



COMMISSION OF THE EUROPEAN COMMUNITIES

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OPINION OF THE COMMISSION

**pursuant to Article 251 (2), third subparagraph, point (c) of the EC Treaty,
on the European Parliament's amendments
to the Council's common position regarding the
proposal for a**

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**coordinating the procedures for the award of public works contracts, public supply
contracts and public service contracts**

**AMENDING THE PROPOSAL OF THE COMMISSION
pursuant to Article 250 (2) of the EC Treaty**

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1. INTRODUCTION

Under the third indent, point (c), of the second subparagraph of Article 251(2) of the EC Treaty, the Commission is to deliver an opinion on the amendments proposed by the European Parliament at second reading. The Commission's opinion on the amendments proposed by Parliament is given below.

2. BACKGROUND

Transmission of the proposal to the EP and the Council (COM(2000) 275 final – 2000/0115(COD)) pursuant to Article 175(1) of the Treaty:	12 July 2000
Opinion of the European Economic and Social Committee:	26 April 2001
Opinion of the Committee of the Regions:	13 December 2000
Opinion of the European Parliament at first reading:	17 January 2002
Council's common position:	20 March 2003
Opinion of the European Parliament at second reading:	2 July 2003

3. SUBJECT OF THE PROPOSAL

The proposal for a Directive is aimed at recasting Community legislation on public procurement, the objective being to create a genuine internal European market in this area. This legislation is intended not to replace national law but to ensure compliance with the principles of equality of treatment, non-discrimination and transparency in the award of public contracts in all Member States.

This proposal, which follows on from the debate launched by the Green Paper on Public Procurement, pursues a threefold objective of modernising, simplifying and rendering more flexible the existing legal framework in this field: modernising in order to take account of new technologies and changes in the economic environment, simplifying to make the current texts

more easily comprehensible for users, so that contracts are awarded in complete conformity with the standards and principles governing this area and the companies involved are in a better position to know their rights, and making procedures more flexible in order to meet the needs of public purchasers.

Moreover, the recasting of the three Directives in force will make available to economic operators, contracting authorities and European citizens a single, clear and transparent text.

4. COMMISSION OPINION ON THE AMENDMENTS PROPOSED BY THE EUROPEAN PARLIAMENT

4.1. Amendments accepted by the Commission: 7 and 84

Amendment 7: this amends recital 24 on the exclusion of certain audiovisual service contracts in order to clarify that “broadcast” should be taken to include also transmission and distribution using any form of electronic network. This is a useful clarification.

Amendment 84: this amends point VIII of Annex III to add ANAS S.p.a. to the list of Italian public-law bodies. The company meets the criteria laid down in the Directive for identifying such bodies.

4.2. Amendments accepted subject to reformulation: 9, 25 and 77

Amendment 77: this divides recital (9) in the common position into two recitals, for which purpose it introduces a recital (9a). The Commission thus takes over this amendment and modifies recital (9) accordingly in order to avoid repetitions:

- "(9) In view of the diversity of public works contracts, contracting authorities should be able to make provision for contracts for the design and execution of work 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, which may be defined by national law.
- (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 9: this proposes editorial changes to recital (32). It is proposed that this amendment should be taken over, using the wording of the "posting of workers" Directive, as follows:

- "(32) The laws, regulations and collective agreements, at both national and Community level, which are in force in the areas of work and employment conditions and safety at work apply during performance of a public 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 services¹ 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 25: according to the justification given, this amendment changes Article 16(b) in order to make clear that the exception must also apply to broadcasting bodies in the field of the Internet. In this sense, the concerns underlying this amendment correspond to those expressed in Amendment 7 (recital 24). On the other hand, the reference to "material" is not acceptable since it could be understood as extending the present exclusion, which relates solely to service contracts, to include supply contracts.

The Commission takes over this amendment in the following form:

"Article 16

Specific exclusions

This Directive shall not apply to public service contracts for:

...

- b) the acquisition, development, production or co-production of programmes by broadcasters and contracts for broadcasting time.

..."

