice.

5. Contracting authorities shall eliminate any tenderer, in the case of open procedures, and any candidate, in the case of restricted and negotiated procedures, not meeting the selection criteria or possessing the capacity and experience levels set in advance.
6. The extent of the information referred to in Articles 55 and 56 and the capacity level required for a specific contract shall ***be proportionate*** to the subject-matter of the contract. In handling this information contracting authorities ***are obliged, during and after the contracting procedure, to respect technical or trade secrets, the confidentiality of tenders and outline solutions and any other confidential information communicated by the economic operator.***

Article 51

Further rules governing restricted and negotiated procedures

1. In restricted and negotiated procedures the contracting authorities shall, on the basis of information given relating to the economic operator's personal position as well as to the information and formalities necessary for the evaluation of the minimum conditions of an economic and technical nature to be fulfilled by him, select from among the candidates with the qualifications required by Section 2 those whom they will invite to submit a tender or to negotiate.

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2. Where contracting authorities award a contract by restricted procedure and by negotiated procedure with publication of a contract notice, namely in those cases referred to in Article 32, they may prescribe the minimum number of candidates which they intend to invite to submit a tender or negotiate. This minimum number shall be five candidates in restricted procedures and three in negotiated procedures. They may also set a maximum number of candidates which they intend to invite to submit a tender provided that this maximum number is fixed in such a way that competition is not restricted. Any numbers set shall be indicated in the contract notice.

Article 52

Qualification systems

1. *Contracting authorities which so wish may establish and operate a system of qualification of economic operators.*

Authorities which establish or operate a system of qualification shall ensure economic operators are at all times able to request qualification.

2. *The system under paragraph 1 may involve different qualification stages.*

It shall be operated on the basis of objective criteria and rules to be established by the contracting authority.

Where those criteria and rules include technical specifications, the provisions of Article 27 shall apply. The criteria and rules may be updated as required.

3. *The criteria and rules for qualification referred to in paragraph 2 shall be made available to economic operators on request. The updating of these criteria and rules shall be communicated to the interested economic operators. Where a contracting authority considers that the qualification system of certain other authorities or bodies meets its requirements, it shall communicate to interested economic operators the names of such other authorities or bodies.*

4. *A written record of qualified economic operators shall be kept; it may be divided into categories according to the type of contract for which the qualification is valid.*

5. *When a notice on the existence of a qualification system has been published in accordance with Article 39(2), tenderers in a restricted procedure or participants in a negotiated procedure shall be selected from the qualified candidates in accordance with such a system.*

Section 2

Criteria for qualitative selection

Article 53

Personal situation of the candidate or tenderer

1. Any economic operator shall be excluded from participation in the contract who, at any time during a five-year period preceding the start of the contract award procedure, has been convicted by definitive judgment:

- (a) of having committed a serious offence by participating in the activities of a criminal organisation, defined as a structured association established over a period of time and operating in a concerted manner to achieve financial advantage and, where appropriate, to influence unduly the functioning of public authorities;
- (b) of corruption, that is to say, of having promised, offered or given, whether directly or via third parties, a benefit of whatever kind to a civil servant or public agent of a Member State, a third country or an international organisation or to any person for the benefit of that person or a third party, with the intention that such person will carry out or refrain from carrying out any act in breach of his professional obligations;

