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Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on the coordination of procedures for the award of certain public works contracts,  
public supply contracts and public service contracts in the fields of defence and security**

(presented by the Commission)

{SEC(2007) 1598}

{SEC(2007) 1599}

## EXPLANATORY MEMORANDUM

### 1) BACKGROUND

- **Grounds for and objectives of the proposal**

The creation of a European defence equipment market is a key factor in backing the European Security and Defence Policy (ESDP). In the field of public procurement, this requires a new European legislative framework which is tailored to the award of sensitive public contracts in the fields of defence and security. This Directive seeks to establish such a framework, by filling in the gaps in the existing legislation identified by the Commission after consulting all the parties concerned.

Public contracts awarded in the fields of defence and security currently fall within the scope of Directive 2004/18/EC<sup>1</sup>, apart from the exceptions arising in the situations provided for by Articles 30, 45, 46, 55 and 296 of the Treaty.

The Court of Justice has consistently ruled in its case law that recourse to derogations from Community law, including those covered by Article 296 of the Treaty, should be restricted to exceptional and clearly defined cases. As it is, in the fields of defence and security, Directive 2004/18/EC is rarely applied by the Member States, which invoke either the exemptions under Article 296 of the Treaty for public defence contracts, or those under Article 14 of the Directive for public security contracts. Thus, derogations which should be the exception according to the Treaty and Court of Justice case law are, in practice, the rule.

As a result, most defence and security equipment is purchased on the basis of uncoordinated national contract award procedures and rules. These provisions differ significantly in terms of publication, tendering procedures, selection and award criteria, etc. This lack of legal uniformity constitutes a major obstacle to the establishment of a European defence equipment market and opens the door to non-compliance with the principles of the Treaty, in particular the principles of transparency, non-discrimination and equal treatment, in wide sections of Europe's defence markets.

The extensive use of these derogations is largely due to the fact that Directive 2004/18/EC, despite the improvements it made to the coordination rules previously in force, does not take sufficient account of the specific requirements that have to be met by certain purchases of goods and services in the fields of defence and security.

It is therefore the Commission's objective to circumscribe the use of exemptions from the Treaty and Directive 2004/18/EC in the fields of defence and security to exceptional cases, in accordance with Court of Justice case law, whilst respecting the security interests of the Member States.

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<sup>1</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114).

This proposal thus aims to introduce a new legal instrument tailored to the specific nature of "sensitive" purchases for which specific requirements and precautions govern the award of contracts, in these fields. The Member States will then have at their disposal a common framework of procurement rules that not only ensure the application of the principles of the EC Treaty but also take into account the particular requirements of these purchases, such as security of information, security of supply and the necessary flexibility of the procedures.

- **General background**

In 1996 and 1997, the European Commission produced two Communications on defence-related industries to encourage restructuring and the setting up of an efficient European defence equipment market. Concrete proposals and measures followed with respect to some of these issues. However, some Member States considered any action at European level on the most essential reforms to be premature.

Following a period of transformation in this sector and in the institutional framework of the EU, including the beginnings of a real European Security and Defence Policy (ESDP), the European Parliament, in a Resolution of 10 April 2002, invited the Commission to tackle the issue of armaments in a new Communication.

In autumn 2002, the Convention on the Future of Europe set up a working party on defence chaired by the European Commissioner, Michel Barnier. The working party's report<sup>2</sup> stressed that the credibility of European defence policy depends on the existence and development of European defence capabilities and a strengthening of the European defence industrial and technological base. To this end, the European Defence Agency (EDA), which was initially provided for in the draft European Constitution, was set up in July 2004 and testifies to the Member States' determination to develop their defence capabilities.

Alongside the efforts made by the Member States, the Commission, through its 2003 Communication entitled "*Towards an EU Defence Equipment Policy*"<sup>3</sup>, launched seven initiatives to establish a more efficient European defence equipment market. In this communication, the Commission emphasised the need to initiate a reflection on how to optimise defence procurement and announced the adoption of an Interpretative Communication on the scope of Article 296 of the Treaty and the preparation of a Green Paper. The purpose of the latter was to serve as the basis for discussion with all parties concerned, on which rules to apply to the award of public defence equipment contracts, in accordance with the level of sensitivity of the equipment.

In 2004, the Commission published the Green Paper entitled "*Defence procurement*"<sup>4</sup>. By the end of the consultation, the Commission had received forty contributions from sixteen Member States, organisations and enterprises.

In 2005, after analysing these contributions and reflecting on its dialogue with the parties concerned, it published a Communication "*on the results of the consultation*

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<sup>2</sup> Final report of working group 8 on Defence: CONV461/02 dated 16 December 2002.

<sup>3</sup> COM(2003) 113, 11.3.2003.

<sup>4</sup> COM(2004) 608, of 23.9.2004.

launched by the Green Paper on Defence Procurement and on the future Commission initiatives"<sup>5</sup>. These contributions confirmed the value of an interpretative communication on the application of Article 296 of the Treaty – which was adopted in 2006<sup>6</sup> - and demonstrated the need for Community rules for defence procurement which take the specific characteristics of certain purchases in this sector into account.

Further consultations with the parties concerned revealed the existence of similar requirements for non-military security purchases which call for a legislative response at European level as well. Indeed, as the European Council noted in the European security strategy "*A secure Europe in a better world*" in 2003, the emergence of asymmetrical transnational threats, such as terrorism and organised crime, is blurring the boundary between external and internal, military and non-military security, and calls for a comprehensive response. Furthermore, in order to combat these threats, non-military security forces often use equipment which, technologically speaking, is comparable to defence equipment. As a result, sensitivity is an increasingly important feature of such security procurement, particularly in terms of complexity and confidentiality, which renders it similar to defence procurement.

- **Existing provisions in the area covered by the proposal**

At present, the contracts covered by this proposal are governed by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

- **Consistency with other policies**

The proposal forms part of the internal market policy and will enhance the ESDP and Europe's industrial policy.

It also falls within the framework of the seven policy areas identified by the Commission in 2003 in its Communication "*Towards an EU Defence Equipment Policy*" and complements other Commission initiatives relating to the defence market and industry.

## 2) **CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT**

- **Consultation of interested parties**

From the outset of its initiative on defence procurement in 2003, the Commission has engaged in in-depth discussions with all parties concerned, resulting in this proposal. Consultations have been held within the Advisory Committee for Public Contracts (ACPC), through the EDA, and during bilateral meetings with the Member States and the European industry. There has also been regular contact with the members of

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<sup>5</sup> COM(2005) 626, of 6.12.2005.

<sup>6</sup> "Interpretative communication on the application of Article 296 of the Treaty in the field of defence procurement" - COM(2006) 779, 7.12.2006.

the European Parliament's "Internal Market and Consumer Protection" (IMCO) Committee.

The Green Paper on "*Defence procurement*" was drawn up on the basis of expert advice from both the Member States and the European industry (see below). It, in turn, gave rise to a broad consultation exercise, with replies being received from forty parties (Member States, enterprises and other parties). The results of this consultation were used by the Commission to continue its work.

The Member States played an active part in compiling the interpretative communication adopted in December 2006 and were asked by the Commission to comment on an initial version of the text distributed to them at the ACPC. Likewise, all the interested parties were closely involved in drawing up this proposal, through a large number of multilateral and bilateral meetings and by sending written replies to four documents addressed to the members of the ACPC. In addition, governments and enterprises were consulted as part of the impact assessment conducted through five studies commissioned from external consultants which covered all aspects of defence procurement (demand, supply, regulatory framework and products).

- **Collection and use of expertise**

Between January and April 2004, the Commission organised six brainstorming sessions with groups of experts from the Member State governments and the European industry in order to collect information on current practices in the field of defence procurement. These sessions dealt with "identifying the characteristics and economic dimensions of defence markets", "defence procurement rules at national, inter-governmental and Community levels" and "the course of action for a Community instrument on defence procurement".

- **Impact assessment**

In the course of its impact assessment, the Commission looked at three options: taking no Community action, adopting a non-legislative measure and adopting a legislative measure.

The non-legislative measures envisaged included an interpretative communication to clarify the application of Article 14 of Directive 2004/18/EC in the field of security, a more rigorous policy on infringements and a training programme for the contracting authorities and Commission staff on how to act on the interpretative communication on the application of Article 296 of the Treaty.

The legislative measures envisaged included a regulation, a sectoral directive applying to all contracting authorities in the fields of defence and security, a separate directive applying to sensitive defence and security contracts and, finally, a directive amending directive 2004/18/EC in order to incorporate new rules relating specifically to these contracts.

The Commission very quickly dismissed the option of non-legislative measures. Although useful, these would not, by themselves, be able to cut down on the use of derogations based on Article 296 of the Treaty and Article 14 of Directive 2004/18/EC. This objective can only be achieved if the Community law on public

procurement contains rules that are tailored to the specific nature of sensitive public defence and security contracts. Given that such rules do not currently exist, they need to be created, which requires the adoption of a legislative measure.

Similarly, if the Commission took no action at all, the extensive application of exemptions for public defence and security contracts from the rules of the internal market would doubtless continue. On the basis of the current legal framework, the majority of defence and security contracts would gain neither in transparency nor in openness.

The reasons behind the Commission's choice of legislative instrument are explained in the relevant section ("choice of instruments").

Aside from the issue of the instrument, the Commission considered various sub-options relating to:

- the scope of the new rules;
- their content, particularly as regards security of supply, security of information and award procedures.

The options relating to scope were assessed in the light of the objective to limit the use of derogations from Community rules to exceptional circumstances, whilst respecting the right of the Member States not to apply Community rules on the grounds of protecting their essential security interests.

The various options concerning the content of the new rules, particularly as regards security of supply, security of information and the award procedures, were assessed with respect to the objective of ensuring the greatest possible degree of transparency, equal treatment and non-discrimination in sensitive defence and security contracts. This objective should not, however, be detrimental to the legitimate security interests of the Member States.

This Directive will substantially improve the regulatory framework for public defence and security procurement. It will make it possible to coordinate national legislation in this field and ensure compliance with the principles of transparency, equal treatment and non-discrimination.

The impact analysis also revealed a very limited effect on administrative costs for the contracting authorities and businesses. Any increases in costs relating to the initial introduction of the new rules should be slight and lead in the medium or longer term to lower administrative costs for businesses and SMEs in particular.

Making defence and security markets more open should, from an economic viewpoint, improve the chances of businesses winning contracts in other Member States, thus allowing the more competitive enterprises to achieve economies of scale and develop their activities. Unit production costs will be reduced, making European products more competitive on the global market. Purchases made by the contracting authorities will be cheaper. Finally, more efficient use will be made of taxpayers' money and EU citizens will be better protected from threats to their security.

The provisions of this proposal will not alter international, and specifically trans-Atlantic, trade relations in the fields of defence and security. These relations are governed by the agreements reached within the World Trade Organization (WTO), and particularly by the Government Procurement Agreement (GPA). Sensitive public contracts awarded by contracting authorities operating in the field of defence, i.e. contracts for the supply of arms, munitions or war material, are excluded from the scope of this agreement. Public security contracts may, for their part, be exempted on a case-by-case basis from the application of this agreement on the basis of Article XXIII. The contracting authorities concerned by this proposal will thus retain the right to decide whether or not to ask for tenders from economic operators from third countries.

### 3) LEGAL ELEMENTS OF THE PROPOSAL

#### • Summary of the proposed action

This proposal for a directive applies to sensitive public supply contracts, public service contracts and public works contracts in the fields of defence and security. The application thresholds proposed are the same as those currently applied at Community level under Directive 2004/18/EC.

This proposal is largely based on the design and rationale of Directive 2004/18/EC, but has a certain number of specific features which are tailored to the characteristics of sensitive public defence and security contracts. These features provide, on the one hand, for more flexibility for the contracting authorities and, on the other hand, for the safeguards required to guarantee the security of information and supply. The key provisions of this proposal cover:

- the procedures: the negotiated procedure with publication of a contract notice is authorised without the need for specific justification in order to allow the flexibility required to award sensitive defence and security contracts. The restricted procedure and the competitive dialogue may also be used. The open procedure, however, which involves distributing the specifications to any economic operator that wants to see them, was felt to be inappropriate in view of the confidentiality and security of information requirements attached to these contracts.
- security of supply: the specific needs of the Member States with respect to security of supply for sensitive public contracts in the fields of defence and security justify specific provisions, in terms of both contractual requirements and the criteria for selecting candidates.
- security of information: similarly, the often confidential nature of the information relating to sensitive public defence and security contracts calls for safeguards applying to the award procedure itself, the criteria for selecting candidates and the contractual requirements imposed by the contracting authorities.

- **Legal basis**

The legal basis is formed by Articles 47(2), 55 and 95 of the EC Treaty, which are intended to ensure that the procedures used for the public procurement of goods and services comply with the principles of the free movement of goods, the freedom of establishment and the freedom to provide services.

- **Subsidiarity principle**

In accordance with the results of the consultations conducted in recent years, the need for legislative action has arisen at Community level in order to introduce a directive to coordinate Community contract award procedures specifically for sensitive purchases in the fields of defence and security.

This objective could not be achieved either by failing to take action or through action by the Member States.

A legislative initiative is thus required to put an end to infringement situations originating from the lack of Community provisions to coordinate the public procurement procedures that currently apply.

- **Proportionality principle**

The instrument chosen is a directive, which gives Member States a high degree of flexibility in terms of implementation.

The provisions laid down mirror those of Directive 2004/18/EC as regards the fields covered by this proposal. Furthermore, the provisions which pay specific attention to features that are peculiar to the fields of defence and security give the Member States and contracting authorities considerable leeway as regards the choices to be made in awarding their contracts.

As long as the provisions of the Directive are fully applied, their transposition into national law will allow each Member State to take into account the specific features and characteristics of the sensitive purchases they make in the fields of defence and security.

- **Choice of instruments**

Given that the legal bases are Articles 47(2), 55 and 95 of the EC Treaty, the use of a Regulation for the provisions applying to both the public procurement of goods and the public procurement of services would not be permitted by the Treaty. The instrument proposed is therefore a Directive.

Since the objective is to improve the operation of the internal market for purchases that involve specific characteristics whilst retaining the recent *acquis* (Directive 2004/18/EC) and the case-law *acquis* for purchases that do not have the same constraints and requirements, the proposal for a separate directive seems to be the best approach. It also ensures that the provisions are clearer and easier to read and understand.

When transposing the Directive, the Member States may, if they so desire, provide for legislation that applies to all their public procurement, including sensitive contracts from the fields of defence and security.

#### **4. BUDGETARY IMPLICATION**

YES

This Directive will have a budgetary impact arising from several lines of action:

- the daily publication of notices in the *Official Journal of the European Union*,
- annual monitoring of the implementation of the Directive,
- medium-term assessment (not before five years) of the administrative impact of implementing the Directive by the contracting authorities and in businesses,
- long-term assessment (not before ten years) of the economic impact of the Directive.

The measures listed above in the field of monitoring and assessment may require the services, in part or in full, of external service providers, under a technical assistance contract, an existing framework contract in the field of evaluation or through an invitation to tender under the restricted or open procedure.

A financial statement attached to the proposal for a directive details the subject-matter and estimated cost of the measures with a budgetary impact.

