

## **P5\_TA-PROV(2003)0312**

### **Procedures for supply, service and works contracts \*\*\*II**

**European Parliament legislative resolution on the Council common position with a view to adopting a European Parliament and Council directive on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (11029/3/2002 – C5-0141/2003 – 2000/0115(COD))**

**(Codecision procedure: second reading)**

*The European Parliament,*

- having regard to the Council common position (11029/3/2002 – C5-0141/2003),
  - having regard to its position at first reading<sup>1</sup> on the Commission proposal to Parliament and the Council (COM(2000) 275)<sup>2</sup>,
  - having regard to the Commission's amended proposal (COM(2002) 236)<sup>3</sup>,
  - having regard to Article 251(2) of the EC Treaty,
  - having regard to Rule 80 of its Rules of Procedure,
  - having regard to the recommendation for second reading of the Committee on Legal Affairs and the Internal Market (A5-0242/2003),
1. Amends the common position as follows;
  2. Instructs its President to forward its position to the Council and Commission.

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<sup>1</sup> OJ C 271 E, 7.11. 2002, p. 176.

<sup>2</sup> OJ C 29 E, 30.1.2001, p. 11.

<sup>3</sup> OJ C 203 E, 27.8.2002, p. 210.

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Amendment 1  
Recital 2

(2) The achievement of freedom of movement of goods in the matter of public supply contracts, and the achievement of freedom of establishment and freedom to provide services in the matter of public works contracts and public service contracts, for contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law requires not only the abolition of restrictions but also the implementation of provisions on the coordination of national procedures for the award of public contracts which are based on the rules governing these three freedoms and on the principles deriving therefrom, such as the principles of equal treatment, of which the principle of non-discrimination is no more than a specific expression, the principle of mutual recognition, the principle of proportionality and the principle of transparency, and the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.

(2) The achievement of freedom of movement of goods in the matter of public supply contracts, and the achievement of freedom of establishment and freedom to provide services in the matter of public works contracts and public service contracts, for contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law requires not only the abolition of restrictions but also the implementation of provisions on the coordination of national procedures for the award of public contracts which are based on the rules governing these three freedoms and on the principles deriving therefrom, such as the principles of equal treatment, of which the principle of non-discrimination is no more than a specific expression, the principle of mutual recognition, the principle of proportionality and the principle of transparency, and the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty. ***Contracting authorities are obliged to observe the above principles as regards all contracts, including those falling below the thresholds specified in Article 7.***

Amendment 77  
Recital 9a (new)

***(9a) A contract shall be deemed to be a public works contract only if its subject-matter specifically covers the execution of activities listed in Annex I, even if the contract covers the provision of other services necessary for the execution of***

*such activities. Public service contracts, in particular in the sphere of property management services, may, in certain circumstances, include works. However, insofar as such works are incidental to the principal subject matter of the contract, and are a possible consequence thereof or a complement thereto, the fact that such works are included in the contract does not justify the qualification of the contract as a public works contract.*

Amendment 7  
Recital 24

(24) The awarding of public contracts for certain audiovisual services in the field of broadcasting should allow aspects of cultural or social significance to be taken into account which render application of procurement rules inappropriate. For these reasons, an exception must therefore be made for public service contracts for the purchase, development, production or co-production of off-the-shelf programmes and other preparatory services, such as those relating to scripts or artistic performances necessary for the production of the programme and contracts concerning broadcasting times. However, this exclusion does not apply to the supply of technical equipment necessary for the production, co-production and broadcasting of such programmes.

(24) The awarding of public contracts for certain audiovisual services in the field of broadcasting should allow aspects of cultural or social significance to be taken into account which render application of procurement rules inappropriate. For these reasons, an exception must therefore be made for public service contracts for the purchase, development, production or co-production of off-the-shelf programmes and other preparatory services, such as those relating to scripts or artistic performances necessary for the production of the programme and contracts concerning broadcasting times. ***A broadcast should be defined as transmission and distribution using any form of electronic network.*** However, this exclusion does not apply to the supply of technical equipment necessary for the production, co-production and broadcasting of such programmes.