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- (c) of fraud within the meaning of Article 1 of the Convention relating to the protection of the financial interests of the European Communities established by the Council Act of 26 July 1995 ⁽¹⁾;
 - (d) *of money laundering within the meaning of Article 1 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering* ⁽²⁾;
 - (e) *of fraudulent or other forms of dishonest anti-competitive behaviour in connection with the award of public contracts in the common market;*
 - (f) *following non-compliance with rules and legislation on collective agreements and other employment-related and social aspects in the country in which they are established or in another relevant country (e.g. that of the previous client);*
 - (g) *of a drugs-related offence within the meaning of Article 3(1)(a) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances adopted on 19 December 1988 in Vienna;*
2. Any economic operator may be excluded from participation in the contract **who**:
- (a) **is** the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or for composition with creditors or of any other similar proceedings under national laws and regulations;
 - (b) has been convicted by **definitive** judgment, **pursuant to the law of the Member State in question**, of any offence concerning his professional conduct;
 - (c) has been guilty of grave professional misconduct, **including the violation of international core labour standards as defined in Annex XI and infringement of fundamental European legislation relating to employment protection and working conditions**, proven by any means which the contracting authorities can demonstrate;
 - (d) 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;
 - (e) **has not fulfilled employment protection obligations towards workers and labour law obligations towards their representatives in accordance with the applicable legal provisions, including those in legislation, collective agreements and contracts; in order to justify exclusion from tender procedures, such non-compliance must have been established by definitive judgment handed down by an ordinary court; such exclusion, and the duration thereof, may not be disproportionate to the importance of the offence;**
 - (f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of countries concerned;
 - (g) is guilty of serious misrepresentation in supplying the information required under this Section;
 - (h) **has been convicted by a judgment of failing, or can be shown by the competent national authority to have failed, to meet his obligations with regard to the health and safety of workers in relation to Community law or the legislation of the countries in question.**
3. **Economic operators who are bankrupt or are being wound up, whose affairs are being administered by the court, who have entered into an arrangement with creditors, who have suspended business activities or who are in an analogous situation arising from a similar procedure under national laws and regulations shall be excluded from participation in the award procedure.**

⁽¹⁾ OJ C 316, 27.11.1995, p. 48.

⁽²⁾ OJ L 166, 28.6.1991, p. 77. Directive last amended by European Parliament and Council Directive 2001/97/EC (OJ L 344, 28.12.2001, p. 76).

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4. Where the contracting authority requests the economic operator to provide proof that none of the cases quoted in paragraph 1 and points (a), (b), (d), (f) or (h) of paragraph 2 applies to him, it shall accept as sufficient evidence:

- (a) for paragraph 1 and points (a) (b) and (h) of paragraph 2, 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 in the country whence that person comes showing that these requirements have been met;
- (b) for points (d) or (f) of paragraph 2, a certificate issued by the competent authority in the Member State concerned.

5. Where the country in question does not issue the documents or certificates referred to in paragraph 4, or where these do not cover all the cases quoted in paragraph 1 and points (a) or (b) of paragraph 2, they may be replaced by a declaration on oath or, in Member States where there is no provision for declarations on oath, by a solemn declaration made by the person concerned before a competent 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 person comes.

6. Member States shall designate the authorities and bodies competent to issue the documents, certificates or declarations referred to in paragraphs 4 and 5 and shall forthwith inform the other Member States and the Commission thereof.

Article 54

Suitability to pursue the professional activity

Any economic operator wishing to take part in a public contract may be requested to prove his enrolment, as prescribed in his country of establishment, in one of the professional or trade registers or to provide a declaration on oath or certificate as described in Annex IX A for public supply contracts, in Annex IX B for public service contracts and in Annex IX C for public works contracts.

In procedures for the award of public service contracts insofar as candidates for a public contract or tenderers have to possess a particular authorisation or to be members of a particular organisation in their home country in order to be able to perform the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership.

Article 55

Economic and financial standing

1. Proof of the economic operator's economic and financial standing may, as a general rule, be furnished by one or more of the following references:

- (a) appropriate statements from banks or evidence of relevant professional risk indemnity insurance;
- (b) the presentation of balance-sheets or extracts from the balance-sheets, where publication of the balance-sheet is required under the law of the country in which the economic operator is established;
- (c) a statement of the undertaking's overall turnover.

2. Contracting authorities shall specify, in the contract notice or in the invitation to tender, which reference or references mentioned in paragraph 1 they have chosen and which other references they intend to obtain.

3. If, for any valid reason, the economic operator is unable to provide the references requested by the contracting authority, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.