#### **5. ADDITIONAL INFORMATION**

- **European Economic Area**

The proposed act concerns an EEA matter and should therefore apply to the European Economic Area.

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on the coordination of procedures for the award of certain public works contracts, public supply contracts and public service contracts in the fields of defence and security**

**(Text with EEA relevance)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission<sup>7</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>8</sup>,

Having regard to the opinion of the Committee of the Regions<sup>9</sup>,

Acting in accordance with the procedure laid down in Article 251 of the Treaty<sup>10</sup>,

Whereas:

- (1) The gradual establishment of a European defence equipment market is essential for strengthening the defence industrial and technological base in Europe and developing the military capabilities required to implement the European Security and Defence Policy (ESDP).
- (2) One prerequisite for the creation of a European defence equipment market is the establishment of an appropriate legislative framework. In the field of public procurement, this involves the coordination of procedures for the award of public contracts to meet the security requirements of the Member States and the obligations arising from the Treaty.
- (3) At the same time, these rules should reflect the European Union's overall approach to security, which responds to changes in the strategic environment. The emergence of asymmetrical transnational threats has increasingly blurred the boundary between external and internal, military and non-military security.

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<sup>7</sup> OJ C [...], [...], p. [...].

<sup>8</sup> OJ C [...], [...], p. [...].

<sup>9</sup> OJ C [...], [...], p. [...].

<sup>10</sup> OJ C [...], [...], p. [...].

- (4) Defence and security equipment is vital both for the security and sovereignty of the Member States and for the autonomy of the European Union. As a result, purchases of goods and services in the defence and security sectors are often of a sensitive nature.
- (5) This results in specific requirements, particularly in the fields of security of supply and security of information. These requirements relate especially to purchases of arms, munitions and war material for the armed forces (as well as services and work directly relating to these), but also to certain particularly sensitive purchases in the field of non-military security.
- (6) The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other public law entities, is subject to compliance with the principles of the Treaty and in particular the principles of the free movement of goods, the freedom of establishment and the freedom to provide services, and with the principles deriving therefrom, such as the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency. For public contracts above a certain value, it is advisable to draw up provisions for the Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of these and to guarantee the effective opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and with other rules of the Treaty.
- (7) Articles 30, 45, 46, 55 and 296 of the Treaty make provision for specific exceptions to the application of the principles set out in the Treaty and, consequently, to the application of law derived from these principles. It therefore follows that none of the provisions in this directive should prevent the imposition or application of any measures considered necessary to safeguard interests recognised as legitimate by these provisions of the Treaty. Nevertheless, in accordance with ECJ case-law, the possibility of recourse to such exceptions should be interpreted in such a way that their effects do not extend beyond that which is strictly necessary for the protection of the legitimate interests that these Articles of the Treaty help safeguard. This means that non-application of the Directive should be proportionate to the aims pursued and cause as little disturbance as possible to the free movement of goods and/or the provision of services.
- (8) Contracts relating to arms, munitions and war material awarded by contracting authorities operating in the field of defence are excluded from the scope of the Government Procurement Agreement (hereinafter "the Agreement") concluded at the World Trade Organization. With respect to the other contracts covered by this Directive, these may be exempted from the application of this agreement on the basis of Article XXIII thereof.
- (9) A contract shall be deemed to be a public works contract only if its subject-matter specifically covers the execution of activities under Division 45 of the "Common Procurement Vocabulary" laid down by Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common

Procurement Vocabulary (CPV)<sup>11</sup> (hereinafter the "CPV"), even if the contract covers the provision of other services necessary for the execution of such activities. Public service contracts may, in some cases, include works. However, insofar as such works are incidental to the principal subject-matter of the contract, and are only 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.

- (10) Public defence and security contracts often contain sensitive information which, for security reasons, needs to be protected from unauthorised access. In the military field, the Member States have systems for classifying this information. The picture is more varied, however, when it comes to non-military security matters. The recommendation is, therefore, to make use of a concept which takes into account the diversity of practices in the Member States and can encompass both the military and non-military fields. At any rate, public procurement in these fields should not, where appropriate, affect the obligations arising from Commission Decision 2001/844/EC of 29 November 2001 amending its internal Rules of Procedure<sup>12</sup> or Council Decision 2001/264/EC adopting the Council's security regulations<sup>13</sup>.
- (11) The contracting authorities should be allowed to use framework agreements, which makes it necessary to provide a definition of the framework agreements and specific rules. Under these rules, when a contracting authority enters into a framework agreement in accordance with the provisions of this Directive relating, particularly, to advertising, time limits and conditions for the submission of tenders, it may enter into contracts based on this framework agreement during its term of validity either by applying the terms set forth in the framework agreement or, if not all terms have been fixed in advance, by reopening competition between the parties to the framework agreement. The reopening of competition should comply with certain rules, the aim of which is to guarantee the required flexibility and to guarantee compliance with the general principles, in particular the principle of equal treatment. For the same reasons, the term of the framework agreements should not exceed five years, except in cases duly justified by the contracting authorities.
- (12) Contracting authorities may make use of electronic purchasing techniques, providing such use complies with the rules drawn up under this Directive and with the principles of equal treatment, non-discrimination and transparency.
- (13) Multiplying the number of thresholds for applying the coordinating provisions complicates matters for the contracting authorities. The application thresholds for this Directive should therefore correspond to those that already have to be met by the contracting authorities in applying Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts<sup>14</sup>. To

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<sup>11</sup> OJ L 340, 16.12.2002, p. 1. Regulation amended by Commission Regulation (EC) No 2151/2003 (OJ L 349, 17.12.2003, p. 1).

<sup>12</sup> OJ L 317, 3.12.2001, p. 1. Decision last amended by Decision 2006/548/EC, Euratom (OJ L 215, 5.8.2006, p. 38).

<sup>13</sup> OJ L 101, 11.4.2001, p. 1. Decision last amended by Decision 2007/438/EC, Euratom (OJ L 164, 26.6.2007, p. 24).

<sup>14</sup> OJ L 134, 30.4.2004, p. 114.

this end, the thresholds should be aligned with those of Directive 2004/18/EC when the latter are revised.

- (14) For the implementation of the rules of this Directive and for monitoring purposes, the best way of defining the field of services is to sub-divide it into categories corresponding to certain codes in the CPV.
- (15) In addition, provision should be made for cases where the Directive does not apply because specific rules on the awarding of contracts which derive from international agreements or which are specific to international organisations are applicable.
- (16) It can be the case that armed forces from the Member States conduct military operations beyond the borders of the European Union. In such circumstances, authorisation should be given to contracting authorities deployed in the field of operations not to apply the rules of this Directive when they award contracts to local economic operators.
- (17) 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. To do so, technical specifications should, on the one hand, be established on the basis of performances and functional requirements. On the other hand, where reference is made to the European standard - or, in the absence thereof, to international or national standards, including those specific to the field of defence - tenders based on equivalent arrangements must be considered by contracting authorities. This equivalence can be assessed in particular with regard to interoperability and operational efficiency requirements. 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. There are also international agreements on standardisation which aim to ensure the interoperability of the armed forces and which can have force of law in the Member States. Should one of these agreements apply, the contracting authorities can demand that tenders comply with the standards described in these agreements. The technical specifications should be clearly indicated, so that all tenderers know what the requirements established by the contracting authority cover.
- (18) The detailed technical specifications and additional information concerning contracts must, as is customary in Member States, be given in the contract documents for each contract or in an equivalent document.
- (19) Defence and security equipment is often intended to be integrated into more complex structures (a system, or system of systems). In this case, certain technical specifications relating to this integration may not appear in the contract documents and may only be revealed to the successful tenderer on condition that the impact of these technical specifications on the tender is limited to explanations or clarifications which do not alter the subject-matter of the contract. In all cases, the contracting authorities provide the same information to all tenderers and ensure that they are all treated equally.

- (20) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents.
- (21) In particular, the conditions of performance may contain requirements by the contracting authorities as regards security of information and security of supply. These requirements are particularly important given the sensitive nature of the equipment covered by this Directive and concern the whole of the supply chain.
- (22) With respect to security of supply, the contracting authority's requirements as regards the organisation and location of the tenderer's supply chain include, for example, the business's internal rules between subsidiaries and the parent company on intellectual property rights.
- (23) In any case, no performance conditions may pertain to requirements other than those relating to the performance of the contract itself.
- (24) 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 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<sup>15</sup> 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.
- (25) The public contracts covered by this Directive are characterised by specific requirements in terms of complexity, security of information or security of supply. Extensive negotiation is often required to satisfy these requirements when awarding the contract. As a result, the contracting authorities may use the negotiated procedure with the publication of a contract notice, as well as the restricted procedure, for the contracts covered by this Directive.
- (26) Contracting authorities which carry out particularly complex projects may, without this being due to any fault on their part, find it objectively impossible to define the means of satisfying their needs or of assessing what the market can offer in the way of technical solutions and/or financial/legal solutions. This situation may arise in particular with projects requiring the integration or combination of several technological or operational capabilities or projects involving complex and structured financing, the financial and legal make-up of which cannot be defined in advance. In this case, use of the restricted procedure and the negotiated procedure with the publication of a contract notice would not be feasible, as it would not be possible to define the contract with enough precision to allow candidates to draw up their offers. It

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<sup>15</sup> OJ L 18, 21.1.1997, p. 1.

is therefore necessary to provide for a flexible procedure which guarantees competition between economic operators as well as the need for the contracting authorities to discuss all aspects of the contract with each candidate. However, this procedure must not be used in such a way as to restrict or distort competition, particularly by altering any fundamental aspects of tenders, or by imposing substantial new requirements on the successful tenderer, or by involving any tenderer other than the one selected as the most economically advantageous.

- (27) Use of the negotiated procedure with the publication of a contract notice could be impossible or entirely inappropriate in certain exceptional circumstances. The contracting authorities should thus, in certain very specific cases and circumstances, be able to use the negotiated procedure without publication of a contract notice.
- (28) Certain circumstances should be partly the same as those provided for by Directive 2004/18/EC. In this respect, consideration should be given in particular to the fact that defence and security equipment is often technically complex. Consequently, the incompatibility or disproportionate technical difficulties in operation and maintenance justifying the use of the negotiated procedure without publication of a contract notice in the case of supply contracts for additional deliveries should be judged in the light of this complexity and the associated requirements for interoperability and standardisation of the equipment. This is the case, for example, with the integration of new components into existing systems or the modernisation of these systems.
- (29) The specific nature of the contracts subject to this Directive also demonstrates the need to provide for new circumstances which may arise in the fields covered by the Directive.
- (30) The armed forces of the Member States may, for example, be called on to intervene in crisis situations or armed conflicts. At the launch, or during the course, of such an intervention, the security of the Member States and their armed forces may necessitate the award of certain contracts at a speed which is incompatible with the deadlines imposed by the award procedures normally laid down by this Directive. Such emergencies could also arise for the security forces, e.g. in the case of a terrorist attack on EU territory.
- (31) Stimulating research and technological development is a key way of strengthening the EU defence technological and industrial base, and the opening-up of public procurement helps achieve this objective. The importance of research in this specific field does, however, justify maximum flexibility when awarding contracts, particularly to encourage the Member States to pool their investments in future capabilities.
- (32) Sales of arms, munitions and war material between governments are also public contracts of a particular type that may be useful in improving interoperability.
- (33) In view of new developments in information and communications technology, and the simplifications these can bring, electronic means should be put on a par with traditional means of communication and information exchange. As far as possible, the means and technology chosen should be compatible with the technologies used in other Member States.

- (34) To ensure development of effective competition in the field of public procurement covered by this Directive, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community. The information contained in these notices must enable economic operators in the Community to determine whether the proposed contracts are of interest to them. For this purpose, they must be given adequate information on the subject-matter of the contract and the conditions attached thereto. Improved visibility should therefore be ensured for public notices by means of appropriate instruments, such as standard contract notice forms and the CPV, which is the reference nomenclature for public contracts.
- (35) Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures<sup>16</sup> and Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ("Directive on electronic commerce")<sup>17</sup> should, in the context of this Directive, apply to the transmission of information by electronic means. The public procurement procedures require a level of security and confidentiality higher than that required by these Directives. Accordingly, the devices for the electronic receipt of offers and requests to participate should comply with specific additional requirements. To this end, the use of electronic signatures, in particular advanced electronic signatures, should be encouraged as far as possible. Moreover, the existence of voluntary accreditation schemes could constitute a favourable framework for enhancing the level of certification service provision for these devices.
- (36) The transmission of contract notices by electronic means leads to savings in time. As a result, it should be possible to reduce the minimum time limit for receipt of requests to participate, subject however to the condition that they are compatible with the specific mode of transmission envisaged at Community level.
- (37) Verification of the suitability and the selection of candidates should be carried out in transparent conditions. For this purpose, non-discriminatory criteria should be indicated which the contracting authorities may use when selecting competitors and the means which economic operators may use to prove they have satisfied those criteria. In the same spirit of transparency, the contracting authority should be required, as soon as a contract is put out to competition, to indicate the selection criteria it will use and the level of specific competence it may or may not demand of the economic operators before admitting them to the procurement procedure.
- (38) A contracting authority may limit the number of candidates in the restricted and negotiated procedures with publication of a contract notice, and in the competitive dialogue. Any reduction in the number of candidates should be performed on the basis of objective criteria indicated in the contract notice. For criteria relating to the personal situation of economic operators, a general reference in the contract notice to the situations set out in Article 30 may suffice.

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<sup>16</sup> OJ L 13, 19.1.2000, p. 12.

<sup>17</sup> OJ L 178, 17.7.2000, p. 1.

- (39) In the competitive dialogue and negotiated procedures with publication of a contract notice, in view of the flexibility which may be required and the high level of costs associated with such methods of procurement, contracting authorities should be entitled to make provision for the procedure to be conducted in successive stages in order gradually to reduce, on the basis of previously indicated contract award criteria, the number of tenders which they will go on to discuss or negotiate. This reduction should, insofar as the number of appropriate solutions or candidates allows, ensure that there is genuine competition.
- (40) 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 a procurement procedure.
- (41) The award of public contracts to economic operators who have participated in a criminal organisation or who have been found guilty of corruption or fraud to the detriment of the financial interests of the European Communities, of money laundering, the financing of terrorism or of terrorist and terrorism-related offences should be avoided. Where appropriate, the contracting authorities should ask candidates or tenderers to supply relevant documents and, where they have doubts concerning the personal situation of a candidate or tenderer, they may seek the cooperation of the competent authorities of the Member State concerned. Such economic operators should be excluded as soon as the contracting authority has knowledge of a judgment concerning such offences rendered in accordance with national law that has the force of *res judicata*. If national law contains provisions to this effect, non-compliance with public procurement legislation on unlawful agreements, which has been the subject of a final judgment or a decision having equivalent effect, may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.
- (42) Non-compliance with national provisions implementing Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation<sup>18</sup> and Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions<sup>19</sup>, which has been the subject of a final judgment or a decision having equivalent effect, may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.
- (43) Given the sensitive nature of the defence and security sectors, the reliability of the economic operators that win the contracts is vital. This reliability depends, in particular, on their ability to respond to the requirements imposed by the contracting authority with respect to security of supply and security of information.
- (44) Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in a transparent and objective

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<sup>18</sup> OJ L 303, 2.12.2000, p. 16.