4.3. Amendments rejected by the Commission: 1, 8, 15, 16, 18-87, 20, 23, 26, 27, 31, 33, 44, 47, 51, 52, 54, 68, 69, 70-95, and 91

Amendment 1 and Amendment 23:

Amendment 1 adds to recital (2), pointing out that contracting authorities are obliged to observe the principles in the Treaty even for contracts which fall below the thresholds for application of the Directive.

Amendment 23 inserts the obligation on contracting authorities to respect the fundamental principles of Community law in connection with all contracts, including those falling below the thresholds for application of the Directive.

¹ OJ L 18, 21.1.1997, p. 1.

There can be no doubt that, as has been recognised in the well-established case law of the Court of Justice, these principles apply to public contracts whatever their value. However, it is not legally desirable to establish an obligation such as this under the present Directive, which applies only above certain thresholds. For contracts below these thresholds this could lead to legal uncertainty with regard to the scope of the Directive and thus of the procedural obligations it lays down. In addition, for contracts covered by the Directive this insertion would be a duplication of recital (2) in the common position.

Amendment 8 and Amendment 33: **Amendment 8** changes recital (27) regarding the technical specifications to state that whenever possible contracting authorities must systematically lay down and refer to specifications that take in to account accessibility for people with disabilities.

Along the same lines, **Amendment 33** adds a paragraph 6a to Article 23 regarding the technical specifications so as to oblige contracting authorities whenever possible to define their technical specifications in terms of accessibility for people with disabilities and adds that these specifications must be clearly indicated in the contract documents.

Accessibility for people with disabilities is undoubtedly an important social aspect; however, while it may be technically possible to prescribe this it would not be desirable in all cases. The fact is that this amendment would lead to a generalisation of this obligation even for contracts for installations that are by nature not intended to be used by people with disabilities (e.g. the construction of barracks or training centres for the fire service).

Furthermore, following Parliament's first reading the common position makes it possible in a public contract to lay down accessibility requirements for people with disabilities; this follows from Annexe VI to the Directive on the technical specifications. However, the public - contracts Directive, the purpose of which is to coordinate procedures, is not the proper instrument for imposing an obligation to prescribe such features.

Lastly, the obligation to indicate such technical specifications only in the contract documents, as laid down in Amendment 33, contradicts the general rule stated in Article 23(1), whereby technical specifications may be set out in the contract notice (which provides prior information compared with the contract documents).

Amendment 15: this changes Article 1(7), which defines an "electronic auction".

It removes:

- 1) as regards values other than prices, any mention that these values relate to certain elements of tenders;
- 2) mention of the fact that the auction occurs after an initial full evaluation of the tenders;
- 3) the possibility of using electronic auctions for awarding works contracts or contracts for "intellectual-creative services" and other more complex services.

As regards point 1), this deletion is not acceptable, since it would allow auctions to proceed with regard to new aspects not covered in the contract for which tenders had been invited and would thus undermine the principle of equal treatment.

As regards point 2), this deletion is not acceptable, since a full initial evaluation of the tenders by the contracting authority is indispensable to allow a subsequent reranking in the electronic auction phase .

As regards point 3), such an exclusion is excessive, since the definition of electronic auctions already restricts their use to the elements that are “suitable for automatic evaluation by electronic means, without any intervention by the contracting authority”. Furthermore, Article 54(1) of the common position allows Member States who consider it desirable to prohibit use of this instrument or to restrict it, for example, to supply contracts only.

Amendment 16: this changes Article 1(9), adding to the list of contracting authorities purchasing groups set up by such authorities.

It thus has the purpose of considering central purchasing bodies set up by the State, local authorities and bodies governed by public law to be contracting authorities. The amendment would have the effect of qualifying any body as a contracting authority provided it had been set up for the purpose of centralising purchases. This element would be supplementary to the definition of central purchasing body already given in Article 1(10), which is based on two elements: being a contracting authority and acquiring goods and services intended for other contracting authorities. The amendment would introduce a manifest contradiction with the definition given in Article 1(9), which lays down conditions for being regarded as a contracting authority.

Amendments 18, 87, 91 and 44: these amendments concern competitive dialogue.

Amendments 18 and 87 change Article 1, adding a paragraph 15a with a definition of a particularly complex contract based on the impossibility of defining the technical or other means of meeting the contracting authority’s requirements as a result of the failure of a design contest or other previous procedure.