Amendment 8  
Recital 27

(27) 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 tenders which reflect the diversity of technical solutions. Accordingly, it must be possible to draw up the technical

(27) 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 tenders 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, tenders based on equivalent arrangements must be considered by contracting authorities. To demonstrate equivalence, tenderers should be permitted to use any form of evidence. Contracting authorities must be able to provide a reason for any decision that equivalence does not exist in a given case. Contracting authorities that wish to define environmental requirements for the technical specifications of a given contract may lay down the environmental characteristics and/or specific environmental effects of product groups or services. They can, but are not obliged to, use appropriate specifications that are defined in eco-labels, such as the European Eco-label, (multi-)national eco-labels or any other eco-label providing the requirements for the label are drawn up and adopted on the basis of scientific information using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and providing the label is accessible and available to all interested parties.

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Amendment 9  
Recital 32

(32) The laws, regulations and collective agreements, at both national and Community level, which are in force in the areas of **welfare** and safety at work apply during performance of a public contract, providing

(32) The laws, regulations and collective agreements, at both national and Community level, which are in force in the areas of **employment conditions** and safety at work apply during performance of a public

that such rules, and their application, comply with Community law. In cross-border situations, where workers from one Member State provide services in another Member State for the purpose of performing a public contract, Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services lays down the minimum conditions which must be observed by the host country in respect of such posted workers. If national law contains provisions to this effect, non-compliance with those obligations may be considered to be grave misconduct or an offence concerning the professional conduct of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a public contract.

contract, providing that such rules, and their application, comply with Community law. In cross-border situations, where workers from one Member State provide services in another Member State for the purpose of performing a public contract, Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services lays down the minimum conditions which must be observed by the host country in respect of such posted workers. If national law contains provisions to this effect, non-compliance with those obligations may be considered to be grave misconduct or an offence concerning the professional conduct of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a public contract.

Amendment 15  
Article 1, paragraph 7

7. An "electronic auction" is a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values ***concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders***, enabling them to be ranked using automatic evaluation methods.

7. An "electronic auction" is a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values, enabling them to be ranked using automatic evaluation methods. ***This procedure is in no way suited to the award of works contracts or contracts for intellectual-creative and other more complex services.***

Amendment 16  
Article 1, paragraph 9, subparagraph 1

9. "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.

9. "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.***

Amendments 18 and 87  
Article 1, paragraph 15a (new)

*15a. 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.*

Amendment 20  
Article 6

*This Directive shall not limit the right of economic operators to require a contracting authority, in accordance with the national law to which it is subject, to respect the confidential nature of information which they make available; such information may include, in particular, technical or trade secrets and the confidential aspects of tenders.*

*Without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 35(4) and 41 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. Such information includes technical or trade secrets, the confidentiality of tenders and proposed solutions and any other confidential information given by the economic operator.*

Amendment 23  
Article 7a (new)

*Article 7a*

*Respect for Community law*

*Contracting authorities shall be obliged to respect the fundamental principles of Community law in connection with all contracts, including those falling below the thresholds specified in Article 7.*

Amendment 25  
Article 16, point (b)

(b) the acquisition, development, production or co-production of programme material by broadcasters and contracts for broadcasting time;

(b) the acquisition, development, production or co-production of programme ***and other electronic material intended for transmission and distribution across all electronic communications networks*** by broadcasters and contracts for broadcasting time.