<sup>19</sup> OJ L 39, 14.2.1976, p. 40. Directive as amended by Directive 2002/73/EC of the European Parliament and of the Council (OJ L 269, 5.10.2002, p. 15).

manner under conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: "the lowest price" and "the most economically advantageous tender".

- (45) To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation - established by case-law - to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of contracting authorities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. Contracting authorities may derogate from indicating the weighting of the criteria for the award in duly justified cases for which they must be able to give reasons, where the weighting cannot be established in advance, in particular on account of the complexity of the contract. In such cases, they must indicate the descending order of importance of the criteria.
- (46) Where the contracting authorities choose to award a contract to the most economically advantageous tender, they shall assess the tenders in order to determine which one offers the best value for money. In order to do this, they shall determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority. The determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications, and the value for money of each tender to be measured.
- (47) Certain technical conditions, and in particular those concerning notices and statistical reports, as well as the nomenclature used and the conditions of reference to that nomenclature, need to be adopted and amended in the light of changing technical requirements. It is therefore appropriate to put in place a flexible and rapid adoption procedure for this purpose.
- (48) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission<sup>20</sup>,

**HAVE ADOPTED THIS DIRECTIVE:**

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<sup>20</sup> OJ L 184, 17.7.1999, p. 23. Decision amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).

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**TITLE I**  
**SCOPE, DEFINITIONS AND GENERAL PRINCIPLES**

*Article 1*  
*Scope*

This Directive shall apply to public contracts awarded in the fields of defence and security for:

- a) the supply of arms, munitions and/or war material, referred to in the Council Decision of 15 April 1958<sup>21</sup> and, where necessary, public works and services contracts strictly related to these supplies;
- b) the supply of parts, components and/or subassemblies for incorporation in or fitting to the goods referred to under a), or for the repair, refurbishment or maintenance of such goods;
- c) the supply of all products intended for training or testing of the goods referred to under a);
- d) works, supplies and/or services involving, entailing and/or containing sensitive information, and which are necessary for the security of the EU and its Member States, in the fields of protection against terrorism or organised crime, border protection and crisis management operations.

This Directive shall apply without prejudice to Articles 30, 45, 46, 55 and 296 of the Treaty.

*Article 2*  
*Definitions*

1. For the purposes of this Directive the following definitions shall apply:
  - 1) "Common Procurement Vocabulary (CPV)": the reference nomenclature applicable to public contracts as adopted by Regulation (EC) No 2195/2002;
  - 2) "Public contracts": contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive;
  - 3) "Public works contracts": works contracts covering either the execution, or both the execution and design, of works related to one of the activities mentioned in Division 45 of the CPV or of a work or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority;

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<sup>21</sup> Decision defining the list of products (arms, munitions and war material) to which the provisions of Article 223(1b) – now Article 296 – of the Treaty apply. Minutes of 15 April 1958: 368/58.

- 4) "Work": the outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an economic or technical function;
- 5) "Public supply contracts": public contracts other than works contracts having as their object the purchase, lease, rental or hire-purchase, with or without the option to buy, of products;
- 6) "Public service contracts": public contracts having as their object the provision of services mentioned in Annex I;
- 7) "Sensitive information": any information (namely, knowledge that can be communicated in any form) or material determined to require protection against unauthorised disclosure for security reasons;
- 8) "Terrorism": intentional acts which, given their nature or their context, may seriously damage a country or an international organisation where committed with the aim of seriously intimidating a population, or unduly compelling a Government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation:
  - a) attacks upon a person's life which may cause death;
  - b) attacks upon the physical integrity of a person;
  - c) kidnapping or hostage taking;
  - d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
  - e) seizure of aircraft, ships or other means of public or goods transport;
  - f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
  - g) release of dangerous substances, or causing fires, floods or explosions, the effect of which is to endanger human life;
  - h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life;
  - i) threatening to commit any of the acts listed in (a) to (h);
- 9) "Criminal organisation": a structured association, established over a period of time, of more than two persons, acting in concert with a view to committing

offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, whether such offences are an end in themselves or a means of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authorities;

- 10) "Crisis": any man-made situation in a Member State or third country presenting a direct physical threat to persons or institutions in that country;
- 11) "Framework agreement": an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged;
- 12) "Contractor", "supplier" and "service provider": any natural or legal person or public entity or consortium of such persons and/or bodies which offers on the market to execute works, supply products and provide services respectively;
- 13) "Economic operator": a contractor, supplier or service provider. The term "economic operator" is used merely in the interests of simplification;
- 14) "Candidate": an economic operator that has sought an invitation to take part in a restricted or negotiated procedure or a competitive dialogue;
- 15) "Tenderer": an economic operator that has submitted a tender under a restricted or negotiated procedure or a competitive dialogue;
- 16) "Contracting authorities": State, regional or local authorities, bodies governed by public law, associations formed by one or several such authorities or one or several of such bodies governed by public law;
- 17) "Body governed by public law": any body:
  - a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
  - b) having legal personality; and
  - c) whose activities are mainly financed by the State, regional or local authorities or other bodies governed by public law, or are 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;
- 18) "restricted procedures": those procedures in which any economic operator may ask to participate and whereby only those economic operators invited by the contracting authority may submit a tender;
- 19) "negotiated procedures": those procedures in which the contracting authority consults the economic operators of its choice and negotiates the terms of the contract with them;

- 20) "competitive dialogue": a procedure in which any economic operator may ask to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender;
- 21) "Particularly complex contract": for the purposes of recourse to the competitive dialogue procedure, a public contract where the contracting authority:
- is not objectively able to define the technical means in accordance with Article 10 (3)(b), (c) or (d), capable of satisfying their needs or objectives, and/or
  - is not objectively able to specify the legal and/or financial make-up of a project;
- 22) "Written" or "in writing": 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;
- 23) "Electronic means": any means using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means.
2. A public contract having as its object the supply of products and which also covers, as an incidental matter, siting and installation operations shall be deemed a "public supply contract".

A public contract having as its object both products and services within the meaning of Annex I shall be deemed a "public service contract" if the value of the services in question exceeds that of the products included in the contract.

A public contract having as its object services within the meaning of Annex I and including activities mentioned in Division 45 of the CPV that are only incidental to the principal object of the contract shall be deemed a public service contract.

### *Article 3* *Public procurement principles*

Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.

## TITLE II

### Rules on public contracts

#### CHAPTER I

##### General provisions

###### *Article 4*

###### *Economic operators*

1. Candidates or tenderers who, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons.

However, in the case of public service and public works contracts as well as public supply contracts covering in addition services and/or siting and installation operations, legal persons may be required to indicate in the tender or the request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract in question.

2. Consortia of economic operators shall be authorised to be candidates. Contracting authorities may not demand that consortia must have a given legal form in order to be allowed to submit a tender or request to take part, but the consortium selected may be required to adopt a given legal form after it has been awarded the contract if this change is necessary for proper performance of the contract.

###### *Article 5*

###### *Confidentiality*

Without prejudice to the provisions of this Directive, in particular those concerning the obligations relating to the information to candidates and tenderers set out in Articles 23(4) and 27, and in accordance with the national law to which the contracting authority is subject, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential; such information includes, in particular, technical or trade secrets and the confidential aspects of tenders.

## CHAPTER II

### Scope: thresholds and exclusion provisions

#### SECTION 1

##### Thresholds

###### *Article 6*

###### *Threshold amounts for public contracts*

This Directive shall apply to public contracts which have a value excluding value-added tax (VAT) estimated to be no less than the following thresholds:

- a) EUR 137 000 for public supply and service contracts awarded by central government authorities other than those operating in the field of defence;
- b) EUR 211 000 for the following public contracts:
  - for public supply and service contracts awarded by contracting authorities that are not central government authorities and by central government authorities operating in the field of defence,
  - for public service contracts awarded by any contracting authority in respect of the services listed in Category 8 of Annex I or Category 5 telecommunications services in that same Annex, the headings of which in the CPV are equivalent to CPV reference nos 64228000-0, 64221000-1 and 642228000-0;
- c) EUR 5 278 000 for public works contracts.

###### *Article 7*

###### *Methods for calculating the estimated value of public contracts and of framework agreements*

1. The calculation of the estimated value of a public contract shall be based on the total amount payable, net of VAT, as estimated by the contracting authority. This calculation shall take account of the estimated total amount, including any form of option and any renewals of the contract.

Where the contracting authority provides for prizes or payments to candidates or tenderers it shall take them into account when calculating the estimated value of the contract.
2. This estimate must be valid at the moment at which the contract notice is sent, as provided for in Article 23(2), or, in cases where such notice is not required, at the moment at which the contracting authority commences the contract award procedure.
3. No works project or proposed purchase of a certain quantity of supplies and/or services may be subdivided to prevent its coming within the scope of this Directive.

4. With regard to public works contracts, calculation of the estimated value shall take account of both the cost of the works and the total estimated value of the supplies necessary for executing the works and placed at the contractor's disposal by the contracting authorities.

5. a) Where a proposed work or purchase of services may result in contracts being awarded at the same time in the form of separate lots, account shall be taken of the total estimated value of all such lots.

Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 6, this Directive shall apply to the awarding of each lot.

However, the contracting authorities may waive such application in respect of lots, the estimated value of which, net of VAT, is less than EUR 80 000 for services or EUR 1 million for works, provided that the aggregate value of those lots does not exceed 20% of the aggregate value of the lots as a whole;

b) Where a proposal for the acquisition of similar supplies may result in contracts being awarded at the same time in the form of separate lots, account shall be taken of the total estimated value of all such lots when applying Article 6(a) and (b).

Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 6, this Directive shall apply to the awarding of each lot.

However, the contracting authorities may waive such application in respect of lots, the estimated value of which, net of VAT, is less than EUR 80 000, provided that the aggregate cost of those lots does not exceed 20% of the aggregate value of the lots as a whole.

6. With regard to public supply contracts relating to the leasing, hire, rental or hire purchase of products, the value to be taken as a basis for calculating the estimated contract value shall be as follows:

a) in the case of fixed-term public contracts, if that term is less than or equal to 10 years, the total estimated value for the term of the contract or, if the term of the contract is greater than 10 years, the total value including the estimated residual value;

b) in the case of public contracts without a fixed term or the term of which cannot be defined, the monthly value multiplied by 120.

7. In the case of public supply or service contracts which are regular in nature or which are intended to be renewed within a given period, the calculation of the estimated contract value shall be based on the following:

a) either the actual aggregate value of successive similar contracts concluded over the previous 10 years adjusted, where possible, for anticipated changes in quantity or value over the 10 years following the initial contract;

- b) or the estimated aggregate value of the successive contracts awarded during the 10 years following the first delivery or during the term if that term is longer than 10 years.

The choice of method used to calculate the estimated value of a public contract may not be made with the intention of excluding it from the scope of this Directive.

- 8. With regard to public service contracts, the value to be taken as a basis for calculating the estimated contract value shall, where appropriate, be the following:
  - a) for the following services:
    - i) insurance services: the premium payable and other forms of remuneration;
    - ii) banking and other financial services: the fees, commissions, interest and other forms of remuneration;
    - iii) design contracts: fees, commission payable and other forms of remuneration;
  - b) for service contracts which do not indicate a total price:
    - i) in the case of fixed-term contracts, if that term is less than or equal to 120 months: the total value for their full term;
    - ii) in the case of contracts without a fixed term or with a term greater than 120 months: the monthly value multiplied by 120.
- 9. With regard to framework agreements, the estimated value to be taken into consideration shall be the maximum estimated value net of VAT of all the contracts envisaged for the total term of the agreement.

## SECTION 2

### Excluded contracts

#### *Article 8*

#### *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, with the agreement of the Member State(s) concerned, may consult the Advisory Committee for Public Contracts referred to in Article 41;

- b) pursuant to the particular procedure of an international organisation.

*Article 9*  
*Specific exclusions*

This Directive shall not apply to the following public contracts:

- a) service contracts for the acquisition or rental, under whatever financial arrangements, of land, existing buildings, or other immovable property or concerning rights in respect thereof;
- b) contracts awarded in a third country, with local economic operators, for the deployment of military forces, or to conduct or support a military operation outside the territory of the European Union.

**CHAPTER III**

**Specific rules governing specifications and contract documents**

*Article 10*  
*Technical specifications*

1. The technical specifications as defined in point 1 of Annex II shall be set out in the contract documentation, such as contract notices, contract documents or additional documents.

When a public contract contains sensitive technical specifications that may only be communicated to the successful tenderer, these must not be set out in the contract notice, contract documents or additional documents provided that knowledge of such specifications is not required in order to prepare tenders.

In this case, these technical specifications are entered in the reports referred to in Article 28 before the contract documents are sent to the candidates.

Such technical specifications may only deal with explanations or clarifications of the tender and have no significant technical or financial impact on the subject-matter of the public contract.

After awarding the contract by applying the award criteria, the contracting authority shall send the successful tenderer the sensitive technical specifications that were not set out in the contract documents or additional documents so that the successful tenderer can adapt his bid accordingly.

2. Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

3. The technical specifications shall be drawn up:
- a) either by reference to technical specifications defined in Annex II and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or - where these do not exist – by reference to national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products, or by reference to the defence standards defined in point 3 of Annex II. Every reference shall be followed by the expression "or equivalent";
  - b) or in terms of performance or functional requirements; the latter may include environmental characteristics. However, such parameters must be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;
  - c) or in terms of performance or functional requirements as mentioned in subparagraph (b), with reference to the specifications mentioned in subparagraph (a) as a means of presuming conformity with such performance or functional requirements;
  - d) or by referring to the specifications mentioned in subparagraph (a) for certain characteristics, and by referring to the performance or functional requirements mentioned in subparagraph (b) for other characteristics.

If the technical specifications are compatible with Community law, the first subparagraph shall not prejudice the compulsory national technical rules and technical requirements to be met by the Member States, under international agreements, in order to guarantee the interoperability required by these agreements.

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

An appropriate means might be constituted by a technical dossier from the manufacturer or a test report from a recognised body.

5. Where a contracting authority uses the option laid down in paragraph 3 to prescribe performance-related or functional requirements, it may not reject a tender for works, products or services which comply with a national standard transposing a European standard, with a European technical approval, a common technical specification, an international standard or a technical reference system established by a European standardisation body, if these specifications address the performance or functional requirements which it has laid down.

In his tender, the tenderer must prove to the satisfaction of the contracting authority and by any appropriate means that the work, product or service in compliance with the standard meets the performance or functional requirements of the contracting authority.

An appropriate means might be constituted by a technical dossier from the manufacturer or a test report from a recognised body.

6. Where contracting authorities lay down environmental characteristics in terms of performance or functional requirements as referred to in paragraph 3(b), they may use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi-)national eco-labels, or by any other eco-label, provided that:
  - those specifications are appropriate as a means of defining the characteristics of the supplies or services that are the object of the contract,
  - the requirements for the label are drawn up on the basis of scientific information,
  - the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations, can participate, and
  - they are accessible to all interested parties.

Contracting authorities may indicate that the products and services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents; they must accept any other appropriate means of proof, such as a technical dossier from the manufacturer or a test report from a recognised body.