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Article 56

Technical and/or professional capability

1. The technical and/or professional capabilities of the economic operators shall be assessed and examined in accordance with paragraphs 2, 3 and 4.
2. In the procedures for awarding public supply contracts, evidence of the supplier's technical capability may be furnished by one or more of the following means according to the nature, quantity and purpose of the products to be supplied:
 - (a) a list of the principal deliveries effected in the past three years, with the sums, dates and recipients, public or private, involved:
 - where the supplies are made to public authorities, evidence of delivery shall be in the form of certificates issued or countersigned by the competent authority;
 - where the supplies are to private purchasers, delivery shall be certified by the purchaser or, failing this, simply declared by the supplier to have been effected;
 - (b) a description of the supplier's technical facilities, his measures for ensuring quality, **environmental protection and protection of the health and safety of workers**, and his study and research facilities;
 - (c) indication of the technicians or technical bodies involved, whether or not belonging directly to the supplier, especially those responsible for quality control, **environmental management and protection of the health and safety of workers**;
 - (d) samples, description and/or photographs of the products to be supplied, the authenticity of which must be certified if the contracting authority so requests;
 - (e) certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of products clearly identified by references to specifications or standards;
 - (f) where the products to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authorities or on their behalf by a competent official body of the country in which the supplier is established, subject to that body's agreement, on the production capacities of the supplier and if necessary on his study and research facilities and quality control measures.
3. In the procedures for awarding public service contracts, the ability of service providers to perform services may be evaluated in particular with regard to their skills, efficiency, experience and reliability.

Evidence of the service provider's technical capability may be furnished by one or more of the following means according to the nature, quantity and purpose of the services to be provided:

- (a) the service provider'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 providing the services;
- (b) a list of the principal services provided in the past three years, with the sums, dates and recipients, public or private, of the services provided:
 - where the services are provided to contracting authorities, evidence of their performance shall be in the form of certificates issued or countersigned by the competent authority;
 - where they are provided to private purchasers, their performance shall be certified by the purchaser or, failing this, simply declared by the service provider to have been effected;
- (c) an indication of the technicians or technical bodies involved, whether or not belonging directly to the service provider, especially those responsible for quality control, **environmental management or the health and safety of workers**;
- (d) a statement of the service provider's average annual manpower and the number of managerial staff for the last three years;

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- (e) a statement of the tools, plant or technical equipment available to the service provider for carrying out the services;
- (f) a description of the service provider's measures for ensuring quality and his study and research facilities;
- (g) where the services to be provided are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authority or on its behalf by a competent official body of the country in which the service provider is established, subject to that body's agreement, on the technical capacities of the service provider and, if necessary, on his study and research facilities and quality control measures;
- (h) an indication of the proportion of the contract which the service provider may intend to sub-contract.

4. In the procedures for awarding public works contracts, evidence of the contractor's technical capability **and reliability** 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;
- (b) a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works; the 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 to the contracting authority direct;
- (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;
- (f) a description of the contractor's environmental management practices.**

5. The contracting authority shall specify, in the notice or in the invitation to tender, which references under paragraphs 2, 3 and 4 it wishes to receive.

Article 57

Quality assurance standards

Should contracting authorities require the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain quality assurance standards, they shall refer to quality assurance systems based on the relevant European standards series certified by bodies conforming to the European standards series concerning certification. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent quality assurance measures from economic operators who have no access to such certificates or no possibility of obtaining them within the relevant time-limits.

Article 58

Environmental management standards

Should contracting authorities require the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain environmental management standards, they shall refer to the Community Eco-Management and Audit Scheme (EMAS) or to environmental

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management standards based on the relevant European or international standards certified by bodies conforming to Community law or the relevant European or international standards concerning certification. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent environmental management measures from economic operators who have no access to such certificates or no possibility of obtaining them within the relevant time-limits.

Article 59

Additional documentation and information

Within the limits of Articles 53 to 56 the contracting authority may invite the economic operators to supplement the certificates and documents submitted or to clarify them.

Article 60

Official lists of approved economic operators

1. Member States which have official lists of approved suppliers, approved service providers or approved contractors shall adapt them to Article 53(1), points (a) to (d) and (g) of Article 53(2), to Articles 54 and 55, and to Article 56(2), in the case of suppliers, Article 56(3) in the case of service providers, and Article 56(4) in the case of contractors.

2. Economic operators registered in the official lists may, for each contract, submit to the contracting authority a certificate of registration issued by the competent authority. The certificate shall state the reference which enabled them to be registered in the list and the classification given in that list.

3. Certified registration in official lists of approved suppliers by the competent bodies shall not, for the purposes of the contracting authorities of other Member States, constitute a presumption of suitability except as regards Article 53(1) and points (a) to (d) and (g) of Article 53(2), Article 54, points (b) and (c) of Article 55(1) and point (a) of Article 56(2).