Amendment 26  
Article 16, paragraph 1a (new)

***In addition, this Directive shall not apply to public supply contracts involving the purchase of schoolbooks in respect of which a fixed final retail price has been laid down by law in the Member State in which the purchase is made.***

Amendment 27  
Article 18a (new)

***Article 18a***

***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.*

Amendment 31

Article 23, paragraph 4, subparagraph 2a (new)

*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 the non-equivalence.*

Amendment 33

Article 23, paragraph 6a (new)

*6a. Whenever possible, public authorities shall take into account accessibility for people with disabilities and design for all requirements. These technical specifications should be clearly indicated in the contract documents.*

Amendment 91

Article 29, paragraph 1a (new)

*1a. In the case of particularly complex contracts within the meaning of Article 1(15a) the contracting authority may make use of the competitive dialogue in accordance with this Article. The award criterion must be the most economically advantageous tender.*

Amendment 44

Article 29, paragraph 6, subparagraph 2

These tenders may be clarified **and** specified at the request of the contracting authority. However, such clarification, specification or additional information may not involve changes to the basic features of the tender or the call for tender, variations in which are likely to distort competition or have a discriminatory effect.

These tenders may be clarified, specified **and fine-tuned** at the request of the contracting authority. However, such clarification, specification, **fine-tuning** or additional information may not involve **fundamental** changes to the basic features of the tender or the call for tender, variations in which are likely to distort competition or



have a discriminatory effect.

Amendment 47  
Article 35, paragraph 2

2. Contracting authorities which wish to award a public contract ***or a framework agreement*** by open, restricted or, under the conditions laid down in Article 30, negotiated procedure ***with the publication of a contract notice or, under the conditions laid down in Article 29, a competitive dialogue***, shall make known their intention by means of a contract notice.

2. Contracting authorities which wish to award a public contract by open, restricted or, under the conditions laid down in Article 30, negotiated procedure shall make known their intention by means of a contract notice ***or, where a qualification system is in operation in accordance with Article 44a, by means of a notice that such a system exists.***

Amendment 51  
Article 42, paragraph 2a (new)

***2a. Contracting authorities shall provide to tenderers on request a certificate from an accredited third party certifying that they have taken the necessary steps to safeguard the confidentiality of tenderers' information during transmission and after receipt.***

Amendment 52  
Article 42, paragraph 3a (new)

***3a. 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.***

Amendment 54  
Article 44a (new)

***Article 44a***

***Qualification systems***

***1. Contracting authorities which so wish may establish and operate a system for***

*qualification of economic operators.*

*Authorities which establish or operate a qualification system shall ensure that 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 23 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 the names of such other authorities or bodies to interested economic operators.*

*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 35(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.*

Amendments 70 and 95  
Article 53, paragraph 1, point (a)

(a) when award is made to the tender most economically advantageous *for the contracting authorities*, various criteria

(a) when award is made to the tender most economically advantageous, various criteria *linked to* the subject of the public

***justified by*** the subject of the public contract in question: for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion or

contract in question: for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, ***including those relating to production methods***, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, ***the tenderer's policy in relation to people with disabilities, its equal treatment policy*** or

Amendment 68  
Article 80a (new)

#### ***Article 80a***

##### ***Monitoring mechanisms***

***Member States shall 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.***

Amendment 84  
Annex III, point VIII

VIII. ITALY

Bodies

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Bodies

Società "Stretto di Messina"  
Ente autonomo mostra d'oltremare e del  
lavoro italiano nel mondo  
Ente nazionale per l'aviazione civile Æ  
ENAC  
Ente nazionale per l'assistenza al volo -  
ENAV

Società "Stretto di Messina"  
Ente autonomo mostra d'oltremare e del  
lavoro italiano nel mondo  
Ente nazionale per l'aviazione civile Æ  
ENAC  
Ente nazionale per l'assistenza al volo -  
ENAV

**ANAS S.p.a.**

Amendment 69

Annex VII, Part A, Prior information notice, Point 1

1. The name, address, fax number, email  
address of the contracting authority and, if  
different, of the service from which  
additional information may be obtained.

1. The name, address, ***telephone and*** fax  
number ***and*** email address of the contracting  
authority and, if different, of the service  
from which additional information may be  
obtained ***and, in the case of services and  
works contracts, of the services from which  
information can be obtained concerning  
the rules and regulations on taxes,  
environmental protection, employment  
protection and working conditions  
applicable in the place where the contract  
is to be performed.***