7. "Recognised bodies", within the meaning of this Article, are test and calibration laboratories, and certification and inspection bodies which comply with applicable European standards.

Contracting authorities shall accept certificates from recognised bodies established in other Member States.

8. Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. 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 11* *Variants*

1. Where the criterion for award is that of the most economically advantageous tender, contracting authorities may authorise tenderers to submit variants.

- 2 Contracting authorities shall indicate in the contract notice whether or not they authorise variants: variants shall not be authorised without this indication.
3. Contracting authorities authorising variants shall state in the contract documents the minimum requirements to be met by the variants and any specific requirements for their presentation.

Only variants meeting the minimum requirements laid down by these contracting authorities shall be taken into consideration.

4. In procedures for awarding public supply or service contracts, contracting authorities which have authorised variants may not reject a variant on the sole ground that it would, if successful, lead either to a service contract rather than a public supply contract, or to a supply contract rather than a public service contract.

#### *Article 12 Subcontracting*

In the contract documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors.

This indication shall be without prejudice to the question of the principal economic operator's liability.

#### *Article 13 Conditions for performance of contracts*

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. These conditions may, in particular, seek to ensure the security of sensitive information and the security of supply required by the contracting authority or take environmental or social considerations into account.

#### *Article 14 Security of information*

When the public contracts involve, entail and/or contain sensitive information, the contracting authority shall specify in the contract documents all measures and requirements needed to ensure the security of such information at the requisite level.

To this end, the contracting authority may require of the tenderer that the tender submitted contain the following particulars:

- a) proof that the subcontractors already identified possess the capabilities required to protect the confidentiality of the sensitive information to which they have access or which they are required to produce when carrying out their subcontracting activities,

- b) a commitment to provide the same proof for any new subcontractors that may be involved during performance of the contract,
- c) a commitment to keep all sensitive information confidential for the entire duration of the contract and after termination or conclusion of the contract.

*Article 15*  
*Security of supply*

Provided that they are in conformity with Community law, the contracting authority may specify requirements to guarantee security of supply.

To this end, the contracting authority may require of the tenderer that the tender submitted contain the following:

- a) evidence that it will be able to honour its obligations regarding the export, transfer and transit of goods associated with the contract, including by means of a commitment from the Member State(s) concerned,
- b) evidence that the organisation and location of its supply chain will allow it to comply with the contracting authority's requirements concerning the security of supply set out in the specifications,
- c) a commitment to meet additional needs required by the contracting authority as a result of an emergency, crisis or armed conflict,
- d) a commitment from its national authorities not to obstruct the fulfilment of any additional needs required by the contracting authority as the result of an emergency, crisis or armed conflict,
- e) a commitment to carry out the maintenance, modernisation or adaptation of the supplies covered by this contract,
- f) a commitment to inform the contracting authority in due time of any change in its organisation or its industrial strategy that may affect its obligations to that authority.

The requirements shall be explained in the specifications or contract documents.

*Article 16*  
*Obligations relating to taxes, environmental protection, employment protection provisions and working conditions*

1. A contracting authority may state in the contract documents, or be obliged by a Member State so to state, the body or bodies from which a candidate or tenderer may obtain the appropriate information on the obligations relating to taxes, to environmental protection, to the employment protection provisions and to the working conditions which are in force in the Member State, region or locality in which the works are to be carried out or services are to be provided and which shall be applicable to the works carried out on site or to the services provided during the performance of the contract.

2. A contracting authority which supplies the information referred to in paragraph 1 shall request the tenderers 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 works are to be carried out or the service is to be provided.

The first subparagraph shall be without prejudice to the application of the provisions of Article 38 concerning the examination of abnormally low tenders.

## **CHAPTER IV**

### **Procedures**

#### *Article 17*

#### *Procedures to be applied*

In awarding their public contracts, contracting authorities shall apply the national procedures adjusted for the purposes of this Directive.

They shall award public contracts by applying the restricted procedure, the negotiated procedure with publication of a contract notice or, under the circumstances referred to in Article 19, the competitive dialogue.

In the specific cases and circumstances referred to expressly in Article 20, the contracting authorities may apply a negotiated procedure without publication of the contract notice.

#### *Article 18*

#### *Negotiated procedure with publication of a contract notice*

1. In negotiated procedures with publication of a contract notice, contracting authorities shall negotiate with tenderers the tenders submitted by them in order to adapt them to the requirements they have set in the contract notice, the specifications and additional documents, if any, and to seek out the best tender in accordance with Article 37.
2. During the negotiations, contracting authorities shall ensure the equal treatment of all tenderers. In particular, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others.
3. Contracting authorities may provide for the negotiated procedure to take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria in the contract notice or the specifications. The contract notice or the specifications shall indicate whether this option has been used.

#### *Article 19*

#### *Competitive dialogue*

1. When a contract is particularly complex, the contracting authority, should it consider that recourse to the restricted procedure or the negotiated procedure with publication

of a contract notice will not enable it to award the contract, may make use of the competitive dialogue in accordance with this Article.

A public contract shall be awarded on the sole basis of the award criterion for the most economically advantageous tender.

2. Contracting authorities shall publish a contract notice setting out their needs and requirements, which they shall define in that notice and/or in a descriptive document.
3. Contracting authorities shall open, with the candidates selected in accordance with the relevant provisions of Articles 29 to 36, a dialogue the aim of which shall be to identify and define the means best suited to satisfying their needs. They may discuss all aspects of the contract with the chosen candidates during this dialogue.

During the dialogue, contracting authorities shall ensure equality of treatment among all tenderers. In particular, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others.

Contracting authorities may not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without his agreement.

4. Contracting authorities may provide for the procedure to take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria in the contract notice or the descriptive document. The contract notice or the descriptive document shall indicate that recourse may be had to this option.
5. The contracting authority shall continue such dialogue until it can identify the solution or solutions, if necessary after comparing them, which are likely to meet its needs.
6. Having declared that the dialogue is concluded and having so informed the participants, contracting authorities shall ask them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue. These tenders shall contain all the elements required and necessary for the performance of the project.

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 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.

7. Contracting authorities shall assess the tenders received on the basis of the award criteria laid down in the contract notice or the descriptive document and shall choose the most economically advantageous tender in accordance with Article 37.

At the request of the contracting authority, the tenderer identified as having submitted the tender offering best value for money may be asked to clarify aspects of the tender or confirm commitments contained in the tender, provided this does not

have the effect of modifying substantial aspects of the tender or of the call for tenders and does not risk distorting competition or causing discrimination.

8. The contracting authorities may specify prices or payments to the participants in the dialogue.

#### *Article 20*

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

1. Contracting authorities may award public contracts by a negotiated procedure without prior publication of a contract notice in the cases set out in paragraphs 2 to 6 below.

The provision of the first subparagraph shall also apply when these contracts are awarded as part of a cooperative programme between two or more Member States.

2. For public works contracts, public supply contracts and public service contracts, the negotiated procedure without prior publication of a contract notice may be applied in the following circumstances:
  - a) when the periods laid down for the restricted procedure and negotiated procedure with publication of a contract notice are incompatible with the urgency of a crisis or armed conflict;
  - b) when, for technical reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator.
3. For public service contracts and public supply contracts, the negotiated procedure without prior publication of a contract notice may be applied for research and development services and for products manufactured purely for the purpose of research, experiment, study or development, with the exception of quantity production to establish commercial viability or to recover research and development costs.
4. For public supply contracts, the negotiated procedure without prior publication of a contract notice may be applied for the following deliveries and supplies:
  - a) 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 not, as a general rule, exceed five years;
  - b) for the supply of arms, munitions and/or war material by the government of a Member State to the government of another Member State.

5. For public works contracts and public service contracts, the negotiated procedure without prior publication of a contract notice may be applied for additional works or services not included in the project initially considered or in the original contract but which have, through unforeseen circumstances, become necessary for the performance of the works or services described therein, on condition that the award is made to the economic operator performing such works or services:
- i) when such additional works or services cannot be technically or economically separated from the original contract without major inconvenience to the contracting authorities,
- or
- ii) when such works or services, although separable from the performance of the original contract, are strictly necessary for its completion.

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

6. The negotiated procedure without prior publication of a contract notice may be applied for new works or services consisting in the repetition of similar works or services entrusted to the economic operator to whom the same contracting authorities awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded according to the restricted procedure, the negotiated procedure with publication of a contract notice or the competitive dialogue.

As soon as the first project is put up for tender, the possible use of this procedure shall be disclosed and the total estimated cost of subsequent works or services shall be taken into consideration by the contracting authorities when they apply the provisions of Article 6.

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

#### *Article 21* *Framework agreements*

1. Member States may provide that contracting authorities may conclude framework agreements.
2. For the purpose of concluding a framework agreement, contracting authorities shall follow the rules of procedure referred to in this Directive for all phases up to the award of contracts based on that framework agreement. The parties to the framework agreement shall be chosen by applying the award criteria set in accordance with Article 37.

Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in paragraphs 3 and 4. Those procedures may be applied only

between the contracting authorities and the economic operators originally party to the framework agreement.

When awarding contracts based on a framework agreement, the parties may under no circumstances make substantial amendments to the terms laid down in that framework agreement, in particular in the case referred to in paragraph 3.

The term of a framework agreement may not exceed five years, save in exceptional cases duly justified, in particular, by the subject of the framework agreement.

Contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.

3. Where a framework agreement is concluded with a single economic operator, contracts based on that agreement shall be awarded within the limits of the terms laid down in the framework agreement.

For the award of those contracts, contracting authorities may consult the operator party to the framework agreement in writing, requesting it to supplement its tender as necessary.

4. Where a framework agreement is concluded with several economic operators, the latter must be at least three in number, insofar as there is a sufficient number of economic operators that satisfy the selection criteria and/or of admissible tenders that meet the award criteria.

Contracts based on framework agreements concluded with several economic operators may be awarded either by application of the terms laid down in the framework agreement without reopening competition, or, where not all the terms are laid down in the framework agreement, when the parties are again in competition on the basis of the same and, if necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement.

In the latter case, the following procedure shall apply:

- a) for every contract to be awarded, contracting authorities shall consult in writing the economic operators capable of performing the contract;
- b) 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-matter of the contract and the time needed to submit tenders;
- c) tenders shall be submitted in writing, and their content shall remain confidential until the stipulated 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 set out in the specifications of the framework agreement.

## CHAPTER V

### Rules on advertising and transparency

#### SECTION 1

##### Publication of notices

###### *Article 22*

###### *Notices*

1. Contracting authorities shall make known, by means of a prior information notice published by the Commission or by themselves on their "buyer profile", as described in point 2 of Annex IV:

a) where supplies are concerned, the estimated total value of the contracts or the framework agreements by product area which they intend to award over the following 12 months, where the total estimated value, taking into account Articles 6 and 7, is equal to or greater than EUR 750 000.

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

b) where services are concerned, the estimated total value of the contracts or the framework agreements in each of the categories of services listed in Annex I which they intend to award over the following 12 months, where such estimated total value, taking into account the provisions of Articles 6 and 7, is equal to or greater than EUR 750 000;

c) where works are concerned, the essential characteristics of the contracts or the framework agreements which they intend to award, the estimated value of which is equal to or greater than the threshold specified in Article 6, taking into account Article 7.

The notices referred to in subparagraphs (a) and (b) shall be sent to the Commission or published on the buyer profile at the earliest opportunity after the beginning of the budgetary year.

The notice referred to in subparagraph (c) shall be sent to the Commission or published on the buyer profile at the earliest opportunity after the decision approving the planning of the works contracts or the framework agreements that the contracting authorities intend to award.

Contracting authorities that publish a prior information notice on their buyer profiles shall send the Commission, electronically, a notice of publication of the prior information notice on a buyer profile, in accordance with the format and detailed procedures for sending notices indicated in point 3 of Annex IV.

This paragraph shall not apply to negotiated procedures without the prior publication of a contract notice.

2. Contracting authorities which wish to award a public contract or a framework agreement by restricted procedure, negotiated procedure with the publication of a contract notice or a competitive dialogue, shall make known their intention by means of a contract notice.
3. Contracting authorities may, in accordance with Article 23, publish notices of public contracts that are not subject to the publication requirement laid down in this Directive.
4. Contracting authorities which have awarded a public contract or concluded a framework agreement shall send a notice of the results of the award procedure no later than 48 days after the award of the contract or the conclusion of the framework agreement.

In the case of framework agreements concluded in accordance with Article 21, the contracting authorities are not bound to send a notice of the results of the award procedure for each contract based on that agreement.

Certain information on the contract award or the conclusion of the 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 23*

##### *Form and manner of publication of notices*

1. Notices shall include the information mentioned in Annex III and, where appropriate, any other information deemed useful by the contracting authority in the format of standard forms adopted by the Commission in accordance with the procedure referred to in Article 41(2).
2. Notices sent by contracting authorities to the Commission shall be sent either by electronic means in accordance with the format and procedures for transmission indicated in Annex IV, paragraph 3, or by other means. In the event of recourse to the accelerated procedure set out in Article 24(4), notices must be sent either by fax or by electronic means, in accordance with the format and procedures for transmission indicated in point 3 of Annex IV.

Notices shall be published in accordance with the technical characteristics for publication set out in point 1(a) and (b) of Annex IV.

3. Notices drawn up and transmitted by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex IV, shall be published no later than five days after they are sent.

Notices which are not transmitted by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex IV, shall be published not later than 12 days after they are sent, or in the case of the accelerated procedure referred to in Article 24(4), not later than five days after they are sent.

4. Contract notices shall be published in full in an official language of the Community as chosen by the contracting authority, this original language version constituting the sole authentic text. A summary of the important elements of each notice shall be published in the other official languages.

The costs of publication of such notices by the Commission shall be borne by the Community.

5. Notices and their contents may not be published at national level before the date on which they are sent to the Commission.

Notices published at national level shall not contain information other than that contained in the notices dispatched to the Commission and shall mention the date of dispatch of the notice to the Commission.

6. The content of notices not sent by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex IV, shall be limited to approximately 650 words.
7. Contracting authorities must be able to supply proof of the dates on which notices are dispatched.
8. The Commission shall give the contracting authority confirmation of the publication of the information sent, mentioning the date of that publication. Such confirmation shall constitute proof of publication.

## SECTION 2

### Time limits

#### *Article 24*

##### *Time limits for receipt of requests to participate and for receipt of tenders*

1. When fixing the time limits for receipt of requests to participate and tenders, contracting entities shall take particular account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set by this Article.
2. In restricted procedures, negotiated procedures with the publication of a contract notice and the use of a competitive dialogue, the time limit for receipt of requests to participate shall be no less than 37 days from the date on which the contract notice is dispatched.

In the case of restricted procedures, the minimum time limit for the receipt of tenders shall be 40 days from the date on which the invitation is sent.

3. Where notices are drawn up and transmitted by electronic means in accordance with the format and procedure for sending notices indicated in point 3 of Annex IV, the time limit for the receipt of the requests to participate referred to in the first subparagraph of paragraph 2, may be shortened by seven days.