Certified registration in official lists of service providers by the competent bodies shall not constitute, for the purposes of the contracting authorities of other Member States, a presumption of suitability corresponding to the service provider's classification except as regards Article 53(1) and points (a) to (d) and (g) of Article 53(2), Article 54, points (b) and (c) of Article 55(1) and point (a) of the second subparagraph of Article 56(3).

Certified registration of a contractor in the official lists by the competent bodies shall not, for the contracting authorities of other Member States, constitute a presumption of suitability for works corresponding to the contractor's classification except as regards Article 53(1) and points (a) to (d) and (g) of Article 53, Article 54, points (b) and (c) of Article 55(1) and points (b) and (d) of Article 56(4).

4. 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 economic operator whenever a contract is offered.

The contracting authorities of other Member States shall apply paragraph 3 and the first subparagraph of this paragraph only in favour of economic operators established in the country holding the official list.

5. For any registration of economic operators of other Member States in an official list, no further proof or statements can be required other than those requested of national economic operators and, in any event, only those provided for under Articles 53, 54, 55, 56 and 57, and Article 56(2), in the case of suppliers, Article 56(3), in the case of service providers, or Article 56(4), in the case of contractors.

6. Member States which have official lists shall be obliged to inform the other Member States of the address of the body to which applications for registration should be sent.

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Article 61

Private law certification bodies

In order to ensure achievement of the objectives referred to in Articles 1, 2 and 3, Member States may make provision for the check on the requirements referred to in Articles 53, 54, 55, 56 and 57 to be carried out by specifically authorised certification bodies established in private law.

Section 3

The award of the contract

Article 62

Contract award criteria

1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting authorities shall base the award of contracts shall be:

- (a) either the lowest price only; or
- (b) when award is made to the most economically advantageous **tender, various** criteria linked to the subject of the public contract in question: for example, quality, price, technical merit, aesthetic and functional characteristics, running costs, **environmental characteristics, including those relating to production methods**, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, **the tenderer's equal treatment policy**.

2. In the case referred to in point (b) of paragraph 1, the contracting authority shall specify the **selection criteria in order of importance**.

- (a) in the contract notice or in the contract documents in the case of open procedures;
- (b) in the contract notice in the case of restricted and negotiated **procedures**.

In restricted and negotiated procedures, the contracting authority may, exceptionally, and in duly justified cases, state this **order of importance of the criteria** in the contract documents or in the invitation to tender. Under the same conditions and in the case of particularly complex contracts awarded under the procedural rules laid down in Article 33, this **order of importance** shall be stated in the invitation to negotiate.

Article 63

Abnormally low tenders

If, for a given contract, tenders appear to be abnormally **low, the** contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant and shall verify, after due hearing of the parties, those constituent elements taking account of the explanations received.

The contracting authority shall take into consideration explanations relating to:

- (a) the economics of the manufacturing process, of the services provided and of the construction method;
- (b) the technical solutions chosen and/or the exceptionally favourable conditions available to the tenderer for the supply of the goods and services, and the execution of the work;
- (c) the originality of the supplies, services or work proposed by the tenderer;
- (d) **the fulfilment of obligations relating to employment protection provisions and working conditions by the tenderer and subcontractors in the performance of the contract, including – in the case of supply of goods and services originating from third countries – compliance with internationally agreed core labour standards referred to in Annex XI in their production.**

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Where the contracting authority establishes that a tender is abnormally low on grounds that the tenderer has obtained a State aid, the tender can only be rejected after consultation with the tenderer where the latter is unable to prove, within a sufficient timeframe fixed by the contracting authority, that the aid in question was notified to the Commission under Article 88(3) of the Treaty and authorised. Where the contracting authority rejects a tender in these circumstances, it shall inform the Commission of that fact.

TITLE III

Granting of special or exclusive rights

Article 64

Compulsory stipulation

When a contracting authority grants to a body other than a contracting authority — regardless of its legal status — special or exclusive rights to engage in a public service activity, the instrument granting this right shall stipulate that the body in question must observe the rules and principles of the Treaty when awarding public supply contracts to third parties.