Article 29 already establishes the conditions under which a contract can objectively be considered as being "particularly complex". Adding the requirement of another procedure prior to the use of dialogue would lead to not inconsiderable wastage of time and money – both for public purchasers and for economic operators – which would go against the flexibility that the amendment seeks to achieve.

Amendment **91** adds to Article 29 a paragraph 1a stating that:

- 1) contracting authorities may make use of competitive dialogue in the cases mentioned in Amendments 18 and 87,
- 2) the award criterion must be the most economically advantageous tender.

As regards point 1), this part of the amendment is not acceptable for the same reasons as Amendments 18 and 87.

As regards point 2), this part of the amendment is superfluous because Article 29(1), second paragraph, states that "a public contract shall be awarded on the sole basis of the award criterion of the most economically advantageous tender".

Amendment **44** changes the second paragraph of Article 29(6) in order to allow adjustments to final bids after the dialogue phase has been concluded, provided the basic features of the tender are not "fundamentally" changed.

Such changes to the proposed solutions may be made during the dialogue phase, but not at the final offer stage, as they would be likely to give an advantage to certain tenderers rather than others by reopening the dialogue phase for some. This amendment is thus unacceptable, especially since it weakens the safeguard provided in the common position, which is that the basic features of tenders may not be changed.

Amendment 20: this changes Article 6 in order to strengthen the obligations of the contracting authority with regard to respecting the confidential nature of the information supplied by economic operators, by imposing these obligations throughout and after the award procedure.

The absolute nature of the phrase "throughout and after the award procedure" could have the effect of hindering competition: where a company had designed a project under a services contract, it would then be the only one in a position to carry out that project since the plans could not be communicated to any other applicant or tenderer. Secondly, there could be a contradiction between transparency obligations, for example vis-à-vis supervisory bodies, and the obligations of confidentiality.

Amendment 26: this adds to Article 16 a paragraph 1a in order to introduce an exemption from the application of the Directive for the purchase of schoolbooks where the price of these books in the contracting authority's country is laid down by law.

The fact that there is a retail price laid down by law does not justify non-application of the Directive. This is because even in the absence of price competition there is nothing to prevent the award of a contract on the basis of the criterion of the most economically advantageous tender. Even where the choice of works and editions is laid down centrally, it is still possible to centre competition on aspects other than price. Economic aspects (e.g. terms of payment² or the coverage of transport costs) or qualitative aspects (such as delivery times in the event of additional purchases, the right to exchange books and the time limits involved, possible responsibility for storage and the management of book distribution, taking back transport packaging etc.) can in fact be used to identify the tender that constitutes overall the economically most advantageous bid. Such cases of award on the basis of aspects other than price are not isolated instances, and for contracts relating to certain services – e.g. architects' services³ – the Directive explicitly provides for competition to be based on aspects other than the fixed-tariff prices.

Amendment 27: this introduces an Article 18a in order to exclude from the scope of the Directive contracts concluded by a contracting authority with an entity over which it has complete control or with a joint venture formed by that contracting authority with other contracting authorities.

This amendment is intended to take account of the "Teckal" judgment and is taken over from an amendment at first reading. The Commission had taken this over in its amended proposal, setting out – in more detail than the Court had in its judgment – the conditions that had to be met for a contract to be described as "in-house", as it considered that the judgment left a large number of questions open. The Council having been unable to reach agreement on this proposal, the Commission accepted that the common position should make no mention of it, since the legislator was not in a position to provide any greater legal security. For the same

² Even with identical prices, the economic assessment for a tender demanding payment on delivery is not the same as for one allowing payment 60 days after delivery.

³ See recital 45 and the beginning of Article 53(1) "Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services...".

reason the Commission considers that the amendment does not clarify the conditions for applying this case law and that it is therefore preferable to carry on with the case law alone, especially because there will shortly be further developments in this case law following a request for a preliminary ruling (case C-26/03) .

Amendment 31: this adds a subparagraph 2a to Article 23(4) on technical specifications, with a view to requiring a contracting authority that decides a tender has not satisfied its requirements in an equivalent manner to inform the tenderer, on request, of the grounds for the non-equivalence.

This amendment is superfluous because this obligation is already covered by Article 41 and is explicitly mentioned in recital (27).