4. In the case of restricted procedures and negotiated procedures with publication of a contract notice, where urgency renders impracticable the minimum time limits laid down in this Article, contracting authorities may fix:
  - 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 the format and procedure for sending notices indicated in point 3 of Annex IV;
  - and, in the case of restricted procedures, a time limit for the receipt of tenders which shall be not less than 10 days from the date of the invitation to tender.

### SECTION 3

#### Information content and means of transmission

##### *Article 25*

##### *Invitations to tender, to negotiate or to participate in the dialogue*

1. In restricted procedures, negotiated procedures with the publication of a contract notice and in the competitive dialogue, the contracting authorities shall simultaneously and in writing invite the selected candidates.
2. The invitation to the candidates shall be accompanied by a copy of the specifications or of the descriptive document and any supporting documents.
3. Where the specifications and/or any supporting documents are held by an entity other than the contracting authority responsible for the award procedure, the invitation shall state the address from which those specifications and documents may be requested and, if appropriate, the closing date for requesting such documents, the sum payable for obtaining them and any payment procedures. The competent department shall send that documentation to the economic operator without delay upon receipt of a request.
4. The additional information on the specifications, the descriptive document or the supporting documents shall be sent by the contracting authority or the competent department not less than six days before the deadline fixed for the receipt of tenders, provided that it is requested in good time. In the event of an accelerated procedure, that period shall be four days.
5. In addition to the particulars provided for in paragraphs 2, 3 and 4, the invitation to negotiate shall contain at least:
  - a) a reference to the contract notice published;
  - b) the deadline 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;
  - c) in the case of the competitive dialogue, the date and the address set for the start of the consultation stage and the language or languages used;

- d) an indication of any documents to be annexed, either to support the verifiable statements provided by the candidate in accordance with Article 29, or to supplement the information provided for in that Article under the same conditions as those laid down in Articles 32 and 33;
- e) the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance of the criteria used to define the economically most advantageous tender, if they are not given in the contract notice, the specifications or the descriptive document.

*Article 26*  
*Information for candidates and tenderers*

1. The contracting authorities shall, at their earliest opportunity, inform candidates and tenderers of decisions reached concerning the award of a contract or the conclusion of a framework agreement, including the grounds for any decision not to award a contract or conclude a framework agreement for which there has been competitive tendering and to recommence the procedure; that information shall be given in writing upon request to the contracting authorities.
2. Upon request from the party concerned, the contracting authority shall, subject to paragraph 3, at its earliest opportunity and at the latest within fifteen days of receipt of the written request for information, inform the parties as follows:
  - a) any unsuccessful candidate of the reasons for the rejection of his application,
  - b) any unsuccessful tenderer of the reasons for the rejection of his tender, including, for the cases referred to in Article 10, paragraphs 4 and 5, the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements,
  - c) 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 or the parties to the framework agreement.
3. Contracting authorities may decide to withhold certain information on the contract award or the conclusion of the framework agreements, referred to in subparagraph 1, 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.

## SECTION 4

### Communication

#### *Article 27*

#### *Rules applicable to communication*

1. All communication and information exchange referred to in this Title may be by post, by fax, by electronic means in accordance with paragraphs 4 and 5, by telephone in the cases and circumstances referred to in paragraph 6, or by a combination of those means, according to the choice of the contracting authority.
2. The means of communication chosen must be generally available and thus not restrict economic operators' access to the tendering procedure.
3. Communication and the exchange and storage of information shall be carried out in such a way as to ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved, and that the contracting authorities examine the content of tenders and requests to participate only after the time limit set for submitting them has expired.
4. The tools to be used for communicating by electronic means, as well as their technical characteristics, must be non-discriminatory, generally available and compatible with the information and communication technology products in general use.
5. The following rules are applicable to devices for the electronic transmission and receipt of tenders and to devices for the electronic receipt of requests to participate:
  - a) information regarding the specifications necessary for the electronic submission of tenders and requests to participate, including encryption, shall be available to interested parties. Moreover, the devices for the electronic receipt of tenders and requests to participate shall conform to the requirements of Annex VI;
  - b) Member States may, in compliance with Article 5 of Directive 1999/93/EC, require that electronic tenders be accompanied by an advanced electronic signature in conformity with paragraph 1 thereof;
  - c) the Member States may introduce or maintain voluntary arrangements for accreditation intended to improve the level of the certification service provided for such devices;
  - d) tenderers or candidates shall undertake to submit, before expiry of the time limit laid down for submission of tenders or requests to participate, the documents, certificates and declarations referred to in Articles 30 to 35 if they do not exist in electronic format.

6. The following rules shall apply to the transmission of requests to participate:
- a) requests to participate in procedures for the award of public contracts may be made in writing or by telephone;
  - b) where requests to participate are made by telephone, a written confirmation must be sent before expiry of the time limit set for their receipt;
  - c) contracting authorities may require that requests for participation made by fax must be confirmed by post or by electronic means, where this is necessary for the purposes of legal proof. Any such requirement, together with the time limit by which it must be met, must be stated by the contracting authority in the contract notice.

## SECTION 5

### Reports

#### *Article 28* *Content of reports*

1. For every public contract and framework agreement, 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 or framework agreement;
  - b) the award procedure chosen;
  - c) in the case of a negotiated procedure without prior publication of a contract notice, the circumstances referred to in Article 20 which justify use of this procedure;
  - d) if appropriate, the reasons for the framework agreement lasting more than five years;
  - e) if appropriate, sensitive technical specifications which can only be communicated to the successful tenderer and the reasons for this restriction;
  - f) the name of the candidates chosen and the reason for this choice;
  - g) the name of the candidates excluded and the reasons for their rejection;
  - h) the reasons for the rejection of tenders found to be abnormally low;
  - i) the name of the successful tenderer and the reasons why his tender was selected and, if known, the share of the contract or framework agreement which the successful tenderer intends, or will have, to subcontract to third parties;

- j) if necessary, the reasons why the contracting authority has decided not to award a contract or framework agreement.
2. The contracting authorities shall take appropriate steps to document the progress of award procedures conducted by electronic means.
3. The report, or the main features of it, shall be communicated to the Commission if it so requests.

## CHAPTER VI

### Conduct of the procedure

#### SECTION 1

##### General provisions

###### *Article 29*

###### *Verification of suitability and choice of participants and award of contracts*

1. Contracts shall be awarded on the basis of the criteria laid down in Articles 37 and 38, taking into account Article 11, after the suitability of the economic operators not excluded under Articles 30 and 31 has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 32 to 36, and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3.
2. The contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with Articles 32 and 33.

The extent of the information referred to in Articles 32 and 33 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject-matter of the contract.

These minimum levels shall be indicated in the contract notice.

3. In restricted procedures, negotiated procedures with publication of a contract notice, and in the competitive dialogue procedure, contracting authorities may limit the number of suitable candidates they will invite to tender or to conduct a dialogue with. This number shall not be lower than 3.

The contracting authorities shall indicate in the contract notice the objective and non-discriminatory criteria or rules they intend to apply, the minimum number of candidates they intend to invite and, where appropriate, the maximum number.

In any event, the number of candidates invited shall be sufficient to ensure genuine competition.

The contracting authorities shall invite a number of candidates at least equal to the minimum number set in advance. Where the number of candidates meeting the selection criteria and the minimum levels of ability is below the minimum number,

the contracting authority may continue the procedure by inviting the candidate(s) with the required capabilities. In the context of this same procedure, the contracting authority may not include other economic operators who did not request to participate, or candidates who do not have the required capabilities.

4. Where the contracting authorities exercise the option of reducing the number of solutions to be discussed or of tenders to be negotiated, as provided for in Articles 18(3) and 19(4), they shall do so by applying the award criteria stated in the contract notice or in the specifications. In the final stage, the number arrived at shall make for genuine competition insofar as there are enough solutions or suitable candidates.

## SECTION 2

### Criteria for qualitative selection

#### *Article 30*

#### *Personal situation of the candidate*

1. Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below shall be excluded from participation in a public contract:
  - a) participation in a criminal organisation, as defined in Article 2(1) of Council Joint Action 98/733/JHA<sup>22</sup>;
  - b) corruption, as defined in Article 3 of the Council Act of 26 May 1997<sup>23</sup> and Article 3(1) of Council Joint Action 98/742/JHA<sup>24</sup> respectively;
  - c) fraud within the meaning of Article 1 of the Convention relating to the protection of the financial interests of the European Communities<sup>25</sup>;
  - d) terrorist offences, offences linked to terrorist activities, as defined in Articles 1 and 3 of the Council Framework Decision (2002/475/JHA)<sup>26</sup> respectively or inciting, aiding or abetting or attempting an offence, as referred to in Article 4 of that framework decision;
  - e) money laundering and terrorist financing as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council<sup>27</sup>.

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.

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<sup>22</sup> OJ L 351, 29.1.1998, p. 1.

<sup>23</sup> OJ C 195, 25.6.1997, p. 1.

<sup>24</sup> OJ L 358, 31.12.1998, p. 2.

<sup>25</sup> OJ C 316, 27.11.1995, p. 48.

<sup>26</sup> OJ L 164, 22.6.2002, p. 3.

<sup>27</sup> OJ L 309, 25.10.2005, p. 15.

They may provide for a derogation from the requirement referred to in the first subparagraph for overriding requirements in the general interest.

For the purposes of this paragraph, the contracting authorities shall, where appropriate, ask candidates or tenderers to supply the documents referred to in paragraph 3 and may, where they have doubts concerning the personal situation of such candidates or tenderers, also apply to the competent authorities to obtain any information they consider necessary on the personal situation of the candidates or tenderers concerned. Where the information concerns a candidate or tenderer established in a State other than that of the contracting authority, the contracting authority may seek the cooperation of the competent authorities. Having regard for the national laws of the Member State where the candidates or tenderers are established, such requests shall relate to legal and/or natural persons, including, if appropriate, company directors and any person having powers of representation, decision or control in respect of the candidate or tenderer.

2. Any economic operator may be excluded from participation in a contract where that economic operator:
  - a) is bankrupt or is being wound up, where his affairs are being administered by the court, where he has entered into an arrangement with creditors, where he has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations;
  - b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or of an arrangement with creditors or of any other similar proceedings under national laws and regulations;
  - c) has been convicted by a judgment which has the force of *res judicata* in accordance with the legal provisions of the country of any offence concerning his professional conduct;
  - d) has been guilty of grave professional misconduct proven by any means which the contracting authority can justify such as, for example, the breach of his obligations regarding security of information during a previous public contract;
  - e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;
  - f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;
  - g) is guilty of serious misrepresentation in supplying the information required under this Section or has not supplied such information.

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.

3. Contracting authorities shall accept the following as sufficient evidence that none of the cases specified in paragraphs 1 or 2(a), (b), (c), (e) or (f) applies to the economic operator:
  - a) as regards paragraphs 1 and 2(a), (b) and (c), the production of an extract from the "judicial record" or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or provenance, showing that these requirements have been met;
  - b) as regards paragraph 2(e) and (f), a certificate issued by the competent authority in the Member State concerned.

Where the country in question does not issue such documents or certificates, or where these do not cover all the cases specified in paragraphs 1 and 2(a), (b) and (c), 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 provenance.

4. Member States shall designate the authorities and bodies competent to issue the documents, certificates or declarations referred to in paragraph 3 and shall inform the Commission thereof. Such notification shall be without prejudice to data protection law.

#### *Article 31*

#### *Suitability to pursue the professional activity*

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

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

#### *Article 32*

#### *Economic and financial capacity*

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, where appropriate, evidence of 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 and, where appropriate, of turnover in the area covered by the contract for a maximum of the last three financial years available, depending on the date on which the undertaking was set up or the economic operator started trading, insofar as the information on these turnovers is available.
2. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.
3. Under the same conditions, a consortium of economic operators as referred to in Article 4 may rely on the capacities of participants in the consortium or of other entities.
4. 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 must be provided.
5. 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.

### *Article 33*

#### *Technical and/or professional capacity*

1. The technical and/or professional capacity of the economic operators shall be assessed and examined in accordance with paragraphs 2 and 3.
2. Evidence of the economic operators' technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services:
  - a)
    - i) a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and location of the works and shall specify whether they were carried out according to the rules of the trade and properly completed. Where appropriate, the competent authority shall submit these certificates to the contracting authority directly;
    - ii) a list of the principal deliveries effected or the main services provided in the past three years, with the sums, dates and recipients, whether public or private, involved. Evidence of delivery and services provided shall be given:
      - where the recipient was a contracting authority, in the form of certificates issued or countersigned by the competent authority,

- where the recipient was a private purchaser, by the purchaser's certification or, failing this, simply by a declaration by the economic operator;
- b) an indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator's undertaking, especially those responsible for quality control and, in the case of public works contracts, those upon whom the contractor can call in order to carry out the work;
- c) a description of the technical facilities and measures used by the supplier or service provider for ensuring quality and the undertaking's study and research facilities;
- d) a check carried out by the contracting authorities or on their behalf by a competent official body of the country in which the supplier or service provider is established, subject to that body's agreement, on the production capacities of the supplier or the technical capacity of the service provider and, if necessary, on the means of study and research which are available to it and the quality control measures it will operate;
- e) the educational and professional qualifications of the service provider or contractor and/or those of the undertaking's managerial staff and, in particular, those of the person or persons responsible for providing the services or managing the work;
- f) for public works contracts and public services contracts, and only in appropriate cases, an indication of the environmental management measures that the economic operator will be able to apply when performing the contract;
- g) a statement of the average annual manpower of the service provider or contractor and the number of managerial staff for the last three years;
- h) a description of the tools, material and technical equipment, staff numbers and know-how and/or sources of supply at the disposal of the economic operator to carry out the contract, cope with any additional needs required by the contracting authority as a result of an emergency, crisis or armed conflict or to carry out the maintenance, modernisation or adaptation of the supplies covered by this contract;
- i) an indication of the proportion of the contract which the service provider may intend to subcontract;
- j) with regard to the products to be supplied, provision of the following information:
  - i) samples, descriptions and/or photographs, the authenticity of which must be certified if the contracting authority so requests;
  - ii) 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;

- k) in the case of public contracts involving, entailing and/or containing sensitive information, proof justifying the capacity to process, store and transmit sensitive information at the level of security required by the contracting authority.

If appropriate, the contracting authority may ask the national security authority of the candidate's Member State or the security authority designated by this Member State to check the conformity of the premises and facilities that may be used, the industrial and administrative procedures that will be followed, the methods for managing information and/or the situation of staff likely to be employed to carry out the contract.

If appropriate, the contracting authority may ask the candidate to produce an undertaking to guarantee, at the requisite level of security, the confidentiality of the sensitive information that will be contained in the specifications or the descriptive document, of which he becomes aware in the course of the award procedure.

3. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.
4. Under the same conditions, a group of economic operators as referred to in Article 4 may rely on the abilities of participants in the group or of other entities.
5. In procedures for awarding public contracts having as their object supplies requiring siting or installation work, the provision of services and/or the execution of works, the ability of economic operators to provide the service or to execute the installation or the work may be evaluated in particular with regard to their skills, efficiency, experience and reliability.
6. The contracting authority shall specify, in the notice or in the invitation to tender, which references under paragraph 2 it wishes to receive.

#### *Article 34*

#### *Quality assurance standards*

Should they require the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain quality assurance standards, contracting authorities 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.