TITLE IV

Rules governing service design contests

Article 65

General provisions

1. The rules for the organisation of the contests shall be in conformity with Articles 65 to 72 and shall be communicated to those interested in participating in the contest.
2. The admission of participants to design contests shall not be limited:
 - (a) by reference to the territory or part of the territory of a Member State,
 - (b) on the grounds that, under the law of the Member State in which the contest is organised, they would have been required to be either natural or legal persons.

Article 66

Scope

1. In accordance with the provisions laid down in this Title, design contests shall be organised by:
 - (a) contracting authorities which are listed as central government authorities in Annex IV, where the value is equal to or greater than € 130 000;
 - (b) contracting authorities not listed in Annex IV, where the value is equal to or greater than € 200 000.
2. The provisions of this Title shall apply to:
 - (a) design contests organised as part of a procedure leading to the award of a public service contract;
 - (b) design contests with prizes and/or payments to participants.

In the cases referred to in point (a), the threshold refers to the estimated value net of VAT of the services.

In the cases referred to in point (b), the threshold refers to the total amount of the prizes and payments.

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Article 67

Exclusions from the scope

This Title shall not apply to:

1. service contests within the meaning of *Directive .../.../EC [on coordinating the procurement procedures of entities operating in the water, energy and transport sectors]* which are organised by contracting authorities exercising one or more of the activities referred to in Articles 3 to 6 of that Directive and are awarded for the pursuit of such activities; nor shall it apply to contests excluded from the scope of that Directive under Articles 5(2) and 63 thereof;
2. contests organised for the principal purpose of permitting the contracting authorities to provide or exploit public telecommunications networks or to provide one or more public telecommunications services.
3. contests which are subject to different procedural rules and granted under:
 - (a) an international agreement concluded in conformity with the Treaty, between a Member State and one or more non-member countries and covering services intended for the joint implementation or exploitation of a project by the signatory States; all agreements shall be communicated to the Commission, which may consult the Advisory Committee for Public Contracts;
 - (b) an international agreement relating to the stationing of troops and concerning undertakings in a Member State or a third country;
 - (c) the particular procedure of an international organisation.

Article 68

Notices

1. Contracting authorities who wish to carry out a design contest shall make known their intention by means of a contest notice.
2. Contracting authorities who have held a design contest shall send a notice of the results of the award procedure in accordance with Annex VIII and must be able to prove the date of dispatch.

Where the release of information on the outcome of the contest would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of a particular enterprise, public or private, or might prejudice fair competition between service providers, such information need not be published.

3. Contracting authorities may publish in accordance with Annex VIII notices of contests which are not subject to the publication requirement laid down in this Title.

Article 69

Form and manner of publication of notices

1. The notices shall be drawn up in accordance with the standard model notices adopted by the Commission in accordance with the procedure in Article 85(2) and shall specify, at least, the information indicated in Annex VII B.
2. The notices shall be published as provided in Annex VIII.
3. Notices drawn up and transmitted by electronic means in accordance with the technical specifications for publication given in Annex VIII shall be published not later than five days after they are sent.

Notices which are not transmitted by electronic means in accordance with the technical specifications for publication given in Annex VIII shall be published not later than 12 days after they are sent.

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4. Contracting authorities shall be responsible for the information they send for publication, and for ensuring that this information complies with the provisions of this Title.
5. The design contest notices referred to in Article 68(1) shall be published in full in an official language of the Community, this language version constituting the sole authentic text. A summary of the important elements of each notice is published in the other official languages.
6. The notices and their contents may not be made public at national level before the date of their dispatch in accordance with Annex VIII.
7. Notices published at national level shall not contain information other than that contained in the notices sent in accordance with Annex VIII and must state the date of dispatch of the latter.
8. The costs of publishing notices in accordance with Annex VIII shall be borne by the Community.

Notices which are not sent electronically in accordance with the technical specifications for publication given in Annex VIII shall be limited to around 650 words in length.