Amendment 47 and Amendment 54: the purpose of these is to introduce into the Directive qualification systems similar to those allowed by the special-sectors Directive.

Amendment 47 introduces the possibility of launching the competition procedure by means of a notice, the content of which is not regulated, stating that a qualification system exists. It also does away with the obligation to publish a contract notice for the conclusion of a framework agreement or for the award of a public contract by the competitive-dialogue procedure.

Amendment 54 introduces an Article 44a containing specific rules for qualification systems. These provisions are closely aligned on the analogous provisions in the current special-sectors Directive (93/38/EEC).

However, the amendment does not take over the provisions on the obligations to give reasons for decisions taken on qualification, nor those requiring mutual recognition and equal treatment in connection with qualification systems. As regards the selection of economic operators, the amendment confines itself to saying that the system is to be operated on the basis of “objective criteria and rules to be established by the contracting authority”, without any reference to the general rules on which the Directive and well-established law – going back to the first coordination Directives – base the qualitative selection of participants in contract award procedures. It should be stressed that such “objective criteria” could open the way to not applying the compulsory exclusions for serious offences (see Article 45(1)).

The amendment would result in an unacceptable loss of transparency and could lead to contracts being reserved for companies which had taken note of the initial notice since, instead of there being as many notices as there are award procedures, there would be a single notice announcing the existence of the system and thereby opening the competition procedure for all the contracts that the system covered. The qualification system would in theory be always open, but in practice gaining access to it would be very uncertain, as it would depend on economic operators’ finding out about the very existence of the system, which had been announced months or even years before.

In addition, this amendment would allow a contracting authority to take over for its own use another contracting authority’s qualification system without this being made public at Community level. The fact is that the amendment contains the obligation to inform “interested economic operators”, which seems to mean only the operators entered in the existing system. This would be detrimental to the competition procedures for contracts and to newly created businesses. It should also be noted that where it applied to “central” contracting authorities the

introduction of qualification systems would be contrary to the Government Procurement Agreement and would place the Union in a situation breaching its international commitments.

Moreover, Amendment 47 is unacceptable because, by making it possible to conclude framework agreements or award contracts by means of competitive dialogue without having published contract notices, it would deprive economic operators of their principal source of information and would prevent any competitive award procedure.

Amendment 51 adds a new paragraph 2a to Article 42 in order to require contracting authorities to use an accredited third party to guarantee the confidentiality of the information transmitted by tenderers.

The confidentiality of the information transmitted by tenderers would seem to be sufficiently safeguarded by the provisions in Annex X.

Furthermore, requiring certification bodies to be accredited could cause distortions due to the disparities between Member States with regard to accreditation.

Amendment 52 adds a new paragraph 3a to Article 42 requiring the use of advanced electronic signatures within the meaning of Directive 1999/93/EC and of reliable security if tenders submitted by electronic means are to be accepted.

According to the justification given, the amendment "is intended to provide appropriate data security when tenders are submitted by electronic means".

The main objective seems to be to obtain a guarantee that it will be possible to detect changes made to tenders after they have been submitted and thus reconstitute their original content, and to guarantee that only authorised persons can know about the content of tenders.

In this sense the amendment is superfluous, and it could on the contrary hold back the adaptation of the Directive to technical progress, given that there are other technical means, in accordance with Annex X, of ensuring the security of tenders on reception. In other words, the integrity of data can be ensured by technical or organisational means other than advanced signatures. Since this is a field where technological development is rapid, accepting the amendment would mean having to amend the Directive to take account of technical progress.

The amendment could also, however, have the purpose of guaranteeing that the identity of a tender's author can be established with certainty at the tender submission stage. It should be pointed out that there is no such requirement at Community level for conventional (non-electronic) tenders and that the use of electronic means of transmission does not imply any such requirement. All the same, if – for reasons of legal security – a contracting authority wants to require this level of identification and authentication in the case of electronic signatures, the Directive already offers the possibility of doing so. Indeed, recital (35) of the common position explicitly states that Directive 1999/93/EC shall apply. As things stand, that means that any requirement to be able to identify with certainty tenderers and their bids can be satisfied by means of a reference to the national legislation transposing Directive 1999/93/EC, which ensures that only an advanced electronic signature can be used to meet these requirements.