*Article 35*  
*Environmental management standards*

Should contracting authorities, in the cases referred to in Article 33(2)(f), 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 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.

*Article 36*  
*Additional documentation and information*

The contracting authority may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 30 to 35.

SECTION 3

Award of the contract

*Article 37*  
*Contract award criteria*

1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which the contracting authorities shall base the award of public contracts shall be either:
  - a) when the award is made to the most economically advantageous tender from the point of view of the contracting authority, various criteria linked to the subject matter of the public contract in question: for example, quality, price, technical merit, functional characteristics, environmental characteristics, running costs, lifecycle costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, security of supply, and interoperability; or
  - b) the lowest price only.
2. Without prejudice to the provisions of the third subparagraph, in the case referred to in paragraph 1(a) the contracting authority shall specify in the contract notice or in the contract documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Those weightings can be expressed by providing for a range with an appropriate maximum spread.

Where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or contract documents or, in the case of a competitive dialogue, in the descriptive document, the criteria in descending order of importance.

*Article 38*  
*Abnormally low tenders*

1. If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, 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.

Those details may relate in particular to:

- a) the economics of the construction method, the manufacturing process or the services provided;
  - b) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work, for the supply of the goods or services;
  - c) the originality of the work, supplies or services proposed by the tenderer;
  - d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;
  - e) the possibility of the tenderer obtaining State aid.
2. The contracting authority shall verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.
  3. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was granted legally. Where the contracting authority rejects a tender in these circumstances, it shall inform the Commission of that fact.

### TITLE III

#### Statistical obligations, executory powers and final provisions

##### *Article 39*

##### *Statistical obligations*

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 40, addressing public supply, services and works contracts awarded by contracting authorities during the preceding year, by no later than 31 October of each year.

##### *Article 40*

##### *Content of the statistical report*

1. The statistical report shall address, separately, public supply, services and works contracts.
2. For each contracting authority that is a central government authority and for each category of other contracting authorities, the statistical report shall specify at least the number and value of contracts awarded which are covered by this Directive.

As far as possible, the data referred to in the first subparagraph shall be broken down by:

- a) the award procedure chosen and, for each of these procedures, the works, products and services as given in Annex I identified by category of the CPV nomenclature;
- b) the nationality of the economic operator to which the contract was awarded.

Where the contracts have been concluded according to the negotiated procedure without publication of a contract notice, the data referred to in the first subparagraph shall also be broken down according to the circumstances referred to in Article 20 and shall specify the number and value of contracts awarded, by Member State or third country of the successful tenderer.

3. The statistical report shall set out any other statistical information which is required under the Agreement.
4. The content of the statistical report shall be determined in accordance with the procedure referred to in Article 41.

*Article 41*  
*Advisory Committee*

1. The Commission shall be assisted by the Advisory Committee for Public Contracts set up by Article 1 of Decision 71/306/EEC<sup>28</sup> (hereinafter referred to as "the Committee").
2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply, in compliance with the provisions of Article 8 thereof.
3. Where reference is made to this paragraph, Article 5a, paragraphs (1) to (4), and Article 7 of Decision 1999/468/EC shall apply.

With regard to the revision of the thresholds laid down in Article 6, the time limits laid down in Article 5a, paragraphs (3c), (4b) and (4e) of Decision 1999/468/EC shall be set at two weeks, in view of the time constraints resulting from the calculation and publication methods laid down in the second subparagraph of Article 78(1) and Article 78(4) of Directive 2004/18/EC.

4. Where reference is made to this paragraph, Article 5a, paragraphs (1), (2), (4) and (6), and Article 7 of Decision 1999/468/EC shall apply.

*Article 42*  
*Revision of the thresholds*

1. At the same time as the revision of the thresholds in Directive 2004/18/EC, referred to in Article 78 thereof, the Commission shall also revise the thresholds laid down in Article 6 of this Directive, by aligning the following thresholds:
  - a) the threshold established in Article 6(a) to the revised threshold laid down in Article 7(a) of Directive 2004/18/EC,
  - b) the threshold established in Article 6(b) to the revised threshold laid down in Article 7(b) of Directive 2004/18/EC,
  - c) the threshold established in Article 6(c) to the revised threshold laid down in Article 7(c) of Directive 2004/18/EC.

The Commission shall carry out the revision and alignment in accordance with the regulatory procedure with scrutiny laid down in Article 41(3). On imperative grounds of urgency, the Commission may follow the emergency procedure referred to in Article 41(4).

2. The value of the thresholds set pursuant to paragraph 1 in the national currencies of the Member States which do not participate in the euro shall be aligned to the respective values of the thresholds in Directive 2004/18/EC referred to in paragraph 1, calculated in accordance with Article 78(3) of Directive 2004/18/EC.

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<sup>28</sup> OJ L 185, 16.8.1971, p. 15. Decision as amended by Decision 77/63/EEC (OJ L 13, 15.1.1977, p. 15).

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

*Article 43*  
*Amendments*

1. In accordance with the procedure referred to in Article 41(2), the Commission may amend:
  - a) the procedures for the drawing-up, transmission, receipt, translation, collection and distribution of the notices referred to in Article 22 and of the statistical reports provided for in Article 39;
  - b) the procedure for sending and publishing the data referred to in Annex IV, on grounds of technical progress or for administrative reasons;
2. The Commission may amend the non-essential provisions of this Directive listed below, in accordance with the regulatory procedure with scrutiny laid down in Article 41(3):
  - a) the reference numbers in the CPV nomenclature set out in Annex I, insofar as this does not change the material scope of this Directive, and the procedures for reference in the notices to particular headings in the CPV within the categories of services listed in that Annex;
  - b) the technical details and characteristics of the devices for electronic receipt referred to in points (a), (f) and (g) of Annex VI.

On imperative grounds of urgency, the Commission may follow the emergency procedure referred to in Article 41(4).

*Article 44*  
*Amendment of Directive 2004/18/EC*

Article 10 of Directive 2004/18/EC<sup>29</sup> is amended as follows:

*"Article 10*  
*Contracts in the fields of defence and security*

This Directive shall apply to public contracts awarded in the fields of defence and security with the exception of contracts to which Directive XXXX/X/EC<sup>30</sup> applies. It shall not apply to public contracts excluded from the scope of Directive XXXX/X/EC pursuant to Articles 8 and 9 thereof."

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<sup>29</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114).

<sup>30</sup> The references of this Directive.

*Article 45*  
*Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [...]. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

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

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the fields covered by this Directive.

*Article 46*  
*Entry into force*

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

*Article 47*  
*Addressees*

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*

## ANNEX I

### SERVICES REFERRED TO IN ARTICLE 1

Category	Description of services	CPV Reference Nos
1	Maintenance and repair services	From 50100000-6 to 50884000-5 (except from 50310000-1 to 50324200-4 and 50116510-9, 50190000-3, 50229000-6, 50243000-0) and from 51000000-9 to 51900000-1
2	Land transport services <sup>31</sup> , including armoured car services and courier services, except transport of mail	From 60110000-2 to 60183000-4 (except 60160000-7, 60161000-4), and from 64120000-3 to 64121200-2
3	Air transport services of passengers and freight, except transport of mail	From 60410000-5 to 60424120-3 (except 60411000-2, 60421000-5), and 60500000-3
4	Transport of mail by land <sup>32</sup> and by air	60160000-7, 60161000-4, 60411000-2, 60421000-5
5	Telecommunications services	From 64200000-8 to 64228200-2, 72318000-7, and from 72700000-7 to 72720000-3
6	Financial services a) Insurance services b) Banking and investment services <sup>33</sup>	From 66100000-1 to 66720000-3 <sup>5</sup>
7	Computer and related services	From 50310000-1 to 50324200-4, from 72000000-5 to 72920000-5 (except 72318000-7 and from 72700000-7 to 72720000-3), 79342311-6
8	R&D services <sup>34</sup>	From 73000000-2 to 73436000-7 (except 73200000-4, 73210000-7, 73220000-0)
9	Accounting, auditing and book-keeping services	From 79210000-9 to 79212500-8
10	Management consulting services <sup>35</sup> and related services	From 73200000-4 to 73220000-0, from 79400000-8 to 79421200-3 and 79342000-3,

<sup>31</sup> Except for rail transport services covered by Category 18.

<sup>32</sup> Except for rail transport services covered by Category 18.

<sup>33</sup> Except contracts for financial services in connection with the issue, purchase, sale or transfer of securities or other financial instruments, and central bank services.

Also excluded are services for the acquisition or rental, by whatever financial means, of land, existing buildings, or other immovable property or concerning rights in respect thereof; nevertheless, financial services provided at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive.

<sup>34</sup> Excluding 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.

		79342100-4, 79342300-6, 79342320-2, 79342321-9, 79910000-6, 79991000-7, 98362000-8
11	Architectural services; engineering services and integrated engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services	From 71000000-8 to 71900000-7 (except 71550000-8) and 79994000-8
12	Building-cleaning services and property management services	From 70300000-4 to 70340000-6, and from 90900000-6 to 90924000-0
13	Sewage and refuse disposal services; sanitation and similar services	From 90400000-1 to 90743200-9 (except 90712200-3), and 50190000-3, 50229000-6, 50243000-0

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<sup>35</sup>

Except arbitration and conciliation services.

## ANNEX II

### **DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS REFERRED TO IN ARTICLE 10**

For the purposes of this Directive, the following definitions shall apply:

- 1)
  - a) "Technical specifications", in the case of public works contracts: the totality of the technical prescriptions contained in particular in the tender documents, defining the characteristics required of a material, product or supply, which permits a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the contracting authority. These characteristics shall include levels of environmental performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling and production processes and methods. They shall also include rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve;
  - b) "Technical specification", in the case of public supply or service contracts: a specification in a document defining the required characteristics of a product or service, such as quality and environmental performance levels, design for all requirements (including accessibility for disabled people), and conformity assessment, performance, use of the product, its safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production methods and procedures, as well as conformity assessment procedures;
- (2) "Standard": a technical specification approved by a recognized standardising body for repeated or continuous application, compliance with which is not compulsory, from one of the following categories:
  - international standard: a standard adopted by an international standards organisation and made available to the general public,
  - European standard: a standard adopted by a European standards organisation and made available to the general public,
  - national standard: a standard adopted by a national standards organisation and made available to the general public;
- 3) "Defence standard": a technical specification the observance of which is not compulsory and which is approved by an international, regional or national standardising body specialising in the production of technical specifications for repeated or continuous application in the field of defence;

- 4) "European technical approval": a favourable technical assessment of the fitness for use of a product for a specific purpose, based on fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of application and use. European technical approvals are issued by an approval body designated for this purpose by the Member State;
- 5) "Common technical specification": a technical specification laid down in accordance with a procedure recognised by the Member States which has been published in the *Official Journal of the European Union*;
- 6) "Technical reference": any product produced by European standardisation bodies, other than official standards, according to procedures adapted to developments in market needs.

**ANNEX III**

**INFORMATION TO BE INCLUDED IN THE NOTICES  
REFERRED TO IN ARTICLE 22**

*NOTICE OF PUBLICATION OF A PRIOR INFORMATION NOTICE ON A BUYER  
PROFILE*

1. Country of the contracting authority
2. Name of the contracting authority
3. Internet address of the "buyer profile" (URL)
4. CPV Nomenclature reference no(s)

## *PRIOR INFORMATION NOTICE*

1. The name, address, 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 departments, e.g. the relevant governmental internet site, from which information can be obtained concerning the general regulatory framework for taxes, environmental protection, employment protection and working conditions applicable in the place where the contract is to be performed.
2. In the case of public works contracts: the nature and extent of the works and the place of execution; if the work is to be subdivided into several lots, the essential characteristics of those lots by reference to the work; if available, an estimate of the range of the cost of the proposed works; CPV nomenclature reference no(s).  
  
In the case of public supply contracts: the nature and quantity or value of the products to be supplied, CPV nomenclature reference no(s).  
  
In the case of public services contracts: the total value of the proposed purchases in each of the service categories in Annex I, CPV nomenclature reference no(s).
3. Estimated date for initiating the award procedures in respect of the contract or contracts, in the case of public service contracts by category.
4. Where appropriate, indicate whether a framework agreement is involved.
5. Where appropriate, other information.
6. Date of dispatch of the notice or of dispatch of the notice of publication of the prior information notice on the buyer profile.
7. Indication whether the procurement is covered by the Agreement.

## *CONTRACT NOTICE*

Restricted procedures, negotiated procedures with publication of a contract notice and competitive dialogues:

1. Name, address, telephone and fax number, email address of the contracting authority.
2.
  - a) The award procedure chosen;
  - b) Where appropriate, the reasons for use of the accelerated procedure (in restricted and negotiated procedures);
  - c) Where appropriate, indicate whether a framework agreement is involved.
3. Form of the contract.
4. Place of execution/performance of the works, for delivery of products or of the provision of services.
5.
  - a) Public works contracts:
    - nature and extent of the works and general nature of the work. Indication in particular of options concerning supplementary works, and, if known, the provisional timetable for recourse to these options as well as the number of possible renewals, if any. If the work or the contract is subdivided into several lots, the size of the different lots; CPV nomenclature reference no(s),
    - information concerning the purpose of the work or the contract where the latter also involves the drawing up of projects,
    - in the case of a framework agreement, indication also of the planned duration of the framework agreement, the estimated total value of the works for the entire duration of the framework agreement and, as far as possible, the value and the frequency of the contracts to be awarded.
  - b) Public supply contracts:
    - nature of the products to be supplied, indicating in particular whether tenders are requested with a view to purchase, lease rental, hire or hire purchase or a combination of these, nomenclature reference number. Quantity of products to be supplied, indicating in particular options concerning supplementary purchases and, if known, the provisional timetable for recourse to these options as well as the number of renewals, if any; CPV nomenclature reference no(s),
    - in the case of regular or renewable contracts during the course of a given period, indication also, if known, of the timetable for subsequent contracts for intended purchases of supplies,
    - in the case of a framework agreement, indication also of the planned duration of the framework agreement, the estimated total value of the

supplies for the entire duration of the framework agreement and, as far as possible, the value and the frequency of the contracts to be awarded.

c) Public service contracts:

- category and description of the service. CPV nomenclature reference number(s). Quantity of services to be provided. Indication in particular of options concerning supplementary purchases and, if known, the provisional timetable for recourse to these options as well as the number of renewals, if any. In the case of renewable contracts over a given period, an estimate of the time frame, if known, for subsequent public contracts for intended purchases of services.

In the case of a framework agreement, indication also of the planned duration of the framework agreement, the estimated total value of the services for the entire duration of the framework agreement and, as far as possible, the value and the frequency of the contracts to be awarded,

- indication of whether the execution of the service is reserved by law, regulation or administrative provision to a particular profession.

Reference to the law, regulation or administrative provision,

- indication of whether legal persons should indicate the names and professional qualifications of the staff to be responsible for the execution of the service.