Article 70

Means of communication

1. All communication and information exchange mentioned in this Title may be performed by letter, fax or electronic *means*.
2. ***A tender may be submitted by electronic means only if an advanced electronic signature within the meaning of Directive 1999/93/EC and a reliable means of encrypting the contents are used.***
3. The communication and information exchange ***and the storage, holding and processing of information*** covered by this Title shall be carried out in such a way as to ensure that the integrity and confidentiality of all information supplied by service providers are preserved, and that the contracting authorities may only examine the content of plans and projects after the time-limit set for submitting these has expired.
4. If plans and designs are submitted by electronic means, participants in design contests shall undertake to submit any documents, certificates, attestations and declarations required by the contracting authorities by any appropriate means not later than the day before the plans and designs are examined by the jury.
5. Whichever means is chosen for submitting plans and projects may not have the effect of hampering the proper functioning of the internal market.

Article 71

Selection of competitors

Where design contests are restricted to a limited number of participants, the contracting authorities shall lay down clear and non-discriminatory selection criteria. In any event, the number of candidates invited to participate shall be sufficient to ensure genuine competition.

Article 72

Composition and decisions of the jury

The jury shall be composed exclusively of natural persons who are independent of participants in the contest. Where a particular professional qualification is required from participants in a contest, at least a third of its members of the jury shall have that qualification or its equivalent.

The jury shall be autonomous in its decisions or opinions. These shall be reached on the basis of projects submitted anonymously and solely on the grounds of the criteria indicated in the contest notice.

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TITLE V

Rules on concessions

CHAPTER I

Rules governing public works concessions

Article 73

Scope

The provisions under this Chapter shall apply to all public works concession contracts concluded by the contracting authorities where the value of the contracts is equal to or greater than € 5 300 000.

Article 74

Exclusions from the scope

The provisions of this Title shall not apply to public works concessions:

1. which are principally for the purpose of permitting the contracting authorities to provide or exploit public telecommunications networks or to provide one or more public telecommunications services;
2. which are declared secret or when their execution must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or when the protection of the basic interests of that State's security so requires;
3. which are subject to different procedural rules and granted under:
 - (a) 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 agreements shall be communicated to the Commission, which may consult the Advisory Committee for Public Contracts;
 - (b) an international agreement relating to the stationing of troops and concerning the undertakings in a Member State or a third country;
 - (c) the particular procedure of an international organisation.

Article 75

Publication of the notice

1. Contracting authorities who wish to award a works concession contract shall make known their intention by means of a notice.
2. The notice shall be drawn up in accordance with the standard forms adopted by the Commission in accordance with the procedure in Article 85(2) and shall specify at least the information indicated in Annex VII C.
3. The notice shall be published as provided in Annex VIII.
4. Notices drawn up and transmitted by electronic means in accordance with the technical specifications for publication given in Annex VIII shall be published not later than five days after they are sent.

Notices which are not transmitted by electronic means in accordance with the technical specifications for publication given in Annex VIII shall be published not later than 12 days after they are sent.

5. Contracting authorities shall be responsible for the information they send for publication, and for ensuring that this information complies with the provisions of this Directive and must be able to supply proof of the date of dispatch.

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6. The notice shall be published in full in an official language of the Community, that language version constituting the sole authentic text. A summary of the important elements of the notice shall be published in the other official languages.

7. The notices and their contents shall not be made public at national level before the date of dispatch in accordance with Annex VIII. Notices published at national level shall not contain information other than that contained in the notices sent in accordance with Annex VIII and must state the date of dispatch of the latter.

8. The costs of publishing notices in accordance with Annex VIII shall be borne by the Community.

Notices which are not sent electronically in accordance with the technical specifications for publication given in Annex VIII shall be limited to around 650 words in length.

9. Contracting authorities may publish in accordance with Annex VIII notices of concessions which are not subject to the publication requirement laid down in this Chapter.

Article 76

Time-limit for the submission of applications

When contracting authorities resort to a public works concession, the time-limit for the presentation of applications for the concession shall be not less than 52 days from the date of dispatch of the notice.

Article 77

Subcontracting

The contracting authority may:

- (a) either require the concessionaire to award contracts representing a minimum of 30 % of the total value of the work for which the concession contract is to be awarded, to third parties, at the same time providing the option for candidates to increase this percentage, this minimum percentage being specified in the concession contract; or
- (b) request the candidates for concession contracts to specify in their tenders the percentage, if any, of the total value of the work for which the concession contract is to be awarded which they intend to assign to third parties.