Amendments 70 and 95 change Article 53(1)(a) concerning the criterion of the most economically advantageous tender to:

- 1) remove the requirement that this tender must be the most advantageous "for the contracting authorities";
- 2) replace "various criteria justified by the subject of the public contract" with "various criteria directly linked to the subject of the public contract";
- 3) add to the list of examples of criteria relating to tenders the characteristics "relating to production methods" and "the tenderer's policy in relation to people with disabilities and its equal treatment policy".

As regards point 1), the elimination of the words "for the contracting authorities" would make it possible to take account of vague and often unquantifiable elements in connection with a possible benefit for "society" in the broad sense. Award criteria of this kind would no longer perform their intended function of permitting an evaluation of the intrinsic qualities of bids in order to identify the one that offered the purchaser the best value for money. This would also run counter to the purpose of the public procurement Directives by creating serious risks of inequality of treatment.

As regards point 2), this part of the amendment is aimed at ensuring that the new Directive will afford the same scope for taking account of certain criteria as the existing well-established law, as interpreted by the Court in the Concordia bus judgment. This amendment is superfluous, as the common position already provides the necessary clarifications and guarantees in Article 53 in conjunction with recital 44.

As regards point 3), production methods play a part in the broader definition of the "environmental characteristics" that are explicitly mentioned among the criteria given as examples. Since the production methods are recognised in Annex VI as possible technical specifications, there is nothing to prevent these same specifications from constituting award criteria. It would therefore be otiose to mention them explicitly among the examples of criteria, which are anyway not an exhaustive list.

Taking account of matters not linked to the subject-matter of the contract – such as the tenderer's policy with regard to the disabled and equal treatment – would run counter to the purpose of the public-procurement Directive, which is to guarantee "healthy" public spending and equal access to public contracts, and turn it into an instrument that only serves other policies. The tenderer's equal-treatment policy does not permit an evaluation of the quality of a bid with a view to determining the best value for money; the purpose of taking such matters into account would be to give preference to a "socially responsible" business, and thus award contracts to tenderers whose bids did not necessarily represent the best value for money.

Amendment 68 introduces a new article in order to force the Member States to set up effective, open and transparent mechanisms to ensure implementation of the Directive. It goes on to specify that for this purpose Member States may set up independent public procurement agencies with broad powers, including the right to set aside a contract award or re-open a contracting process.

This amendment is partly superfluous and is inappropriate in the present Directive, in that Directive 89/665/CEE on review procedures for public contracts already required Member States to provide effective remedies at national level with regard to the award of contracts covered by the current public-procurement Directives, including interlocutory procedures and powers to set aside decisions taken unlawfully and to award damages. The Member States may fulfil this obligation either by ensuring that the national courts have these powers or by setting up bodies vested with suitable powers. The obligation that this amendment introduces is thus already the subject of Community legislation and does not need to be reiterated. In addition, in its Internal Market Strategy the Commission announced that it would reexamine the question of "supervisory authorities" as part of its preparatory work on revising the above-mentioned Directive, and it has promised that a legislative proposal will be presented in the course of 2004.

Amendment 69 changes point 1 of Annexe VII, Part A, Prior information notice, to make it compulsory to:

- 1) give the contracting authority's telephone number;
- 2) and, in the case of service and works contracts, give details of the departments 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.

As regards point 1), while it is useful to give the contracting authority's telephone number in the contract notice, this is not the case for the prior information notice, since it could be interpreted as a possibility of entering into contact with the contracting authority before the contract award procedure is launched, which could be detrimental to the principle of equal treatment for economic operators and to a proper competition procedure for contracts.

As regards point 2), although economic operators have a legitimate interest in being properly informed of their possible obligations, this obligation would contradict Article 27, under which giving details of these departments is an option which only the Member State concerned can transform into an obligation. It should also be pointed out that prior information notices concern sets of contracts that may be carried out under differing legislation, e.g. at regional level, which would make it excessively complicated to put into effect any obligation to give details of all the departments responsible for providing the above-mentioned information.

5. CONCLUSION

Pursuant to Article 250(2) of the EC Treaty, the Commission amends its proposal as set out above.