6. If the contracts are subdivided into lots, indication of the possibility for economic operators of tendering for one, for several and/or for all the lots.
7. Admission or prohibition of variants.
8. Time limit for completion of works/supplies/services or duration of the works/supply/services contract. Where possible, time limit by which works will begin or time limit by which delivery of supplies or services will begin.
9. Where applicable, particular conditions to which the performance of the contract is subject.
10.
  - a) The final date for the receipt of requests to participate;
  - b) address to which they must be sent;
  - c) the language or languages in which they must be drawn up.
11. Where applicable, any deposits and guarantees required.
12. Main terms concerning financing and payment and/or references to the texts in which these are contained.
13. Where applicable, the legal form to be taken by the grouping of economic operators to whom the contract is to be awarded.

14. Selection criteria regarding the personal situation of economic operators that may lead to their exclusion, and information required proving that they do not fall within the cases justifying exclusion. Selection criteria and information concerning the economic operators' personal situation, information and any necessary formalities for assessment of the minimum economic and technical standards required of the economic operator. Minimum level(s) of standards possibly required.
15. In the case of framework agreements: the number and, where appropriate, proposed maximum number of economic operators who will be members of it, the duration of the framework agreement.
16. In the case of a competitive dialogue or a negotiated procedure with the publication of a contract notice, indication, if appropriate, of recourse to a staged procedure in order gradually to reduce the number of solutions to be discussed or tenders to be negotiated.
17. When recourse is had to the option of reducing the number of candidates to be invited to submit tenders, to engage in dialogue or to negotiate: minimum and, if appropriate, proposed maximum number of candidates and objective criteria to be used to choose that number of candidates.
18. Criteria referred to in Article 37 to be used for award of the contract: "lowest price" or "most economically advantageous tender". Criteria representing the most economically advantageous tender as well as their weighting shall be mentioned where they do not appear in the specifications or, in the event of a competitive dialogue, in the descriptive document.
19. Date of dispatch of the notice.
20. Indication of whether the contract is covered by the Agreement.

### *CONTRACT AWARD NOTICE*

1. Name and address of the contracting authority.
2. Award procedure chosen. In the case of a negotiated procedure without prior publication of a contract notice (Article 20), justification.
3. Public works contracts: nature and extent of the services.  
  
Public supply contracts: nature and quantity of products supplied, where appropriate, by the supplier; CPV nomenclature reference number.  
  
Public service contracts: category and description of the service; CPV nomenclature reference number; quantity of services purchased.
4. Date of contract award.
5. Contract award criteria.
6. Number of tenders received.
7. Name and address of the successful economic operators.
8. Price or range of prices (minimum/maximum) paid.
9. Value of the tender (tenders) retained or the highest tender and lowest tender taken into consideration for the contract award.
10. Where appropriate, value and proportion of contract likely to be subcontracted to third parties.
11. Date of publication of the tender notice in accordance with the technical specifications for publication in Annex IV.
12. Date of dispatch of the notice.

## ANNEX IV

### FEATURES OF PUBLICATION

#### 1. Publication of notices

- a) The notices referred to in Article 22 must be sent by the contracting authorities to the Office for Official Publications of the European Communities in the format referred to in Article 23. The prior information notices referred to in Article 22(1), first subparagraph, published on a buyer profile as described in point 2, must also use that format, as must the notice of such publication.

The notices referred to in Article 22 must be published by the Office for Official Publications of the European Communities or by the contracting authorities in the case of a prior information notice published on a buyer profile.

In addition, contracting authorities may publish this information on the Internet on a "buyer profile" as referred to in point 2;

- b) the Office for Official Publications of the European Communities shall give the contracting authority the confirmation of publication referred to in Article 23(8).

#### 2. Publication of supplementary information

The buyer profile may include prior information notices as referred to in Article 22(1), first subparagraph, information on ongoing invitations to tender, scheduled purchases, contracts concluded, procedures cancelled and any useful general information, such as a contact point, a telephone and fax number, a postal address and an e-mail address.

#### 3. Format and procedures for sending notices electronically

The format and procedure for sending notices electronically are accessible at the Internet address "<http://simap.europa.eu>".

**ANNEX V**  
**REGISTERS<sup>36</sup>**

PART A

PUBLIC WORKS CONTRACTS

The professional registers and corresponding declarations and certificates for each Member State are:

- in Belgium the "Registre du Commerce"/"Handelsregister",
- in Bulgaria, the "Търговски регистър",
- in the Czech Republic, the "obchodní rejstřík",
- in Denmark, the "Erhvervs- og Selskabsstyrelsen",
- in Germany, the "Handelsregister" and the "Handwerksrolle",
- in Estonia, the "Keskäriregister",
- in Ireland, the contractor may be requested to provide a certificate from the Registrar of Companies or the Registrar of Friendly Societies or, if he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place under a given business name,
- in Greece, the "Μητρώο Εργοληπτικών Επιχειρήσεων - ΜΕΕΠ" of the Ministry for Environment, Town and Country Planning and Public Works (Υ.ΠΕ.ΧΩ.Δ.Ε),
- in Spain, the "Registro Oficial de Empresas Clasificadas del Ministerio de Hacienda",
- in France, the "Registre du commerce et des sociétés" and the "Répertoire des métiers",
- in Italy, the "Registro della Camera di commercio, industria, agricoltura e artigianato",
- in Cyprus, the contractor may be requested to provide a certificate from the "Council for the Registration and Audit of Civil Engineering and Building Contractors (Συμβούλιο Εγγραφής και Ελέγχου Εργοληπτών Οικοδομικών και Τεχνικών Έργων)" in accordance with the Registration and Audit of Civil Engineering and Building Contractors Law,
- in Latvia, the "Uzņēmumu reģistrs",

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<sup>36</sup> For the purposes of Article 31, "registers" means those listed in this Annex and, where changes have been made at national level, the registers which have replaced them.

- in Lithuania, the "Juridinių asmenų registras",
- in Luxembourg, the "Registre aux firmes" and the "Rôle de la Chambre des métiers",
- in Hungary, the "Cégnyilvántartás", the "egyéni vállalkozók jegyzői nyilvántartása",
- in Malta, the contractor obtains his "numru ta' registrazzjoni tat- Taxxa tal- Valur Miżjud (VAT) u n- numru tal-licenzja ta' kummerc", and, in the case of a partnership or company, the relevant registration number as issued by the Malta Financial Services Authority,
- in the Netherlands, the "Handelsregister",
- in Austria, the "Firmenbuch", the "Gewerberegister", the "Mitgliederverzeichnisse der Landeskammern",
- in Poland, the "Krajowy Rejestr Sądowy",
- in Portugal, the "Instituto dos Mercados de Obras Públicas e Particulares e do Imobiliário" (IMOPPI),
- in Romania, the "Registrul Comerțului",
- in Slovenia, the "Sodni register" and the "obrtni register",
- in Slovakia, the "Obchodný register",
- in Finland, the "Kaupparekisteri" and "Handelsregistret",
- in Sweden, the "aktiebolags-, handels- eller föreningsregistren",
- in the United Kingdom, the contractor may be requested to provide a certificate from the Registrar of Companies or, if he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established in a specific place under a given business name.

## PART B

### PUBLIC SUPPLY CONTRACTS

The relevant professional and trade registers and declarations and certificates are:

- in Belgium the "Registre du Commerce"/"Handelsregister",
- in Bulgaria, the "Търговски регистър",
- in the Czech Republic, the "obchodní rejstřík",
- in Denmark, the "Erhvervs- og Selskabsstyrelsen",
- in Germany, the "Handelsregister" and the "Handwerksrolle",
- in Estonia, the "Keskäriregister",
- in Greece, the "Βιοτεχνικό ή Εμπορικό ή Βιομηχανικό Επιμελητήριο",
- in Spain, the "Registro Mercantil" or, in the case of non-registered individuals, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question,
- in France, the "Registre du commerce et des sociétés" and the "Répertoire des métiers",
- in Ireland, the supplier may be requested to provide a certificate from the Registrar of Companies or the Registrar of Friendly Societies that he is certified as incorporated or registered or, if he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place under a given business name,
- in Italy, the "Registro della Camera di commercio, industria, agricoltura e artigianato", and the "Registro delle commissioni provinciali per l'artigianato",
- in Cyprus, the supplier may be requested to provide a certificate from the "Registrar of Companies and Official Receiver" (Εφορος Εταιρειών και Επίσημος Παραλήπτης) or, if this is not the case, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place and under a given business name,
- in Latvia, the "Uzņēmumu reģistrs",
- in Lithuania, the "Juridinių asmenų registras",
- in Luxembourg, the "Registre aux firmes" and the "Rôle de la Chambre des métiers",
- in Hungary, the "Cégnyilvántartás", the "egyéni vállalkozók jegyzői nyilvántartása",
- in Malta: the supplier obtains his "numru ta' registrazzjoni tat- Taxxa tal- Valur Miżjud (VAT) u n- numru tal-licenzja ta' kummerc", and, in the case of a partnership

or company, the relevant registration number as issued by the Malta Financial Services Authority,

- in the Netherlands, the "Handelsregister",
- in Austria, the "Firmenbuch", the "Gewerberegister", the "Mitgliederverzeichnisse der Landeskammern",
- in Poland, the "Krajowy Rejestr Sądowy",
- in Portugal, the "Registo Nacional das Pessoas Colectivas",
- in Romania, the "Registrul Comerțului",
- in Slovenia, the "Sodni register" and the "obrtni register",
- in Slovakia, the "Obchodný register",
- in Finland, the "Kaupparekisteri" and "Handelsregistret",
- in Sweden, the "aktiebolags-, handels- eller föreningsregistren",
- in the United Kingdom, the supplier may be requested to provide a certificate from the Registrar of Companies stating that he is certified as incorporated or registered or, if he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in a specific place under a given business name.

## PART C

### PUBLIC SERVICE CONTRACTS

The relevant professional and trade registers and declarations and certificates are:

- in Belgium, the "Registre du commerce/Handelsregister" and the "Ordres professionnels/Beroepsorden",
- in Bulgaria, the "Търговски регистър",
- in the Czech Republic, the "obchodní rejstřík",
- in Denmark, the "Erhvervs- og Selskabsstyrelsen",
- in Germany, the "Handelsregister", the "Handwerksrolle", the "Vereinsregister", the "Partnerschaftsregister" and the "Mitgliedsverzeichnisse der Berufskammern der Länder",
- in Estonia, the "Keskäriregister",
- in Ireland, the service provider may be requested to provide a certificate from the Registrar of Companies or the Registrar of Friendly Societies or, if he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place under a given business name,
- in Greece, the service provider may be asked to provide a declaration on the exercise of the profession concerned made on oath before a notary; in the cases provided for by existing national legislation, for the provision of research services as mentioned in Annex II A, the professional register "Μητρώο Μελετητών" and the "Μητρώο Γραφείων Μελετών",
- in Spain, the "Registro Oficial de Empresas Clasificadas del Ministerio de Hacienda",
- in France, the "Registre du commerce et des sociétés" and the "Répertoire des métiers",
- in Italy, the "Registro della Camera di commercio, industria, agricoltura e artigianato", the "Registro delle commissioni provinciali per l'artigianato" or the "Consiglio nazionale degli ordini professionali",
- in Cyprus, the service provider may be requested to provide a certificate from the "Registrar of Companies and Official Receiver" (Εφορος Εταιρειών και Επίσημος Παραλήπτης) or, if this is not the case, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place and under a given business name,
- in Latvia, the "Uzņēmumu reģistrs",

- in Lithuania, the "Juridinių asmenų registras",
- in Luxembourg, the "Registre aux firmes" and the "Rôle de la Chambre des métiers",
- in Hungary, the "Cégnyilvántartás", the "egyéni vállalkozók jegyzői nyilvántartása", some "szakmai kamarák nyilvántartása" or, in the case of some activities, a certificate stating that the person concerned is authorised to be engaged in the commercial activity or profession in question,
- in Malta: the service provider can obtain his "numru ta' registrazzjoni tat- Taxxa tal-Valur Miżjud (VAT) u n- numru tal-licenzja ta' kummer", and, in the case of a partnership or company, the relevant registration number as issued by the Malta Financial Services Authority,
- in the Netherlands, the "Handelsregister",
- in Austria, the "Firmenbuch", the "Gewerberegister", the "Mitgliederverzeichnisse der Landeskammern",
- in Poland, the "Krajowy Rejestr Sądowy",
- in Portugal, the "Registo Nacional das Pessoas Colectivas",
- in Romania, the "Registrul Comerțului",
- in Slovenia, the "Sodni register" and the "obrtni register",
- in Slovakia, the "Obchodný register",
- in Finland, the "Kaupparekisteri" and "Handelsregistret",
- in Sweden, the "aktiebolags-, handels- eller föreningsregistren",
- in the United Kingdom, the service provider may be requested to provide a certificate from the Registrar of Companies or, if he is not so certified, a certificate stating that he has declared on oath that he is engaged in the profession in question in a specific place under a given business name.

## ANNEX VI

### **REQUIREMENTS RELATING TO DEVICES FOR THE ELECTRONIC RECEIPT OF REQUESTS TO PARTICIPATE AND TENDERS**

Devices for the electronic receipt of requests for participation and tenders must at least guarantee, through appropriate technical means and procedures, that:

- a) electronic signatures relating to requests to participate and tenders comply with national provisions adopted pursuant to Directive 1999/93/EC;
- b) the exact time and date of the receipt of requests to participate and tenders can be determined precisely;
- c) it may be reasonably ensured that, before the time limits laid down, no-one can have access to data transmitted under these requirements;
- d) if that access prohibition is infringed, it may be reasonably ensured that the infringement is clearly detectable;
- e) only authorised persons may set or change the dates for opening data received;
- f) during the various stages of the contract award procedure, access to all data submitted, or to part thereof, must be possible only through simultaneous action by authorised persons;
- g) simultaneous action by authorised persons must give access to data transmitted only after the prescribed date;
- h) data received and opened in accordance with these requirements must remain accessible only to persons authorised to acquaint themselves therewith.

## LEGISLATIVE FINANCIAL STATEMENT

### 1. NAME OF THE PROPOSAL

Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of certain public works contracts, public supply contracts and public service contracts in the fields of defence and security.

### 2. **ABM/ABB FRAMEWORK (ACTIVITY-BASED MANAGEMENT/ACTIVITY-BASED BUDGETING)**

Policy area(s) concerned and associated activity/activities:

- Policy area:

12-81: Public procurement

- Associated activities:

12-81.C3-10 (C3): formulation, monitoring and implementation of public procurement legislation

*Proposal for a Directive on the award of public contracts in the fields of defence and security.*

To be done.

*Interpretative Communication on the application of Article 296 TEC in the field of defence procurement*

12-81.C3-10.02 (C3): Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement.

12-81.C3-10.30-02 (C3): Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement.

*Green Paper on Defence Procurement*

12-81.C3-10.30-01 (C3): Communication on the results of the consultation launched by the Green Paper on Defence Procurement and on the future Commission initiatives

12-81.C3-10.25-01 (C3): Green Paper on Defence Procurement – CWP 2004

### 3. BUDGET LINES

#### 3.1. Budget lines (operational lines and related technical and administrative assistance lines (ex-B.A. lines)), including headings:

Budget line	Heading	Measures
12.010201.00.20	Technical assistance	Technical assistance contract
12.020100.01	Implementation and development of the Internal Market	Studies outsourced
26.02.01	Procedures for awarding and advertising public supply, works and service contracts	Publication of notices

#### 3.2 Duration of the action and of the financial impact:

The Directive relating to public procurement in the fields of defence and security is a legislative act adopted for an unlimited period starting from the date it enters into force.