CHAPTER II

Rules on contracts awarded by concessionaires

Article 78

Rules applicable when the concessionaire is a contracting authority

When the concessionaire is a contracting authority as referred to in Article 1(5), he shall comply with the provisions laid down by this Directive for public works contracts in the case of works to be carried out by third parties.

Article 79

Rules applicable when the concessionaire is not a contracting authority

When the concessionaire is not a contracting authority as referred to in Article 1(5), he shall comply with the provisions in Articles 80 to 82 for contracts which he awards with third parties.

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Article 80

Advertising rules: threshold and exceptions

1. The Member States shall take the necessary measures to ensure that public works concessionaires apply the advertising rules defined in Article 81 when awarding works contracts to third parties when the value of such contracts is equal to or greater than € 5 300 000.

Advertising shall not, however, be required when a works contract satisfies the conditions listed in Article 35.

2. Groups of undertakings that have been formed to obtain the concession or undertakings related to them shall not be considered third parties.

'Related undertaking' shall mean any undertaking on which the concessionaire can exert a dominant influence, directly or indirectly, or any undertaking which can exert a dominant influence on the concessionaire or which, as the concessionaire, is subject to the dominant influence of another undertaking as a result 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:

- (a) holds a majority of the undertaking's subscribed capital; or
- (b) controls a majority of the votes attached to the shares issued by the undertaking; or
- (c) can appoint more than half of the undertaking's administrative, management or supervisory body.

The restrictive list of undertakings shall be included in the application for the concession. This list shall be brought up to date following any subsequent changes in the relationship between the undertakings.

Article 81

Publication of the notice

1. Works concessionaires who wish to award works contracts to a third party *shall* make known their intention by way of a notice.

2. The notice shall be drawn up in accordance with the standard form in accordance with the procedure in Article 85(2) and shall specify at least the information indicated in Annex VII D.

3. The notice shall be published in accordance with the provisions laid down in Article 75(2) to (8).

4. Article 75(9) on the voluntary publication of notices shall apply.

Article 82

Time-limit for the receipt of requests to participate and receipt of tenders

In works contracts awarded by a works concessionaire, the time-limit for the receipt of requests to participate, fixed by the concessionaire, shall be not less than 37 days from the date on which the contract notice was dispatched, and the time-limit for the receipt of tenders not less than 40 days from the date on which the contract notice or the invitation to tender was dispatched.

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TITLE VI

Statistical duties, executory powers and final provisions

Article 83

Statistical duties

In order to permit assessment of the results of applying this Directive, Member States shall forward to the Commission a statistical report, prepared in accordance with Article 84, separately addressing public supply, services and works contracts awarded by contracting authorities during the preceding year, not later than 31 October each year.

Article 84

Content of statistical report

1. For each contracting authority listed in Annex IV, the statistical report shall detail at least:

- (a) the number and value of contracts awarded;
- (b) the number and total value of contracts awarded pursuant to derogations to the Agreement.

As far as possible, the data referred to in point (a) of the first subparagraph shall be broken down by:

- (a) the contract award procedures used,
- (b) and, for each of these procedures, according to category:
 - of products identified using the CPV nomenclature,
 - of services identified using the nomenclature given in Annex I,
 - of works identified using the nomenclature given in Annex II.
- (c) the nationality of the economic operator to whom the contract was awarded.

Where the contracts have been concluded according to the negotiated procedure, the data referred to in point (a) of the first subparagraph shall also be broken down according to the circumstances referred to in Articles 32 and 35 and shall specify the number and value of contracts awarded by the Member State and non-member country of the successful contractor.

2. For each category of contracting authority which is not given in Annex IV, the statistical report shall detail at least:

- (a) the number and value of the contracts awarded, broken down in accordance with the second subparagraph of paragraph 1;
- (b) the total value of contracts awarded pursuant to derogations to the Agreement.

3. The statistical report shall set out any other statistical information, which is required under the Agreement.

The information referred to in the first subparagraph shall be determined pursuant to the procedure under Article 85(2).

Article 85

Advisory Committee

1. The Commission shall be assisted by the Advisory Committee for Public Contracts instituted by Article 1 of Council Decision 71/306/EEC⁽¹⁾ (hereinafter 'the Committee').

⁽¹⁾ OJ L 185, 16.8.1971. Decision as amended by Decision 77/63/EEC (OJ L 13, 15.1.1977, p. 15).