The financial impact relates to both recurrent and non-recurrent expenditure:

- the recurrent expenditure is linked to the use of the Directive (publication of notices, processing cases of infringement),
- the non-recurrent expenditure is linked to the implementation of the Directive, and particularly to evaluation work to be subcontracted (over a time frame of five to ten years after the entry into force of the Directive).

#### 3.3 Budgetary characteristics:

Budget line	Type of expenditure		New	EFTA contribution	Contributions from applicant countries	Heading in financial perspective
	NCE	Non-diff.				
12.010201.00.20	NCE	Non-diff.	None	None	None	5
12.020100.01	NCE	Diff.	None	YES	None	1a
26.02.01	NCE	Diff.	None	None	None	1.1 (1.1 OTH)

## 4. SUMMARY OF RESOURCES

### 4.1. Financial resources

#### 4.1.1. Summary of commitment appropriations (CA) and payment appropriations (PA)

€ million (to 3 decimal places)

Type of expenditure	Section No		Year n	n + 1	N + 2	n + 3	n + 4	n + 5 and later	Total
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#### Operational expenditure<sup>37</sup>

Commitment appropriations (CA)	8.1	a	0.006	0.012	0.018	0.024	0.030	0.180	<b>0.270</b>
Payment appropriations (PA)		b	0.006	0.012	0.018	0.024	0.030	0.180	<b>0.270</b>

#### Administrative expenditure within reference amount<sup>38</sup>

Technical and administrative assistance (Non-diff.)	8.2.4	c	0.000	0.000	0.000	0.000	0.000	0.000	<b>0.000</b>
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#### TOTAL REFERENCE AMOUNT

<b>Commitment appropriations</b>		<b>a+c</b>	<b>0.006</b>	<b>0.012</b>	<b>0.018</b>	<b>0.024</b>	<b>0.030</b>	<b>0.180</b>	<b>0.270</b>
<b>Payment appropriations</b>		<b>b+c</b>	<b>0.006</b>	<b>0.012</b>	<b>0.018</b>	<b>0.024</b>	<b>0.030</b>	<b>0.180</b>	<b>0.270</b>

#### Administrative expenditure not included in reference amount

Human resources and associated expenditure (Non-diff.)	8.2.5	d	0.060	0.060	0.060	0.060	0.060	0.060	<b>0.360</b>
Administrative costs other than human resources and associated expenditure, not included in reference amount (Non-diff.)	8.2.6	e	0.000	0.000	0.000	0.000	0.000	0.000	<b>0.000</b>

#### Total indicative financial cost of intervention

<b>TOTAL CA including cost of human resources</b>		<b>a+c+d+e</b>	<b>0.066</b>	<b>0.072</b>	<b>0.078</b>	<b>0.084</b>	<b>0.090</b>	<b>0.240</b>	<b>0.630</b>
<b>TOTAL PA including cost of human resources</b>		<b>b+c+d+e</b>	<b>0.066</b>	<b>0.072</b>	<b>0.078</b>	<b>0.084</b>	<b>0.090</b>	<b>0.240</b>	<b>0.630</b>

<sup>37</sup> Expenditure that does not fall under Chapter xx 01 of the Title xx concerned.

<sup>38</sup> Expenditure within Article xx 01 04 of Title xx.

## Co-financing details

This initiative does not give rise to co-financing.

### 4.1.2. Compatibility with financial programming

**Not applicable.**

- Proposal is compatible with existing financial programming.
- Proposal will entail reprogramming of the relevant heading in the financial perspective.
- Proposal may require application of the provisions of the Interinstitutional Agreement<sup>39</sup> (i.e. flexibility instrument or revision of the financial perspective).

### 4.1.3. Financial implications on revenue

- Proposal has no financial implications on revenue
- Financial impact - the effect on revenue is as follows:

€ million (to 1 decimal place)

Budget line		Revenue	Prior to action (Year n – 1)	Situation following action							
				[Year n]	[n + 1]	[n + 2]	[n + 3]	[n + 4]	[n + 5] <sup>40</sup>		
		a) Revenue in absolute terms									
		b) Change in revenue	Δ	0	0	0	0	0	0	0	0

## 4.2. Human resources in FTE (including officials, temporary and external staff) – see details under point 8.2.1.

Annual requirements	Year n	n + 1	n + 2	n + 3	n + 4	n + 5 and later
Total number of human resources	2	2	2	2	2	2

<sup>39</sup> See points 19 and 24 of the Interinstitutional Agreement.

<sup>40</sup> Additional columns should be added if necessary i.e. if the duration of the action exceeds 6 years.

## **5. CHARACTERISTICS AND OBJECTIVES**

### **5.1 Need to be met in the short or long term**

It is generally recognised that the high level of fragmentation in defence markets impairs the efficiency of public procurement and the operation of the internal market.

The parties concerned (Member States, industries, think tanks, European Parliament) have asked the Commission to take action to overcome this fragmentation and intensify competition on defence markets.

- Short term

The Commission, as the guardian of the Treaties, has provided some legal clarification by means of its Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement, which was adopted in December 2006. Simple clarification is not, however, sufficient.

- In the medium to long-term

The Commission considers that in the medium to longer term a specific Directive on public procurement in the fields of defence and security is the most appropriate instrument to address the problems identified.

### **5.2. Value-added of Community involvement and coherence of the proposal with other financial instruments and possible synergy**

The initiative on defence procurement is part of an overall initiative to open up defence markets by bringing more transparency and competition to these markets. The current fragmentation of the markets has a negative impact not just on the efficiency of public expenditure but also on the military capacity of the Member States. It is also an obstacle to the growth and competitiveness of the European defence industry.

Alongside the efforts made by the Member States, the Commission has launched an initiative to encourage the establishment of a European defence equipment market (EDEM). In its March 2003 Communication entitled "Towards an EU Defence Equipment Policy", the Commission presented a series of proposals for action in fields relating to defence industries and markets (standardisation, observation, intra-Community transfers, public procurement, exports of dual-use goods, research). This Communication was thus the point of departure for the Commission's initiative in the field of public procurement.

### **5.3. Objectives, expected results and related indicators of the proposal in the context of the ABM framework**

- Objectives

- The Commission's general objective is to establish an open and competitive European defence equipment market. This market will cover both military goods (arms, munitions and war material) and sensitive non-military goods (security).

- The specific objective of the policy on defence procurement is to establish a regulatory framework to allow the effective operation of these markets. This specifically implies the effective implementation of the principles in the Treaty for the internal market.
- The operational objective of this Directive is to provide a regulatory framework which is tailored to the specific characteristics of the defence and security markets, in compliance with the principles of the Treaty and reducing the need for recourse to the exemptions laid down in Article 296 of the Treaty and Article 14 of Directive 2004/18/EC.
- Target results

The expected results are:

- more transparent and more open defence and security procurement,
- more efficient public spending,
- more competitiveness and greater growth in defence industries, helping to strengthen the European defence technological and industrial base.
- Connected indicators

Two indicators will be calculated:

- the publication rate (ratio between the value of the contracts published and the value of the defence markets) as an indicator of transparency,
- the penetration rate (ratio between the value of intra-Community transfers and the value of the defence markets) as an indicator of openness.

#### 5.4 Method of implementation (indicative)

##### *Centralised Management*

- directly by the Commission
- indirectly by delegation to:
  - executive agencies,
  - bodies set up by the Communities as referred to in Article 185 of the Financial Regulation
  - national public-sector bodies/bodies with a public-service mission

##### *Shared or decentralised management*

- with Member States
- with third countries

- *Joint management with international organisations (please specify)*

## 6. MONITORING AND EVALUATION

### 6.1. Monitoring system

The Commission departments responsible for this dossier will pay particular attention to the development of case-law in the field of defence procurement.

Two indicators:

- the publication rate (as an indicator of transparency),
- the penetration rate (as an indicator of openness),

will be calculated annually on the basis of the data available.

### 6.2. Evaluation

#### 6.2.1. *Ex ante evaluation*

A preliminary impact study, including an ex ante evaluation, is enclosed as an Annex with the draft Directive.

#### 6.2.2. *Measures taken following an intermediate/ex-post evaluation (lessons learned from similar experience in the past)*

The specific Directive is the first legislative act proposed by the Commission in the field of defence procurement. The interpretative communication is still too recent (adopted in December 2006) for an effective evaluation to be carried out.

#### 6.2.3. *Terms and frequency of future evaluation*

- **Regular evaluation**

An evaluation of the effects of the new Directive will be carried out regularly by the Commission from the third year following its implementation by the Member States. It will look at the impact of the new Directive on public procurement practices, particularly as regards publication, the competition procedure for providers and the opening of markets to providers from other Member States.

- **Medium-term: interim evaluation**

Following the legislative process for the adoption of the Directive and its transposition by the Member States, an initial evaluation of the administrative impact of the implementation of the new Directive, first of all on the Member States, and then on businesses, should be carried out within five years.

- **Long term: overall evaluation**

Given the long lifecycles of defence equipment (and related services, especially maintenance), an evaluation of the overall – and particularly economic – impact of

the Directive may only reasonably be expected in the longer term (i.e. not before ten years after its entry into force).

**7. ANTI-FRAUD MEASURES**

This initiative makes no provision for any specific anti-fraud measures.

## 8. DETAILS OF RESOURCES

### 8.1 Objectives of the proposal in terms of their financial cost

Commitment appropriations in EUR million (to 3 decimal places)

(Headings of objectives, measures and outputs should be provided)	Type of output	Average unit cost	Year n		Year n+1		Year n+2		Year n+3		Year n+4		Year n+5 and later		TOTAL	
			No	Tot EUR mil	No	Tot EUR mil	No	Tot EUR mil	No	Tot EUR mil	No	Tot EUR mil	No	Tot EUR mil	No	Tot EUR mil
<b>OPERATIONAL OBJECTIVE No. 1</b> Increase the transparency of defence procurement <b>Measure No 1</b> Encourage the publication of public defence contracts <b>Output No 1</b> Increase the number of notices of public defence contracts published in the <i>Official Journal</i>	Publication of notices	30€	200	0.006	400	0.012	600	0.018	800	0.024	100 0	0.030	100 0	0.030	<b>4000</b>	<b>0.120</b>
<b>OPERATIONAL OBJECTIVE No. 2</b> Intensify the free movement of defence products		n/a		0.000		0.000		0.000		0.000		0.000		0.000		<b>0.000</b>
<b>ASSESSMENT</b> Medium-term administrative impact		n/a		0.000		0.000		0.000		0.000		0.000		0.150		<b>0.150</b>
<b>TOTAL COST</b>				<b>0.006</b>		<b>0.012</b>		<b>0.018</b>		<b>0.024</b>		<b>0.030</b>		<b>0.180</b>		<b>0.270</b>

## 8.2 Administrative expenditure

### 8.2.1. Number and type of human resources

Types of post		Staff to be assigned to management of the action using existing and/or additional resources ( <b>number of posts/FTEs</b> )					
		Year n	Year n + 1	Year n+ 2	Year n+ 3	Year n+ 4	Year n+ 5
Officials or temporary staff (12 01 01)	A*/AD	2	2	2	2	2	2
	B*, C*/AST	0	0	0	0	0	0
Staff financed <sup>41</sup> under Art. 12 01 02		0	0	0	0	0	0
Other staff financed under Art. 12 01 04/05		0	0	0	0	0	0
<b>TOTAL</b>		<b>2</b>	<b>2</b>	<b>2</b>	<b>2</b>	<b>2</b>	<b>2</b>

### 8.2.2. Description of tasks deriving from the measure

Once the Directive has entered into force, two types of tasks will need to be implemented:

- Infringement proceedings

These will be handled by specialist rapporteurs already at the Commission who work by geographical area and not by sector of activity (so there will be no specialist rapporteur for defence procurement).

- Observation and evaluation

This will be done either within the Unit by an administrator with a background in economics, or by the Unit specialising in economic aspects at the public procurement Directorate, or by the specialist Unit dealing with "impact assessment and evaluation" at the Directorate-General.

In all cases, the posts already exist and there are no plans to create new ones.

### 8.2.3. Sources of human resources (statutory)

- Posts currently allocated to the management of the programme to be replaced or extended

<sup>41</sup> Cost of which is NOT covered by the reference amount.

- Posts pre-allocated within the APS/PDB exercise for year n
- Posts to be requested in the next APS/PDB procedure
- Posts to be redeployed using existing resources within the service concerned (internal redeployment)
- Posts required for year n although not foreseen in the APS/PDB exercise for the year in question

8.2.4. *Other administrative expenditure included in the reference amount*

EUR million (to 3 decimal places)

Budget line (number and heading)	Year n	Year n+1	Year n+2	Year n+3	Year n+4	Year n+5 and later	TOTAL
<b>1 Technical and administrative assistance (including related staff costs)</b>							
Executive agencies							
Other technical and administrative assistance							
- <i>intra muros</i>							
- <i>extra muros</i>							
12.01.04 - Support expenditure for operations in the Internal Market policy area	0	0	0	0	0	0	0
<b>Total technical and administrative assistance</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>

8.2.5. *Financial cost of human resources and associated costs not included in the reference amount*

EUR million (to 3 decimal places)

Type of human resources		Year n	Year n+1	Year n+2	Year n+3	Year n+4	Year n+5 and later	TOTAL
Expenditure related to staff in active employment in the Internal Market policy area	Article 12 (01)-(01)	0.000	0.000	0.000	0.000	0.000	0.000	<b>0.000</b>
External staff - <b>Technical assistance contract</b>	Pst. 12 01 02 01	0.060	0.060	0.060	0.060	0.060	0.060	<b>0.360</b>

Total cost of human resources and associated costs (NOT included in the reference amount)		0.060	0.060	0.060	0.060	0.060	0.060	0.360
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Calculation – *Officials and Temporary agents (Article 12 01 01)*

The implementation of the new Directive does not require the creation of any additional posts (the legislative drafter, rapporteur and economist posts already exist)

\*

Calculation – *External staff (Art. 12 01 02)*

The use of external human resources within the framework of the technical assistance contract (budget line 12.010201.00.02.20) might be necessary to annually monitor the implementation of the new Directive

8.2.6. *Other administrative expenditure not included in the reference amount*

EUR million (to 3 decimal places)

		Year n	Year n+1	Year n+2	Year n+3	Year n+4	Year n+5 and later	TOTAL
- Missions	12 01 02 11 01	0	0	0	0	0	0	0
- Meetings and conferences	12 01 02 11 02	0	0	0	0	0	0	0
- Committees	12 01 02 11 03	0	0	0	0	0	0	0
- Studies and consultation	12 01 02 11 04	0	0	0	0	0	0	0
- Information systems	12 01 02 11 05		0	0	0	0	0	0
<b>2 Total other management expenditure</b>	<b>12 01 02 11</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>
<b>3 Other expenditure of an administrative nature</b> (specify including reference to budget line)		<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>
<b>Total administrative expenditure, other than human resources and associated costs (NOT included in reference amount)</b>		<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>

\*

Calculation - *Other administrative expenditure not included in the reference amount*

None