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2. Where reference is made to this paragraph, the advisory procedure laid down in Article 3 of Decision 1999/468/EC shall apply, in compliance with Article 7 and Article 8 thereof.
3. The Committee shall examine, on the initiative of the Commission or at the request of a Member State, any question relating to the application of this Directive.

Article 86

Revision of the thresholds

1. The Commission shall revise, in accordance with the procedure laid down in Article 85(2), the thresholds established in Article 9, every two years from 1 January ..., where such revision is necessary in order to ensure compliance with the thresholds in force as laid down by the Agreement, which are expressed in Special Drawing Rights (SDR).

The calculation of the value of these thresholds shall be based on the average daily value of the euro, expressed in SDR, over the 24 months terminating on the last day of August preceding the revision with effect from 1 January. The value of the thresholds thus revised shall, where necessary, be rounded down to the nearest ten thousand euro.

2. At the same time as the revision under paragraph 1, the Commission, in accordance with the procedure under Article 85(2), shall align:

- (a) the thresholds established in the first paragraph of Article 10 (subsidised contracts), in Article 73 (concessions), and in Article 80(1) (contracts awarded by the concessionaire) on the revised threshold applying to public works contracts;
- (b) the thresholds established in the second paragraph of Article 10 (subsidised services, and point (a) of Article 66(1) (contests organised by central government authorities) on the revised threshold applying to public service contracts concluded by the contracting authorities referred to in Annex IV;
- (c) the threshold established in point (b) of Article 66(1) (service contracts awarded by contracting authorities other than central government authorities), on the revised threshold applying to public service contracts awarded by the contracting authorities not included in Annex IV.

3. The value of the thresholds set pursuant to paragraph 1 in the national currencies of the Member States who are not participating in monetary union is normally to be adjusted every two years from 1 January 2002 onwards. The calculation of such value shall be based on the average daily values of those currencies expressed in euro over the 24 months terminating on the last day of August preceding the revision with effect from 1 January.

4. The revised thresholds referred to in paragraph 1 and their corresponding values in the national currencies referred to in paragraph 3 shall be published by the Commission in the Official Journal of the European Communities at the beginning of the month of November following their revision.

Article 87

Amendments

1. In accordance with the procedure referred to in Article 85(2), the Commission may **amend**:
 - (a) **the** lists of bodies and categories of bodies governed by public law in Annex III, when, in particular on the basis of the notifications from the Member States, amendments appear necessary;
 - (b) the lists of central government authorities in Annex IV, following any adaptations which might prove necessary subsequent to the agreements concluded within the World Trade **Organisation**;

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2. In accordance with the procedure laid down in Article 85(2), the Commission shall examine the application of this Directive to public service contracts and evaluate, in particular, the prospects for the full application of the Directive to procurement of the other services listed in Annex I B and the effects of in-house performance of services on the effective opening-up of procurement in this area. It shall make any necessary proposals to adapt the Directive accordingly.

Article 88

Implementation

Member States shall bring into force the laws, regulations and administrative provisions to comply with this Directive by 30 June 2002 at the latest. They shall immediately inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Article 89

Repeals

Directives 93/36/EEC, 92/50/EEC and 93/37/EEC are repealed with effect from the date shown in Article 88, without prejudice to the obligations of the Member States concerning the deadlines for transposition and application set out in Annex XII.

References to the repealed Directives shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex XIII.

Article 90

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Communities.

Article 91

Monitoring mechanisms

Member States shall be required to establish effective, open and transparent mechanisms to ensure implementation of this Directive by contracting authorities operating within their jurisdiction.

These mechanisms may include, inter alia, the establishment of an independent Public Procurement Agency with the powers to monitor contracting processes, to ensure that all stages of a contract award are properly completed and to intervene, as appropriate, where the procedures required by this Directive are not being followed. The independent agency should be given powers to enforce compliance, including, inter alia, the setting aside of contract awards or the re-opening of a contracting process. These powers should be subject to an independent appeals procedure open to contracting authorities and potential suppliers and should not preclude the right of contracting parties to take legal action.

Article 92

Addressees

This Directive is addressed to the Member States.

Done at ...,

For the European Parliament
The President

For the Council
The President
